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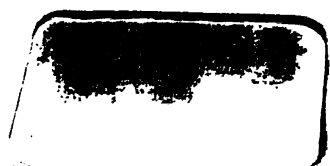
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Scotland. Court of session.

✓DECISIONS

OF THE

COURT OF SESSION,

FROM 12TH NOV. 1835, TO 9TH JULY 1836;

REPORTS

OF THE JURY SITTINGS,

FROM 21ST DECEMBER 1835, TO 28TH JULY 1836;

CASES DECIDED IN THE HIGH COURT OF
JUSTICIARY,

FROM 16TH NOVEMBER 1835, TO 12TH MARCH 1836,

AND

JUDGMENTS OF THE HOUSE OF LORDS,

FROM 29TH MARCH 1834, TO 12TH SEPTEMBER 1835.

COLLECTED BY

J. CRAIGIE, GEORGE ROBINSON AND CHARLES
ROBERTSON, ESQUIRES, ADVOCATES.

BY APPOINTMENT OF THE FACULTY OF ADVOCATES.

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JUDGES
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COURT OF SESSION,
DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 712, line 5, for '*repealed*' read '*repeated*.'

—— 780, — 10, after succeed insert (,) *comma*; and for '*those*' read '*than*.'

DECISIONS
OF THE
COURT OF SESSION.

FIRST DIVISION.

No. I.

12th November 1835.

WILLIAM EWING
against
BURNETT'S TRUSTEES.

PROMISSORY-NOTE.—PRESCRIPTION. — STATUTE, 23. GEO. III. c. 18.—PROCESS.—*A party deceased granted a promissory-note : the grantee lodged a claim with his trustees, in consequence of a request by them to that effect, in answer to a previous application to them : the period of prescription having elapsed, the grantee raised action upon the promissory-note :—held, (1.) That the plea of prescription was not barred by the above circumstance. (2.) The pursuer not having averred that he could establish the debt aliunde, an application by him, after closing the record, for a diligence to recover documents for this purpose, refused.*

THE pursuer, as executor-creditor of the deceased John Buchan, Narrative. W. S., raised an action against the defenders, as trustees of the deceased Kilpatrick Williamson Burnett of Monboddo, setting forth, that their constituent, by his promissory-note, dated 21st February 1821, promised and became bound to pay to the said John Buchan, three months after date, the sum of L.68 sterling, for value received, as the said promissory-note or bill in itself bears: That after the granter, Mr Burnett's death, the agents for him

12 Nov. 1835.

Ewing v.
Burnett's
Trustees.

trustees, Messrs Mackenzie and Innes, W. S. wrote to the pursuer, as executor-creditor of the late Mr Buchan, requesting him to transmit a state of his claim to them, and which, in their letter to him of the 23d December 1823, they mentioned they would 'communicate to Mr Burnett's trustees, and let you know their answer.' That the pursuer accordingly transmitted the amount of his claim to these gentlemen; and as they stated no objection to it for a number of years, the pursuer believed the amount had been admitted as correct, and been ranked on Mr Burnett's estate: That the pursuer was entitled to rely on this having been done; the more particularly as Messrs Mackenzie and Innes, the agents for the trustees, returned no answer to his communication transmitting the claim, as they promised specially to do, in the event of his debt being objected to, or not held by the trustees as just and correct. The summons concluded for payment of said sum of L.68, and interest thereof from 24th May 1821.

The defender pleaded that the bill was prescribed, and that the circumstances founded on by the pursuer did not elide that plea. The pursuer replied, that prescription was not pleadable in the circumstances of the case; at least it was elided by the claim made by the pursuer, and the defender's acquiescence in, or tacit recognition of, the claim. The Lord Ordinary 'sustained the plea of prescription stated for the defenders, assoilzied them from the conclusions of the libel,' and 'found the pursuer liable in expenses.'

Pursuer's
Pleas.

The pursuer *reclaimed*, and prayed their Lordships 'to recall the interlocutor, to repel the plea of prescription, &c. or otherwise, in the mean time, to grant diligence, at the pursuer's instance, against the defenders, for recovery of all minutes of the defenders, or other writings and correspondence connected with the pursuer's said claim of debt.' The pursuer argued, that the Lord Ordinary had been induced to repel the plea of prescription, from a misconception of the grounds of reversal in the case of *Ettles v. Robertson*, 15th Feb. 1833, 11. S. D. B. 397; that his Lordship had conceived that that case was reversed upon the merits, whereas the reversal rested entirely upon a question regarding the stamp laws. The trustees made no answer to the claim of the pursuer, which fully entitled him to rely on its being paid; and the trustees were not now entitled to say, We shall not examine the justice of the claim, but meet you with the plea of prescription; that, at all events, either with a view to establish the debt aliunde, or a reference to the oath of the defender, if the prescription had been ten times stronger, the pursuer was entitled to a diligence, to recover all books and writings connected with his claim in the possession of the defender.

The Court, without hearing counsel for the defender, unanimously adhered to the interlocutor of the Lord Ordinary. 12 Nov. 1835.

Lord Balgray.—I have no doubt as to prescription. The mere making claim will not bar it, though the ranking of the debt might. The pursuer says he got no answer from the trustees: that is just the very reason why he should have raised his action sooner. Ewing v. Burnett's Trustees. Judgment. Opinion of Court.

The Lord President concurred, and further observed, that the diligence asked for was entirely a fishing diligence: there is no averment on record to support the application.

Lord Gillies.—According to the terms of the statute, the plea of prescription is invincible. There is no averment that there exists any writ on the part of the defender which would establish the debt.

Lord Mackenzie.—I am of the same opinion as to prescription. The act of Parliament is very strong. There was a mere claim, and no answer. We are not to take for granted that this is an admission of the debt. If they had made any specific statement, that there were writings existing on the part of the defender, this might have entitled them to a diligence.

Lord Ordinary, *Corehouse.* Act. *Rutherford, Paterson.* Alt. *H. J. Robertson.*
Pursuer's Agents, *Wotherspoon & Mack,* W. S. Defenders' Agents, *Mackenzie & Innes,* W. S. B. Clerk.

C.

FIRST DIVISION.

No. II.

13th November 1835.

WILLIAM BELL, W. S.

against

SIR WILLIAM FRANCIS ELIOTT, BART.

EXPENSES.—TRANSFERENCE.—CLAUSE.—*An heritable bond of annuity was granted to a party as trustee, for payment of debts, &c. of the grantor: The grantee raised money on it by transferring it to a third party:—held, that the grantee was not entitled to claim the expense of the transference from the grantor, notwithstanding a clause in the bond, by which the grantor bound and obliged himself, &c. to be at the whole expense of any discharge or discharges of these presents, or conveyance of the same, or any part thereof made to any person or persons.*

13 Nov. 1835.

Bell v. Elliott.

Narrative.

SIR W. F. ELLIOTT executed an heritable bond of annuity (11th April 1828) for L.1100 sterling, in implement of certain family settlements, in favour of Mr Bell, as trustee, for payment of annuities, &c., and also to cover certain advances made by Mr Bell to Sir William. Mr Bell (6th June 1834) raised a summons against Sir William, in which, after setting forth the execution of said bond in his favour, he stated, ‘ That by disposition and assignation, dated on or about 8th February 1830, the pursuer, with the consent and concurrence of the said defender, sold, alienated and disposed to George Scott, Esq. then residing at Malleny, in the parish of Currie, Lieutenant-Colonel of the Edinburgh regiment of North British Militia, and his heirs or assignees whomsoever, all and whole an annuity or clear yearly sum of L.405, being a proportional part of the foresaid annuity of L.1100, with interest and penalties corresponding thereto : That by disposition and assignation, dated on or about 10th February 1830, the pursuer sold, alienated and disposed to Sir James Montgomery of Stanhope, Baronet, and others, for behoof of the Edinburgh Life Assurance Company, all and whole an annuity or clear yearly sum of L.504 : 9 : 7, being part of the foresaid annuity of L.1100 sterling, or such part of the said annuity of L.1100 sterling as should be sufficient to satisfy and pay the interest that might accrue on the sum of L.4439 : 11 : 1½, from and after the term of Martinmas 1829, or on such portion thereof as might rest and be due from time to time ; together with the premiums due and to become due upon a policy of insurance for L.1300 on the life of the said defender ; and also the sum of L.250 sterling annually, in extinction pro tanto of the said principal sum of L.4439 : 11 : 1½, to be uplifted and taken at the terms specified in the said bond of annuity, during the life of the defender, and the not redemption, with penalties and interest, as there mentioned : That the sums due to the said Colonel George Scott, and Edinburgh Life Assurance Company, have, the pursuer understands, been paid to them up to the term of Candlemas last, but no part of the said annuity has been paid to the pursuer ; and there is now due to him, as trustee foresaid, applicable to the purposes of the said trust, the whole balance of the said annuity of L.1100, after deducting the payments so made to the said parties ; which balance amounts, for the period from March 1829 to the term of Whitsunday last, inclusive, to the sum of L.857 : 6 : 10½, being nine instalments of the termly payment of L.95 : 5 : 2½, payable at the terms of Whitsunday and Martinmas in each year : That the pursuer, in execution of the trust conferred upon him, as said is, has made payments and incurred expenses, as at 21st March last, to the amount of L.813 : 2 : 10,

‘no part of which has yet been paid or satisfied.’ The pursuer then concluded for payment of said balance of said annuity, and the several sums above specified. After a remit to the Auditor, the defender admitted his liability for the sums claimed by the pursuer as taxed; but he objected to payment of one item in the account, being a sum of L.104 : 14 : 3, the expense of the second transfer above mentioned, which the pursuer alleged he had paid to the Edinburgh Life Assurance Society. A minute having been lodged by the pursuer, and answers by the defender, ‘the Lord Ordinary (7th March 1835) having heard counsel for the parties on the objection contained in the foregoing answers for the defender, to the sum of L.104 : 14 : 3, with corresponding interest, sustains the objection, and finds that the said sum and interest must be deducted from the sums concluded for in the summons.’

13 Nov. 1835.

Bell v. Elliott.

The pursuer *reclaimed*, and founded principally on a clause contained in the precept of sasine, to the following effect: ‘Declaring that, when the said redemption takes place, I and my fore-saids shall be at the whole expense of all the writings necessary for carrying the same into execution. And farther, I bind and oblige myself, and my foresaids, to be at the whole expense of any discharge or discharges of these presents, or conveyance of the same, or any part thereof, made to any person or persons.’ He further contended, that as the proceeding had been adopted by him in his character of trustee, it must be held to have been in rem versum of the defender.

Pursuer's
Pleas.

It was *answered*, that the clause founded on related solely to the redemption, and that the second part of the clause was not independent of, but connected with the first; that although the bond was granted to the pursuer, as trustee, he could only demand payment of the instalments from the defender, and was not entitled, without his consent, (which it was not alleged had been obtained,) to raise money upon it from third parties, so as to anticipate the period of payment; and therefore he could not charge the expense of the measure adopted by him against the defender, but was bound to take it upon himself.

Defender's
Pleas.

The Court unanimously concurred in the view taken by the defender, and accordingly adhered.

Lord Ordinary, Fullerton.

Act. Robert Bell, Graham Bell.

Alt. Neaves.

Bells & Rutherford, W. S. Pursuer's Agents.

Alexander Stuart, W. S.

Defender's Agent. S. Clerk.

C.

FIRST DIVISION.

No. III.

17th November 1835.

CAMERON AND MANDATARY
against
CHAPMAN AND MANDATARY.

EXPENSES.—AUDITOR'S FEE.—*The Auditor having struck off a large sum from an account in proportion to the amount, the Court subjected the parties equally in payment of the Auditor's fee.*

THE account of expenses having been taxed in this case, reported ante, 7th July 1835, the Auditor struck off L.28 from a sum of L.72. The defender submitted to the Court, that, in such circumstances, he should not be bound to pay the Auditor's fee. The Court, on the ground that the account might have been paid without auditing, if the amount claimed had been reasonable, subjected the parties equally in payment of the fee.

Act. Sol.-Gen. (Cuninghame). Alt. Christison. Agents, David Manson, S. S. C.
Wm. Renny, W. S. S. Clerk.

C.

FIRST DIVISION.

No. IV.

17th November 1835.

MRS MARGARET SMELLIE
against
WILLIAM MILLER.

PRESCRIPTION, TRIENNIAL.—STAT. 1579, c. 83.—*In an action for remuneration for services performed as a governess or housekeeper, although no specific amount had been fixed or agreed upon between the parties, prescription was held to apply, except to the last year, which fell within the period.*

Narrative.

THE pursuer raised an action against the defender, in circumstances similar to those in the case at her instance against another defender, (Cochran,) reported ante, 25th February 1835. She set forth in her

summons, That shortly after her father's death, with whom she formerly resided, the pursuer, in the summer of 1820, was applied to by the defender, William Miller, farmer in Niddry-Mains, her brother-in-law, to go to Linlithgow, as a housekeeper or governess, for the purpose of taking charge of his children, while attending the schools and receiving their education at that place: That in this view a house was accordingly taken at Linlithgow, which was kept and superintended by the pursuer, from the 6th day of October 1820, down to the 15th day of May 1829: That during this period the pursuer had several of the defender's children intrusted to her charge, and to whom she rendered every service in her power, with the utmost assiduity and attention: That there was no specific agreement made with the pursuer at the time she entered into the said engagement, nor during its currency, in regard to the amount of salary or remuneration to be paid to her by the said defender, for her services before mentioned: That considering the trouble and importance of the charge, as well as the benefit derived by the defender from having his children intrusted to the charge of one in whom he could confide, and whose sole study, daily and nightly, was the promotion of their interest and comfort, the pursuer considers that L.15 sterling per annum, during the period aforesaid, will afford even an inadequate remuneration for the services performed. She concluded for payment of the sum of L.129:1:6 sterling, in name of salary or remuneration for her said services for said period, being at the rate of L.15 sterling per annum. The summons is dated 28th December 1831. The Lord Ordinary 'sustained the 'plea of prescription against the pursuer's claim, except in so far as 'the same consists of a charge for wages during the last year of 'her service.'

Smellie v.
Miller.

17 Nov. 1835.

The pursuer *reclaimed*, and *pleaded*—That as there had been no specific annual amount of remuneration fixed or agreed upon, the claim could only be held to have emerged at the expiration of the service; that she had claimed a slump sum as a recompence, although an annual rate had been specified, to point out the rate of remuneration; and thus, although the triennial prescription might properly have applied to the case, supposing three years to have elapsed from the period when the claim arose, (as was found in the former action against Cochran,) it could not have the effect of cutting off any part of the present demand.

Pursuer's
Pleas.

It was *answered*—That the terms of the summons rendered the triennial prescription strictly applicable; and it was plain, if the party had any claim for remuneration at all, she could have raised action for it at the end of each successive year.

Defender's
Pleas.

17 Nov. 1835.

Smellie v.
Miller.Opinion of
Court.

Lord Balgray.—I could understand the plea now urged by the pursuer, if there had been a general agreement for a certain sum; but what puzzles me is the terms of the summons, in which she says she acted as a menial servant; and though no precise wages were fixed, she considers herself entitled to L. 15 per annum. She makes the demand expressly for wages. The law of prescription applies to the claim for services in general, whether there be a precise sum fixed or not. If I take a servant, and do not fix his wages, but say that I will see how he behaves, before I agree to give a specific amount, still, whatever claim he might have against me would fall under the prescription.

Lord Gillies.—If there was to be a remuneration, it must have been from year to year. I think it would amount to a contract *de anno in annum*, and of course the prescription applies.

Lord Mackenzie.—I am of the same opinion. The plea of the pursuer just comes to this, that if the triennial prescription does not apply where a person served for wages, but the amount was not fixed, any servant might come forward any time within forty years, and say, that he served his master for a certain period, but the wages were not fixed, and put his master to a proof of payment. I conceive that the admissions of the party in this case are sufficient to authorise the application of the triennial prescription.

The *Lord President* concurred.

Judgment.

The *Court* therefore adhered, but found no expenses due.

Lord Ordinary, *Corehouse.* Act. *Dean of Fac. (Hope.) Turnbull.* Alt. *Rutherford, Sandford.* *Wotherspoon & Mack,* W. S. Pursuer's Agents. *J. B. Watt,* Defender's Agent. *B. Clerk.*

C.

SECOND DIVISION.

No. V.

17th November 1835

LACHLAN M'NEILL

against

WALTER BLAIR AND JOHN BLAIR.

HERITABLE CREDITOR. — TITLE-DEEDS. — INTERDICT. — *An heritable creditor, although the security contains a special assignation to the title-deeds, is not entitled to demand the absolute delivery of the title-deeds from the proprietor of the subjects over which his security extends. (2.) Circumstances in which an interdict granted by ma-*

gistrates against a proprietor using his title-deeds to the prejudice of an heritable creditor was recalled. 17 Nov. 1835.

M'Neill v.
Blairs.

Narrative.

IN 1825, Lachlan M'Neill borrowed L.900 from the late Rev. Walter Blair, and granted a bond and disposition in security over certain houses in Paisley, upon which Mr Blair was duly infeft. By the bond it was declared, that if M'Neill should fail to pay the money at Whitsunday 1830, (which period of repayment was afterwards, by back letter by Mr Blair, extended to ten years from the date of the bond,) or in case of two half-yearly payments falling into arrear, it should be lawful to Mr Blair, upon the expiration of three months, to sell the subjects. The bond contained an obligation on M'Neill to infeft and seise Blair, and his heirs and assignees, in the subjects, to be holden a me vel de me, together with a special assignation to the rents and duties, 'and to the writs and title-deeds of said subjects, 'whole clauses therein contained, and all action competent thereon; 'surrogating and substituting Mr Blair and his foreshaids in my full 'right and place in the premises.' The Rev. Mr Blair died in 1832, when his brother, the late John Blair, obtained a precept of clare from M'Neill, upon which he was infeft.

In October 1832, John Blair, upon the allegation that M'Neill was embarrassed, and that the security had fallen in value, raised an action 'before the Magistrates of Paisley, concluding that M'Neill 'should be ordained to exhibit and produce the writs and title-deeds, 'and all other writs, title-deeds and evidents in his possession, or under his power, relating to the subjects contained in the bond;' and farther, that the title-deeds 'be given to the pursuer, (Blair,) to 'be farther used and disposed of by the pursuer as his writs and 'evidents of the subjects,' until the subjects should be redeemed. Mr Blair also presented a separate application for an interdict against M'Neill putting away these titles. In the conjoined processes the Magistrates (20th January 1833) decerned 'as libelled in the ordinary action against the defender, M'Neill, and in the summary 'action' continued 'the interdict,' and found M'Neill liable in expenses.

M'Neill was thereafter charged, in the terms of the conclusions of the original action and decree, to make delivery of the whole writs and titles.

M'Neill brought a reduction of the judgment of the Magistrates, and *pleaded*—1st, That a proprietor's right of custody of his titles is subject only to the obligation to produce them when the creditor has special occasion for them, and tenders an obligation to redeliver them within a reasonable and limited time; at least the proprietor

Pursuer's
Pleas.

17 Nov. 1835. lies under no obligation to surrender his titles unqualifiedly into the hands of the creditor, to be used as the creditor's evidents, during the subsistence of the loan; 2. *Ross's Lect.* 381-7. 2d, The clause of assignation of the writs being granted in security merely, did not warrant the demand made by the creditor, especially as he claimed the titles, on the allegation that, during the subsistence of the loan, he was the true proprietor, and the pursuer was a mere precarious and illegal possessor of his own evidents.

M' Neill v.
Blairs.

Defenders'
Pleas.

The defenders, the representatives of the late John Blair, *pleaded*, in support of the Magistrates' judgment, 1st, In a question with the granter of an heritable bond and disposition in security, containing a special assignation to the titles, the heritable creditor, during the non-redemption, is entitled to insist for possession of the title-deeds of the subjects, not only in virtue of the special assignation, but as an accessory to the right in security, subject only to the temporary use of the titles by the proprietor for the vindication of his radical right. 2d, The defenders were entitled to insist for possession of the title-deeds, in respect, (1.) They were originally required in order to enable the defender's predecessor to complete his title; (2.) In the insolvent circumstances of the pursuer, and the security being inadequate, there was a risk of the pursuer's impledging or hypothecating the titles, and so creating a preferable right in the holder of the titles over the prior real right of the defenders; ranking of Hamilton of Provanhall's Creditors, 9th Aug. 1784, *M.* 6253; Campbell and Clason v. Goldie, 15th Nov. 1822; Cameron v. Burns, 25th June 1824; Dobie v. Scales, 19th May 1831, and authorities there cited.

The Lord Ordinary pronounced this interlocutor, and added a note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the closed record, with the productions, and inferior court process, and heard parties, repels the defences, reduces the decree of the Magistrates of the 28th of January, 11th and 16th March 1833, and decerns: Finds the defenders liable in expenses; appoints an account thereof to be given in; and when lodged, remits to the Auditor to tax the same, and report.'

Note.

Note.—'The Magistrates were not warranted in deciding as they did without better evidence of several disputed facts. But, in reversing their judgment, the Lord Ordinary assumes the material statements of the defenders to be correct, viz. that the pursuer's affairs had become embarrassed, that his property had become depreciated, that there was reason to fear that he might

‘pledge the title-deeds, and that the possession of them would be
 ‘convenient for the defender. These circumstances might have
 ‘justified an application to a court for *adequate protection*, but the
 ‘application actually made was far too extensive. It was not mere-
 ‘ly that he should get the *use* of the titles, or that they should be
 ‘*secured*, but that ‘the whole writs, title-deeds and evidents be
 “*given and delivered to the pursuer, (now defenders,) as heir afore-*
 “*said, for the purposes mentioned in the said summons, and to be*
 “*further used and disposed of by the pursuer, as his writs and evidents*
 “*of the subjects before specified, ay and while the said subjects re-*
 “*main unredeemed.*’ This was as ample a demand as could have
 ‘been made by any absolute proprietor against any unauthorised
 ‘holder of the writs. Yet, at the date of the demand, the bor-
 ‘rower was not bound to redeem for about two years, and there
 ‘was only one-half year’s interest due. The Magistrates decerned
 ‘*as libelled*; and the defenders, instead of restricting their claim,
 ‘defend this judgment. The Lord Ordinary is of opinion that the
 ‘claim was neither warranted by the general assignation of writs
 ‘and evidents, nor by the circumstances of the case.

17 Nov. 1835.

M^rNeill v.
Blairs.

‘If the principal action had been well founded, the subsidiary
 ‘petition for interdict might not have been improper. But as it
 ‘was presented expressly in support of a claim that was groundless,
 ‘it must follow the fate of the principal case. Besides the judg-
 ‘ment is *ultra petita*. The prayer is for an interdict ‘*during the*
 “*dependence of the said process* of exhibition and delivery.’ It was
 ‘granted at once, and thus the papers were made safe *during the*
 ‘*dependence*; yet, in *finally* deciding the cause, the Magistrates *con-*
 ‘*tinue* the interdict; and the effect of the two parts of the judg-
 ‘ment combined was, that while, on the one hand, the present pur-
 ‘suer was ordered to deliver the writings to the defenders, to be
 ‘disposed of as their own, on the other hand, he was permanently
 ‘interdicted from parting with them.’

The pursuer *reclaimed*. Their Lordships were of opinion that
 an heritable creditor was not entitled, in virtue of the assignation
 to the titles, to push his claim so far as to insist not merely for ex-
 hibition, but delivery of the titles. They considered the application
 too broad, and that the decree, in the terms of that application, up-
 on which a charge had been given, could not be sustained.

Opinion of
Court.

The Court *adhered*, ‘but without prejudice to the defenders’
 ‘legal right to call for exhibition, as accords of law,’ and found ad-
 ditional expenses.

Judgment.

Lord Ordinary, Cockburn. Act. M^rNeill, Wm. Bell. Alt. Rutherford, J. M. Bell.
 A. Nairne, and M^rLean & Giffen, W. S. Agents. T. Clerk.

R.

FIRST DIVISION.

No. VI.

18th November 1835.

TRUSTEES OF JOHN SCOTT
against
 THE ORPHAN HOSPITAL.

PUBLIC POLICE.—PUBLIC STREET, ENCROACHMENT ON.—*Found that the Magistrates of Edinburgh had no right to permit an arch to be thrown across the common passage running parallel with the east side of the North Bridge.*

Narrative.

THE Incorporation of the Orphan Hospital and Workhouse at Edinburgh proposed to lay out the ground lately occupied by their establishment, at the east side of the north end of the North Bridge, for the erection of a public building fronting the same. With a view to obtain permission to have access from said building to the Bridge, having previously obtained the consent of the Magistrates for a consideration in money, they presented an application to the Dean of Guild, for warrant to build according to a plan, which included an arch of communication across the lane leading from Shakespeare Square to the markets, High Street, &c. The application, so far as regarded the proposed arch, was opposed by the trustees of John Scott, deceased, who was proprietor of certain subjects on the south side of Shakespeare Square, upon the ground that the said lane had been a public passage for time immemorial, which gave an interest to every citizen to object to the erection of the arch, and in respect of the proposed building being immediately injurious to the conterminous proprietors. The Dean of Guild 'having visited and inspected the subjects, along with the trades' members of court, &c. granted warrant to erect the said archway and 'relative buildings, as craved,' &c. The subjoined note was added*.

* *Note by the Assessor.*—The operations which the pursuers have in view are of a twofold description. *First*, To erect a building on their own ground, and within their own boundaries, over which there is no servitude in favour of the property belonging to the respondents. To this there can be no good objection offered by them. The *second* operation projected is to connect the intended building with the North Bridge, by means of an archway over the *foot-road* leading from Shakespeare Square along the east side of the bridge. The breadth of the archway, as shewn on the plans, is to be fifty feet; the height from the ground to the spring of the arch about thirty-four feet; and the total height to the top of the arch about fifty feet, or nearly about the same height as the arch of the North

Upon an advocacy by Scott's trustees, the Lord Ordinary pronounced this interlocutor, (20th February 1835) : ' The Lord Ordinary having heard counsel on the closed record, having afterwards considered the plans of the lane in question, and the proposed buildings, and having inspected the subjects in the presence of the agents for the parties, and the architect, remits to the Lord Dean

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Bridge. The pursuers have acquired, by purchase from the Magistrates, the right to connect their intended new building with the North Bridge by an archway, such as has now been mentioned, and the pursuers' right to throw an archway, of the breadth and height in question, is therefore to be treated as if the operation were to be performed by the Magistrates themselves. The title of the respondents to oppose what is sought by the pursuers is not stronger than that of any other inhabitant of Edinburgh residing in that quarter of the city, and using the road in question as an access to the ground below the bridge, as no encroachment is to be made on the private property of the respondents. The whole question thus comes to be, whether the erection of the proposed archway over the foot-road is injurious to the right of access to and from Shakespeare Square, common to all the inhabitants of Edinburgh? whether it will unduly obscure the light which is at present enjoyed by those who use that road? and whether, if no injury can be qualified, and no deformity produced of which the public may have a right to complain, the Magistrates shall be prevented from turning what is public property to the advantage of the community, a considerable price having been stipulated to the city for such right of entry from the bridge? The height and breadth of the proposed arch are shewn on the plans; and at the visitation, the trades members of Court expressed a very decided opinion, that the archway would not be in any degree injurious or detrimental to the foot-road, over which it was to stretch, the breadth not exceeding fifty feet, and the height being not less than fifty feet, and that any loss of light from such archway would hardly if at all be perceptible, as might be tried by walking under one of the arches of the North Bridge. The road, too, is merely frequented by occasional foot passengers, and not used by horses and carriages. For, as far back as 1772, it became necessary to erect certain abutments at the north end of the bridge, and on the east side of it, on which occasion the road from Shakespeare Square was altered, and thereafter became accessible only by the stair, which exists at the present day. This stair, it appears, is at the distance of fifty feet from the base of the arch, and consequently the light under the archway is not more obscured than if the stair and abutments did not exist, though something to the contrary of this is insinuated in the respondents' pleadings. It may be added, that the proposed erection in the pursuers' grounds will be highly ornamental to that quarter of the city, and one therefore which the Magistrates are bound to assist in carrying into effect, if unattended with any real injury to the inhabitants in that neighbourhood, and others using the road in question. It may be true, that such a building may prove injurious to the *prospect or light* of part of the respondents' houses in Shakespeare Square, and that, if the archway is prohibited, the projected building may never be carried into effect. But this, it is humbly thought, is a hardship which the Court cannot look to. The only point that admits of dispute is the right of the Magistrates, and of the pursuers, as coming in their place, to throw an archway over the foot-road or passage in question; and if it be lawful for them to do so, the Court cannot take into consideration the remote consequence that may follow to the properties of conterminous individuals, who have no right of servitude to plead against the erection of the proposed building.

18 Nov. 1835. of Guild, with instructions to alter his interlocutor, and to refuse the prayer of the Incorporation of the Orphan Hospital and Work-house at Edinburgh, and decerns.

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Note.

His Lordship issued the following note: 'It is admitted that the lane which forms the western boundary of the feus of the parties is a common way or passage, and has been so used by those for whom the advocates are trustees, and their predecessors, and by the public at large, for a period exceeding the long prescription. Since the royalty was extended in that direction, it has become a street or lane in the city. The Magistrates of Edinburgh having received L.750 from the respondents, have authorised them to erect the buildings, and make the arch of the dimensions, and in the manner described in the pleadings.

'In defence of this measure it is maintained, 1st, That the arch proposed to be thrown over the lane is no encroachment on the rights of the parties for whom the advocates are trustees; 2dly, That the Magistrates are entitled to grant this permission, in virtue of an act of Parliament passed in 1816, authorising certain improvements in this part of the extended royalty.

'On the first point it is said that the lane is not diminished in breadth by the intended operations. That is true, if a narrow stripe of ground claimed by the Magistrates, on which the west abutments or piers of the arch are to stand, belongs to the town, a point not yet settled. Next, it is said, and this is the principal point on which the issue turns, that the arch will be of no detriment in any respect to the access, and is therefore justifiable, as *res innocuæ utilitatis*. The Lord Ordinary cannot so regard it. To him it appears physically impossible, that a great portion of light should not be intercepted by an arch fifty feet in breadth over this lane, the lateral walls being also fifty feet in height on both sides of the lane, extending on the one side about ninety feet, and on the other nearly double that distance, which will convert the passage, for a certain space, into a tunnel. Farther, at the north end, the buttresses raised many years ago to support the bridge, the connecting arches, and the stairs below them, have a great effect in excluding the light from that end.

'The Dean of Guild has been informed by the trades' members of his council, that the loss of light, in consequence of the arch, will be imperceptible; but the ground on which they rest that opinion is not satisfactory. There is no resemblance between one of the arches of the North Bridge, the passage under which is fully illuminated on both sides, and this long and narrow lane, where the light is excluded by lateral walls and by obstructions at one end. A passage in the heart of the city so obscured must

'be inconvenient to those who, like the advocates' constituents, 18 Nov. 1835
'have frequent occasion to use it; and as they are entitled to en-
'joy their right *tantum optimum maximum*, an encroachment of
'this nature may be legally resisted. The cases of the Magistrates Trustees of
'of Montrose, (Feb. 27. 1762,) *M.* 13,175, and Ferrier, (Feb. 14. John Scott v.
'1832,) to which the advocates refer, are, in the Lord Ordinary's The Orphan
'opinion, decisive precedents on the subject, Hospital.
Nots.

'With regard to the act of Parliament, the petition is not laid
'upon it, nor is it founded upon in the interlocutor of the Dean of
'Guild. Assuming, however, that the respondents are entitled to
'avail themselves of its provisions, it does not appear, on a sound
'construction, to afford any argument in their favour. The powers
'granted to the Magistrates of Edinburgh to suppress the lane in
'question are coupled with the condition, that they shall previously
'obtain the consent of the proprietors on the east of the north end
'of the bridge, and of the proprietors of Shakespeare Square.
'But they have not obtained the consent of the advocates, and
'they cannot contract exclusively with the respondents. The at-
'tempt which is made to construe the copulative 'and' as a dis-
'junctive, would defeat the declared object of the act. If, instead
'of taking down the east parapet on the north end of the bridge,
'so as to widen the access on the east side, as it has been widened
'on the west side, there was only to be a perforation made in it
'fifty feet wide, to be used, as the petition sets forth, 'both as a
'road and a foot-path,' at right angles to the roadway of the bridge,
'a great inconvenience would be created, prejudicial to the public
'at large, and more particularly to the inhabitants of Shakespeare
'Square. The foot-pavement on the east side would be disunited
'to that extent, and an obstruction created by carriages passing to
'the east, by a road, not a thoroughfare, but conducting exclusively
'to the new building proposed to be erected. Not only the foot-
'pavement, but the carriage-way of the North Bridge would suf-
'fer from this operation; and it receives no sanction from the sta-
'tute, which plainly contemplated that the buildings were to be
'brought forward on the east side, in the same manner as they have
'been on the west side, the consent of all the proprietors in the line
'being first obtained.'

The respondents *reclaimed*, and contended, that the proposed arch
could be no detriment to the passage beneath in any way; that by
the act in 1816, the Magistrates had power to come within twelve
feet of the said east end of the bridge, which prevented the right
of the public to object to any building accessible from the bridge at
a greater distance; and though the act required the consent of con-

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terminous proprietors where any building to be erected would actually interfere with their property, the same consent was not required where such building would not have this effect*. The Court, however, unanimously adhered to the Lord Ordinary's interlocutor.

Opinion of
Court.

Lord Gillies.—I have no hesitation in concurring with the Lord Ordinary. I conceive the parties here were entitled to object to the arch both as part of the public and as proprietors. The act appears to be carried too far. According to the construction put upon it, there would be nothing to prevent the town, with consent of the proprietors on the north-east side, to shut up the street altogether. I don't think the act could have intended that. However, the right of interference on the part of these individuals is provided for in the most effectual way possible, because the Magistrates are entitled to act under the clause quoted, only with the consent of all the conterminous proprietors; and the consent of all being necessary, it was needless to provide compensation. With regard to the effect of the proposed building or arch, I think it would have the effect of deteriorating the passage very much. It is said the Dean of Guild and tradesmen had inspected the place; but the Lord Ordinary also visited it, and your Lordships might have visited it; and would your Lordships be bound to disregard the evidence of your own senses, because in opposition to the opinion of the Dean of Guild?

Lord Mackenzie.—I am of the same opinion. The proceedings before the Dean of Guild were not rested on the act at all. I don't think the act can be brought to bear on the present circumstances,

* The clause in the act referred to is as follows: 'And be it enacted, that it shall be lawful to the Lord Provost, Magistrates and Council of the said city, and they are hereby authorised and empowered to contract and agree with the proprietors of houses and areas in Saint Anne Street and Canal Street on the west, and with the proprietors of houses and areas opposite thereto, on the east of the north end of the said North Bridge, and with the proprietors of houses and areas in Shakespeare Square, in order that buildings may be erected within twelve feet of the parapet walls on each side of the North Bridge, and to take down the said parapet walls, so as to give access to the said buildings from the said North Bridge; and also in order that buildings may be erected in Canal Street, between the corner of that street next to the North Bridge, and the lane leading from Canal Street to the property of Robert Young and others; provided always, that the roadway of the said bridge shall be increased in width opposite to the said buildings twelve feet at the least on each side thereof; and it shall also be lawful to the said Lord Provost, Magistrates and Council, after contracting and agreeing with the proprietors on the east of the north end of the said bridge, as aforesaid, to alter and amend the access from Shakespeare Square to the grounds between the said North Bridge.'

because no power is given of affecting this street, excepting on two conditions; the one is, that they should make a new and better road somewhere else; and the other, that they should have the consent of the parties mentioned. The act was necessary, because it would have been difficult to shut-up this road, even for the advantage of the town; but certainly the act gives no power to interfere with it, except with consent of the neighbouring proprietors.

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Lord Balgray.—I am of the same opinion. It is unnecessary to add any thing. It was clear to me, on reading these papers, that the passage in question must be considered as a public street, and that the Magistrates have no power of themselves to interfere with it in any way. On these general grounds I concur with the Lord Ordinary.

The *Lord President* declined to vote, as he was governor of the incorporation at the time the action was raised, and was still a member.

Lord Ordinary, *Corehouse.*Act. *Keay, Miller.*Alt. *Dean of Fac. (Hope.)**Penney.* John *Yule*, W. S. Advocators' Agent.*J. & W. Jollie*, W. S.Respondents' Agents. *S. Clerk.*

C.

FIRST DIVISION.

No. VII.

21st November 1835.

JAMES MERRY

against

MARY DUN OR MASON.

TENOR, PROVING OF.—*Circumstances in which the adminicles were sustained in an action of proving the tenor of a disposition and sasine, stated to have been executed in implement of articles of roup, with a view to meet an action of reduction thereof, although the pursuer did not condescend on the names of the writer or witnesses, or produce any other relative writings, with the exception of an extract of a sasine from the burgh records, and an entry in the books of an agent, containing a charge for drawing and extending the disposition.*

The defender in the present action had raised an action of reduc- Narrative.

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tion of a certain contract, articles of roup, and instrument of sasine, the nature of which appears from the summons to be immediately noticed. The ground of reduction of the contract was, that it did not bear her genuine signature; of the articles of roup, that not having been signed by herself, they were ineffectual, unless homologated by a disposition in implement thereof; and of the instrument of sasine, that it did not proceed upon a disposition or other warrant. An issue was sent to a jury in respect to the signature to the contract, and a verdict was returned, (16th July 1830,) finding the contract to be the deed of the defender. The Court having applied the verdict, assoilzied the present pursuer from the conclusions of the action so far as regarded the contract, found him entitled to expenses, and quoad ultra remitted to the Lord Ordinary, (Moncreiff.) His Lordship (14th May 1833) 'having considered the judgment of the Court, applying the verdict and remitting the cause, and having heard parties' procurators, of this date, and resumed consideration of the closed record, found that the ground of reduction, applicable to the articles of roup, was *not relevant*; that unless the defender could succeed in reducing the said articles of roup, and the sale following thereon, she had no legal interest to challenge the instrument of sasine, of date 8th June 1791, the second deed called for by the summons, on the ground that the disposition or warrant on which it proceeded had not been produced.' Therefore, on the whole remaining merits of the cause, his Lordship dismissed the action, and found expenses due.

The Lord Ordinary's interlocutor having been submitted to review, the Court (14th November 1833) 'having advised this case, and heard parties by their counsel, sist process until a proving of the tenor of the disposition and sasine within mentioned shall be brought.'

The pursuer, in his summons in the present action, libelled, That by disposition, dated the 26th day of January 1771, John Kerr, weaver in Glasgow, disponed to James Dun, yarn-merchant in Glasgow, all and whole that piece of yard; and the said James Dun was infest thereupon, conform to instrument of sasine, which is dated and recorded on the 12th day of February thereafter, in the register of sasines kept for the burgh of Glasgow: That the said James Dun having married Mary Crawford, daughter of James Crawford, victual-dealer in Glasgow, both of these spouses died, the last of them in the year 1774, leaving an only child, Mary Dun, afterwards the wife of James Mason, labourer in Glasgow, now his widow, and at present residing in Edinburgh: That the said James Crawford executed a deed of settlement, which is dated the 21st day of October

1777, whereby he disposed in favour of the said Mary Dun, his grandchild, whom failing, in favour of Marion Brown, his wife, his whole estate; and he declared that the said Mary Dun should be bound to make up titles thereto, and convey one-half thereof to the said Marion Brown: That upon the 19th day of March 1779, after the death of the said James Crawford, the said Mary Dun, then about nine years of age, was served, by ward of court, before the Magistrates of Glasgow, nearest and lawful heiress to James Dun, her father, and was thereupon infest in the foresaid subjects acquired from John Kerr, conform to instrument of sasine, dated and recorded at Glasgow the 1st day of April 1779: That by contract, dated the 20th day of March 1787, betwixt the said Marion Brown, formerly wife of the said James Crawford, then spouse of James Merry at Rosehall, with his consent, on the one part, and the said Mary Dun, therein designed daughter of the said deceased James Dun, merchant in Glasgow, and then spouse of James Mason, labourer at Airdrie, with the special advice and consent of her said husband, on the other part, the said Mary Dun, inter alia, disposed, conveyed and made over to the said Marion Brown, and her heirs or assigns, the just and equal half pro indiviso of the foresaid subjects which belonged to the said John Kerr: That by articles of roup, dated the 19th day of May 1790, and which are subscribed by the said James Merry and James Mason, for themselves, and as having power from, and taking burden on them for their said wives, the foresaid subjects were on the same day exposed to sale by the said Mary Dun, with consent of the said James Mason, her husband, and with consent and concurrence of the said Marion Brown, with the consent of the said James Merry, her husband, the said Mary Dun standing vest and seised in the said subjects, but being accountable to the said Marion Brown for one-half of the same; and various offers by different persons were made, particularly the said James Mason offered L.75 sterling, and the said James Merry, besides other offers, offered L.76 sterling; and he being the last and highest offerer for the said subjects was preferred by the judge to the purchase; as the said several writings above enumerated more fully bear: That by said articles of roup it was conditioned that the exposers should, upon payment of the price, or security being found by the purchaser, grant to him a formal disposition and conveyance of the subjects above described: That in implement of the said sale and obligation above mentioned, the said Mary Dun or Mason, with consent of the said James Mason, and with consent and concurrence of the said Marion Brown, with consent of the said James Merry, granted a disposition of the said subjects in favour

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of the said James Merry, dated the 31st day of May 1791, and ratified by the said Mary Dun or Mason, and by the said Marion Brown, the same day : And the said James Merry was infest upon the said disposition, conform to instrument of sasine in his favour, dated and recorded in the register of sasines kept for the said burgh of Glasgow the 8th day of June 1791 : That the said James Merry, in virtue of these titles, possessed the said subjects until the time of his death, and the said James Merry, the pursuer, his son, has since possessed the same, in virtue of a special disposition or conveyance thereof in a deed of settlement executed by his said father, dated the 1st day of October 1802 : That the foresaid disposition, granted by the said Mary Dun or Mason, with consent of her said husband, and with consent and concurrence of the said Marion Brown and her husband, in favour of the said James Merry, the pursuer's father, and the instrument of sasine following thereon, have been abstracted, lost or become amissing, and the pursuer has, notwithstanding the most careful search, and inquiries at different persons who appear to have had access to them, been unable to recover the same. He then set forth the tenor of the disposition in the name of Mary Dun, with consent of James Mason, and with consent and concurrence of Marion Brown, with advice and consent of James Merry, bearing that the same proceeded on the articles of roup, and containing a receipt for the price, dispositive clause, procuratory of resignation, and clause of absolute warrandice. The testing clause was set forth blank in the name of the writer and witnesses, but with the signatures of Marion Brown, James Merry and James Mason, appended. There was then set forth an attestation by notaries, as subscribing for Mary Dun, blank in the names of the notaries and witnesses. There was likewise set forth a ratification in the names of Mary Dun and Marion Brown, in presence of a Justice of Peace and notary-public, bearing the signature of Marion Brown, but blank in the name of the Justice of Peace, notary and witnesses.

The extract of the instrument of sasine from the burgh records bore date the 8th June 1791, but of course did not contain the testing clause of the disposition. Certain witnesses were examined, inter alia one of the principal clerks, and the deputy keeper of the register of sasines for the burgh of Glasgow, who testified to the accurate manner in which said register had been kept, and that it was the practice to examine the *ex facie* accuracy of dispositions before passing infestment upon them. From the evidence of the first of these witnesses, however, it appeared that it was the practice, at the time said sasine was recorded, not to insert the doquet of each particular sasine, but in making the extract to copy the doquet, from a style inserted at the beginning of the volume.

Alexander Henderson, writer in Glasgow, of Messrs Graham and Mitchell, writers there, deponed, inter alia, ' That he has carefully searched the repositories of the late concern of Thomas and Robert Grahame, of Robert Grahame of Grahame and Mitchell, of Mitchell, Grahame and Mitchell, of which last concern the deponent is a partner, for said deeds, and in his search he was assisted by Mr John Edwards, book-keeper to the last-mentioned concern; but the deponent and Mr Edwards did not find the said deeds in said repositories. Being called also to produce the draft of the said disposition, depones, That he and the said John Edwards also searched the said repositories for the said draft, but they did not find, and did not expect to find it, in consequence of scrolls and a number of the old papers of the concern of Thomas and Robert Grahame, which were considered useless, having been destroyed twenty years ago, at a removal of the place of business from Ingram Street to Miller Street, and at subsequent periods; and the deponent himself has destroyed some of such papers as appeared to the deponent to be useless.'

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James Tayler, writer in Glasgow, deponed, inter alia, ' That in consequence of a marking which he observed on a disposition and assignation by Robert Glen and Mary Forrester, dated 1762, being No. 12. of process, of a paper having been given or lent to a Mr Bain, the deponent applied to a Mr Peter Bain, tailor, residing in Tradeston of Glasgow, for information as to the paper so stated to have been lent him: That Mr Bain was so applied to, in consequence of his being a proprietor of some property adjoining that to which the deeds called for refer: That this application to Mr Bain was made by the deponent in March 1830, and Mr Bain died in about two months thereafter. Depones, That on the said occasion, Mr Bain stated, that he had borrowed from the late Mr James Merry, the pursuer's father, the disposition called for, being the one in his, Mr Merry's favour, and that he, Mr Bain, had handed the same to the late Mr James Robb, writer in Glasgow, in reference to some dispute which Mr Bain had in regard to his property adjoining Mr Merry's: That the deponent does not know or suspect where the deeds called for may now be, unless the disposition be amongst the papers of the said James Robb, or of Mr Robert M'Callum, who was Mr Robb's partner, at or about the time of Mr Robb's death, or of Messrs Campbell and Tennent, writers in Glasgow, whom the deponent understood got Mr Bain's title-deeds, as agent for his trustees, or heritable creditors.'

Mr M'Callum and Mr Tennent (Mr Campbell being dead) were also examined. They had searched for but had not found any

21 Nov. 1835. of said papers. The pursuer produced the books of Mr R. Grahame, containing, inter alia, the following entry :

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1790.

Nov. 12. Drawing disposition by Mary Dun, &c.

to James Merry, 4 sh. - - - L.0 15 0

Stamped paper, - - - 0 5 2

Clerk for extending, - - - 0 4 0

Agency in the sale of this tenement,
much trouble in getting disposition

executed, &c. - - - 1 1 0

Glasgow, 31st May 1791.—Settled the above account on the above terms. (Signed) JAMES MASON. JAMES MERRY.

Mr R. Grahame was also examined in France, (19th January,) under a commission from the Court to his son, James Grahame, Esq. advocate *. Mr Grahame was again examined before the Sheriff-substitute of Lanarkshire, (25th August 1835 †.)

* Being interrogated, inter alia, If he recollects framing the disposition in implement of the sale effected under the articles of roup, on which infestment afterwards followed? depones, That he cannot recollect the drawing out the said disposition; but he has not the slightest doubt that such a disposition was prepared, either by him or by one of his clerks, under his direction; and that the same was regularly and properly subscribed and executed by the said Mary Dun, and her husband, James Mason, and the other parties. Interrogated, Whether the twenty-one shillings charged in the account, for agency and trouble in getting the disposition signed, was for signing as notaries, and getting the deed ratified? declares, That he cannot now distinctly recollect. Interrogated, respecting the instrument of sasine in favour of James Merry, of which an extract is produced? declares, That he cannot recollect the expeding of the sasine, but, from the entries in his books, he has not the slightest doubt that it was regularly expedited. Being interrogated respecting the circumstances of the defender, Mary Dun, having been able to subscribe her name in the year 1787, and of her being unable to subscribe her name in 1791, and having then recourse to notaries to subscribe for her? depones, That he has found it a common thing for young persons in the working classes, who have received an imperfect education, to be able, when young, to make a shift to subscribe their name, but in a short time thereafter, from not having occasion to write, or from coarse labour, to become unable to write, and to be obliged to have recourse to subscribing by notaries.

† Being shewn the original articles of roup, No. 27. of process, depones, That he observes that the term of payment of the price is 11th November 1790; and on turning to the day-book now produced, he finds entries of the following tenor :

‘ 11th November 1790.—Successors of James Crawford : Drawing disposition
by Mary Dun and Marion Brown, with consent of their respective husbands, to
James Merry, of the subjects near Meal Market, 7 pages, -

‘ 12th November 1790.—Successors of James Crawford : Extending disposition
by Mary Dun and others, to James Merry, - - -

‘ Stamped paper, - - - - - 0 5 2’

The defender contended that the tenor of the deeds in question had not been proved. The pursuer had not condescended on the names of the writer or witnesses. No person had seen the dispo-

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And the copies of said entries, now inserted in this deposition as above, have been compared by the deponent and commissioner with the original entries in the day-book, and found to be correctly taken therefrom. Depones, That the disposition referred to in said entries applies to the subjects referred to in said articles of roup, and which disposition had been prepared in the view of a settlement at the term of payment of the price of said subjects, it being common enough to have deeds prepared some time before the transactions are settled. Depones, That in posting the entry as to the extending of the disposition from the day-book into the ledger, it appears to have been entered in the ledger in the same line with the entry as to the drawing of the disposition under date 12th November 1790, but afterwards struck out, as appears in the copy of said account on the preceding page hereof: That all the entries in the account inserted in the ledger subsequent to the entries, 'stamped paper,' 'clerk for extending,' appear to have been written at one and the same time, and in a more hurried manner than the other entries. Depones, That after having examined his day-book, of date 31st May 1791, and for some days prior and subsequent to that date, he does not find in said day-book any of the entries in the account before copied subsequent to the extending: That he accounts for this from the circumstance that the entries in the ledger subsequent to the words, 'stamped paper,' and 'clerk for extending,' seem to have been entered by the same hand, and at the same time, and on 31st May 1791, when the parties appear to have settled in terms of the doquet subjoined to said account, which doquet seems also to be written by the same hand, and at the same time with that part of the said account just referred to: That said part of the account and doquet are written in a good hand, but apparently in a great hurry, as the parties were probably waiting to have said account fully made out and doqueted, and the transaction closed. Depones, That the day-book produced contains an entry of the following tenor: 'James Merry, 8th June 1791. Paid officer's dues and instrument money at infesting you in the subjects disposed by Mary Dun and her husband, &c. to you, 3s.' That the said entry applies and could apply to nothing else than the infestment on the disposition by Mary Dun and her husband, &c. to the pursuer's father, before referred to. Interrogated, Whether the deponent, from the entries in his books, above spoken to, and from his recollection, knows that the transactions described in the entries actually took place, and that the disposition by Mary Dun, &c. in favour of the pursuer's father, was executed of the date of the doquet above mentioned, viz. 31st May 1791? depones, That he has no doubt that the said transactions so took place, and that the said disposition was so executed. Interrogated for the defender, and shewn an entry contained in the account above referred to, taken from ledger, No. 9, folio 72, in the following terms: '1790, Nov. 12. Agency in the sale of this tenement; much trouble in getting disposition executed, &c. 'L. 1, 1s.' And being interrogated, How he has deponed that the disposition was not executed until 31st May 1791, when the transaction was settled? depones, That he thinks that this question has been substantially answered already; but he repeats, that the words written immediately after Nov. 12. 1790 are, 'drawing disposition, &c. by Mary Dun to James Merry, and ext^d stamped paper,' 'clerk for extending,' and then follows, in a different hand, in different ink, and apparently written at a different time, the whole of the rest of the account, beginning with the words, 'agency in the sale,' &c. and which appears to have been all written at the same time as the date of the doquet of the account, viz. 31st May 1791.

21 Nov. 1835. sition subscribed, or seen it after it was subscribed. There was no evidence that either of the deeds in question had ever existed; and that being the case, there could be no evidence of their destruction. Even if the deed had existed, there was no scroll or relative writing to shew that it contained a clause of warrandice or other essential clauses libelled. The presumption undoubtedly was, that the supposed granter of the disposition would have signed it herself, if it had been signed at all. There had been a verdict of a jury substantiating her subscription to a deed a very few years before. Mr

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Interrogated, What date said article of agency, &c. bears? depones, That it might be supposed that said article of agency, &c. was of the same date as the preceding three articles, viz. 12th Nov. 1790; but from the reasons which the deponent has before stated, he has no doubt that said article of agency, &c. was written on 31st May 1791, the date of the doquet of the account. Being desired to look at the preceding article in the account, 'clerk for extending,' and to say whether that entry is not of the same handwriting, written with the same ink, and at the same time with the following articles for agency, &c. depones, That the words, 'clerk 'for extending,' are written more hurriedly than the articles above it, but apparently with the same ink, and, he thinks, must have been written at the same time. Interrogated, Whether, if the disposition had been duly ratified by the defender before a justice of the peace, and notaries required to sign the deed and the ratification for her, there would have been an entry in the deponent's books for drawing and extending the ratification, and for the notaries' fees? depones, That the deponent has no specific recollection of the manner in which the business was executed, farther than what is suggested by the entries in the books; but from these entries, and the recollections they suggest, the deponent has no doubt that the whole business was regularly, fairly and duly executed, and he knows that he had a great deal more trouble, and spent more time than is stated in the entries in the books, and that the article ending in, 'much trouble in getting disp^d 'executed,' &c. might have been a great deal fuller stated, and higher charged than it is in the account. Whether the deponent, from his general knowledge of the business, and his memory, when now assisted by the entries in his books, can depone positively that the deed in question was signed by notaries for her, viz. Mary Dun, because she could not write, or whether she herself subscribed the deed? depones, That he cannot recollect; but that in the course of the last forty years, the deponent has signed as a notary to numberless deeds and ratifications; but at present he recollects only one of these cases, which made an impression on his mind, from the circumstance of its having been dangerous to go near the person, who was labouring under putrid fever: That the deponent thinks it right to add, that as he never intended to charge the parties in question fully for all the business he was employed to do for them, he paid little regard to entering all the articles of time and trouble for which they might have been charged in his books. Being specially interrogated, Upon what ground the deponent has deponed that the deed in question was executed upon 31st May 1791, seeing that the defender's agent can find no entry in the deponent's books of the payment of the price of the property in question? depones, That the deponent's *causa scientiæ* appears from the previous parts of this deposition, and those formerly emitted by him. Interrogated, Whether, about forty years ago, it was a practice among men of business to dispense with the ratification of deeds by married women, in matters of small amount? depones, That there was such a practice; but it was by no means uniform.

Grahame could not state that the deed in question had been signed by notaries; and the explanation of this matter, as given by him, was a mere general proposition, having no specific application to the case in hand. The entry in Mr Grahame's books, in November 1790, was no proof that a deed had been executed in May 1791. The extract of the sasine would not satisfy the production in a reduction-improbation: even as an extract it did not shew that it contained a doquet of the tenor libelled, in respect of the practice above stated, in so far at least as to prove the tenor of the sasine.

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The *Court*, however, concurred in sustaining the adminicles.

Judgment.

Lord Balgray.—I am satisfied, on examining Mr Grahame's books, and the extract of the sasine, that the disposition was executed of the date it bears, in the way and manner set forth in the summons.

Lord President.—I am of the same opinion. No doubt there is some confusion and difficulty in the case; but this has been in a great measure occasioned by the defenders remaining inactive for thirty-seven years, and allowing the pursuer to continue in possession. In regard to the entry in Mr Grahame's books, and the account of the matter given by him, I certainly must say that it is surprising he should have remembered this trifling transaction so accurately as he has done. It has been noticed, as an awkward circumstance, that Mr Grahame should have stated at the jury trial that the defender signed the contract with her own hand; whereas he now states that she could not write at the date of the disposition, and that it was necessary to have it signed by notaries. I am not at all surprised, however, at this statement, after seeing Mary Dun's subscription. If I had been her agent, I would not have taken such a signature: it is not writing. Having made such a signature as this, I would consider it most natural, and indeed necessary, that she should subscribe by notaries. When I consider the strong adminicles which are produced here, and particularly the sasine by the town clerk, expedite and recorded in the usual way, I would not have the least doubt, sitting as a jurymen, that this disposition was executed.

Opinion of
Court.

Lord Gillies.—I am not going to differ from your Lordships as to the probability of this disposition having been executed. My doubts, however, as to the manner in which it was executed, are very great. The articles of roup are signed by the husbands, and not by the wives. This was a clumsy proceeding. What proof is there that they did not also execute the disposition? Unless it was signed by the wife, or notaries were employed, it was good for no-

21 Nov. 1835. thing. What evidence is there that the wife signed by notaries?

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Opinion of
Court.

Mr Grahame's books do not establish that notaries subscribed: there is no charge for notaries: no mention of notaries in any part of the books. Does Mr Grahame swear that notaries were actually employed? All that he says is, that in point of form they would be necessary. My difficulties are very great as to the whole of this proving of the tenor. As to Mr Grahame's books, you are called on to judge, not so much from the books themselves as they stand, as on a correction of these books. You must take them as *admi-nicles*, not as they are; but you must correct them by your own observations, and by inference from Mr Grahame's depositions on the subject. This is going to a great extent in proving the tenor.

Lord President.—I certainly see the difficulty which has been stated. It is not so remarkable that the husband should have signed the articles of roup, because it was a kind of act of administration. The reason why there is no charge for notaries may have been, that Mr Grahame may have been one himself; and it is extremely probable, in the circumstances, that he would make no charge. Considering the whole circumstances, though certainly I have difficulties about it, I am inclined to think the tenor proved.

Lord Mackenzie.—I think this a weak case, but still that there is evidence enough. I think the *casus amissionis* of great importance. If no good reason had been assigned why the deed was amissing, and there was reason to think the disposition had been fraudulently put away, in order to substitute a proving of the tenor for a bad deed, I should have felt a greater degree of jealousy on the subject; but that does not appear to be the case here. When you get rid of that, you get rid of the difficulty. This was a person who might either say she could or could not write. Looking to the signature before us, there is certainly nothing surprising in her having allowed it to be done by notaries. The very nature of the former signature would lead to this. I don't deny there is something in what Lord Gillies has mentioned; yet I think it was very natural the husband should sign the articles of roup. They might grudge the expense of notaries, when the articles were to be immediately covered over and homologated by a subsequent writing. I don't think it is to be inferred, because the parties took their hazard as to the articles of roup, that they would do the same with the disposition. On the whole I think the disposition was executed, and that we may hold the essentials as restored.

Act. Dean of Fac. (*Hope.*) Alt. *Whigham, Penney.* T. *Darling, Pursuer's*
Agent. James Taylor, Defender's Agent. S. Clerk.

C.

SECOND DIVISION.

No. VIII.

21st November 1835.

HUGH BAIRD JUNIOR

against

JAMES CORBETT AND OTHERS, (JOHN CORBETT'S REPRESENTATIVES.)

GUARANTEE.—Circumstances in which a letter of guarantee was held, from its terms and the subsequent conduct of the parties, to be limited to a specific transaction.

In August 1827, the Luggieside Distillery Company proposed to deal with the pursuer, Mr Baird, for being supplied with malt in the course of their business. The pursuer having agreed to transact with them, the Distillery Company obtained from John Corbett, the defenders' author, and delivered to the pursuer, a letter of guarantee in these terms: 'To HUGH BAIRD Junior, Hamilton Hill. SIR, I hereby guarantee the payment of any quantity of malt that may be furnished by you to the Luggieside Distillery Company to the extent of L.98 : 6 : 8 sterling; and I am, Sir, your most obedient servant, (Signed) JOHN CORBETT. *Luggieside, by Kirkintilloch, 17th August 1827.*' A few days after the date of the letter, malt to the value of L.98, 10s. was furnished to the distillery, for which the company granted a bill at three months. On the 21st September 1827, the pursuer made a further furnishing of malt to the company, amounting to L.80, which was paid for in cash, on the 29th of the same month. On the 8th, 9th and 10th October 1827, and during the currency of the bill for the original furnishing, another furnishing was made by the pursuer to the company, of fifty bolls malt, amounting to L.100, which it was proposed to pay for in cash, but which was not paid, and became the subject of this action. On the 14th November 1827, John M'Gowan, one of the partners of the Luggieside Distillery, wrote to the pursuer in these terms: 'DEAR SIR, I see that our bill falls due on the 23d. As the guarantee you hold is a general one, I wish to know if you will have malt ready to replace it when it is paid. Will you be so kind as to give an answer by my young man, and a sample of your malt and price?' (Signed) 'JOHN M'GOWAN, for Luggieside Distillery Company. 14th November 1827.' No more furnishings were made, but the original bill was duly retired.

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bett and
Others.

The pursuer thereafter constituted the debt arising out of the last transaction against the company, and the parties were duly charged. He then brought the present action to recover, under the letter of guarantee, payment of the L.100, the price of the last furnishing.

It was pleaded in defence, 1. That the letter of guarantee applied to a single specific furnishing of L.98:6:8; that the furnishing having been made and paid for when the bill was retired, the guarantee became extinguished. 2. The furnishing unpaid was made during the currency of the bill for the original furnishing, and so could not have been made on the faith of that guarantee, which was manifestly exhausted at the time.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the closed record, and heard counsel for the parties thereon, sustains the defences, as-
'soilzies the defender from the conclusions of the libel, finds no
'expenses due, and decerns.'

Note.

Note.—'The question here is, whether the letter of guarantee
'founded on, be a continuous guarantee, or only for a single trans-
'action. The use of the word *any* in such letter is no doubt im-
'portant, but can scarcely be held to be decisive: It does admit
'of a construction importing a single transaction only, and circum-
'stances may control its more general, perhaps its more usual mean-
'ing. Now, a guarantee to the extent of L.98:6:8 would be a
'singular limitation of a continuous guarantee, and no explanation
'was attempted as to why such a sum, instead of L.100, or some
'round number, was introduced into it. If a single transaction on-
'ly was in contemplation of the parties, the reason is obvious; and
'accordingly a quantity of malt, exceeding only by a few shillings
'this sum, was furnished on credit just four days afterwards, for
'which a bill is granted. During the currency of this bill, an-
'other quantity is furnished on 21st September, which, however, is
'a cash transaction, and accordingly payment is made by cash on
'the 29th; and in this transaction the pursuer plainly did not rely
'on the guarantee. On 8th, 9th and 10th October, fifty bolls of
'malt are also furnished; but the entry in the books of the pursuer
'also shews that this was a cash transaction, and of course that the
'pursuer did not then rely on the guarantee for its payment, which
'was still protecting the original furnishing, the bill for which was
'not payable for five weeks yet. This then affords no proof that
'the pursuer understood this as a continuous guarantee, and acted

'on the faith of its being so. The letter of 14th November from 21 Nov. 1833.
'Mr M'Gowan seems rather to imply that this was the first time
'the pursuer was called upon to hold it as a general guarantee, but
'he did not at this time at least act upon that understanding.

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bett and
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Note.

'Upon the whole, the Lord Ordinary is of opinion, that the more
'natural construction of this document is, that it applied to the
'single transaction about which the parties were treating at the
'time, and that the conduct of the pursuer in subsequent transac-
'tions rather shews that this was the interpretation he put upon it
'himself. At the same time, as the defender might easily have
'made his letter unambiguous, leaving no room for doubt or dis-
'cussion, expenses have not been given. It was said at the bar,
'that if he meant to be liable only for this transaction, he might
'have been a party to the bill. But many mercantile men will
'grant a letter of guarantee who will not put their name to a bill.
'It is disadvantageous to them to have their names on bills in the
'circle, except for their own transactions; besides, they become
'liable to summary diligence, and lose the benefit of discussion.'

The pursuer having *reclaimed*, the Court, upon advising, were di-
vided in opinion, the Lords Justice-Clerk and Meadowbank con-
sidering the guarantee to be of a general nature. The Court ac-
cordingly ordered minutes of debate, with a view to consult the
other Judges.

The pursuer *pleaded*—The letter of guarantee was not limited to
a particular transaction. It contains no restrictive expressions; on
the contrary, it is framed in terms that have been invariably used
by parties, and enforced by courts, as constituting a general and
standing guarantee. The expression 'any' has always been held
as strongly indicating an obligation of this comprehensive nature.
(English authorities,) *Mason*, 2. *Campb.* 436; 12. *East*, 227; 2.
Campb. 413; 3. *Campb.* 220. (Scotch authorities,) 1. *Bell*, 373;
Sir William Forbes and Co. v. Dundas, 4th June 1830. (English
authorities,) 2. *Saunders*, 403-11; *Fell on Guarantee*, 99-100. The
letter ought to be liberally construed for the pursuer; *Hargreave*,
6. *Bing.* 248-9.

Pursuer's
Pleas.

Pleaded for the defenders—According to the settled rule of law,
the only inquiry in regard to such letters is, what was the true and
fair intention and understanding of the parties at the time they en-
gaged in the transaction? 1. *Bell*, 373; *Rankine v. Murray*, 15th
May 1812, *F. C.* (English authorities,) *Fell*, 98; 2. *Saund.* 403-

Defenders'
Pleas.

21 Nov. 1833. 414; 6. *East*. 507. Letters of guarantee ought to be favourably interpreted for the cautioner; *Houston's Executors v. Speirs*, 4th March 1820, affirmed; *Ross v. Greig*, 11th Feb. 1834. (English authorities,) 5. *Bingh*. 485; 3. *B. and A.* 593; 1. *Cro. and M.* 48. The cases referred to by the pursuer applied to guarantees conceived in terms of a general and unlimited kind. The conduct of the parties in their subsequent dealings shewed that the letter was limited to the first transaction.

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Defenders' Pleas.

Opinion of Consulted Judges.

The Consulted Judges returned this opinion: ' We are of opinion with the Lord Ordinary, that the guarantee in this case cannot be considered as a current continuous credit, but one limited to the specific goods then furnished or ordered. We are of opinion that the very special amount of the sum mentioned, L.98:6:8; seems strongly to point at some precise and limited order for goods, and not to a general current credit, which, as most usual; if not general, would have been expressed in round numbers; and this is strongly corroborated by the fact, that as soon as the credit for this L.98:6:8 was exhausted, the parties proceeded to deal on the footing of ready money, or cash payments, which seems to be quite inconsistent with the notion, that there was all the while a subsistent current guarantee. Besides, if we had any doubt, then, when there is doubt or ambiguity in such a letter of credit, the construction ought to be in favour of the cautioner.'

Judgment.

At the final advising, the *Court*, consistently with the foregoing opinion, assolizied the defenders, Lord Meadowbank adhering to his former opinion. After some discussion, the defenders were found entitled to expenses, (the Lord Justice-Clerk dissenting,) not only since the date of the Lord Ordinary's interlocutor, but also to the expenses previously incurred.

Lord Ordinary, *Medwyn*.

Rutherford and Pennay.

Stewart & Sprott, W. S. Defenders' Agents.

Act. *Dean of Fac. (Hope)* and *Neaves*.

Hugh Handyside, W. S. Pursuer's Agent.

T. Clerk.

R.

SECOND DIVISION.

No. IX.

21st November 1835.

RONALD MENZIES AND TUTORS

against

STEVENSON AND OTHERS, (MENZIES'S REPRESENTATIVES).

MARRIAGE.—PROCESS.—*Action of reduction of a decret of divorce, pronounced by the Commissaries of Edinburgh, brought beyond year and day after the date of the decret,—found to be incompetent.*

Question, Whether a patrimonial interest will entitle third parties, after the death of the party divorced, to reduce the decrees of divorce.

STEWART MENZIES of Culdres granted, in favour of his brother, John Henry M'Naughton Menzies, who was otherwise unprovided for, a bond of annuity for L.100, and also invested, in trust, L.4000, heritably secured, for behoof of John and his children, if he should have any. The trustees were directed to pay to John the yearly interest of this sum, to pay to his widow, in case he should leave one, a jointure not exceeding L.100 a-year, and in the event of his leaving children, to divide the capital sum equally among them; but in the event of his leaving a widow and no children, or neither a widow nor children, then, and in either of these events, the L.4000 to revert and be payable to Stewart Menzies and his heirs, from and after John's death, but subject to the payment of his widow's annuity, should he leave one. John Menzies married Euphemia Christie in 1816, and was said to have deserted her in three months. As was alleged by the pursuers, a collusive arrangement was afterwards made by John Menzies and Euphemia Christie, and one Mary Henderson, with a view to her obtaining a dissolution of the marriage; and a postnuptial contract was entered into in 1821, securing to her an annuity of L.55, in the event of her survival. In 1822, Euphemia Christie obtained decree of adherence, in absence, against John, and in March 1824 obtained a decree of divorce, also in absence. John had no issue by this first marriage. In May 1824 John Menzies married Mary Henderson, by whom he had three children. He died in 1832, survived by Euphemia Christie, Mary Henderson and the three children. Euphemia Christie married and had children subsequent to the divorce from Mr Menzies.

As the L.4000 would, in the event of John having died childless,

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revert to Ronald Menzies of Culdare, the son of Stewart Menzies, his tutors, on the ground that the divorce by Euphemia Christie had been obtained in absence, by a collusive transaction, to which Mary Henderson, the second wife, was a party, raised an action of reduction of the decrees of adherence and divorce, containing conclusions declaratory of the illegitimacy of the three children, he called, as defenders, Mr Stevenson, trustee under a settlement executed by John Menzies, Mary Henderson the widow, and her three children and their tutors.

The action was met by certain preliminary defences. In particular, the defenders pleaded, 1. No process, Euphemia Christie not being a defender; 2. No title to pursue; 3. The action was incompetent, more than year and day having elapsed since the decret of divorce was pronounced; *Donald v. Thom*, 16th May 1823; 4. Action barred by death of John Menzies, and second marriage of Euphemia Christie; 5. Proof of collusion excluded, an oath of calumny having been taken; *Greenhill*, 2. *Sh. App.* 435.

The Lord Ordinary ordered cases, and thereafter reported the cause to the Court.

Defenders'
Pleas.

The defenders, in support of the third defence, founded upon the 'Instructionis to the Commissaris of Edinburgh' in 1563, articles 18, 19 and 20, and which were ratified by Parliament, 5th June 1592, and 1st July 1606; *Balfour*, 659, 665; *Act. of Sed.* 1666, p. 97. In *Donald v. Thom*, 16th May 1823, the Court 'found reduction of the decret, by the Commissaries, of absolutor in a declarator of marriage, not competent after year and day.' In that case, a prior judgment by Lord Reston, in the case of Gardner, 18th May 1817, to the same effect, was quoted, and which appeared to have proceeded both on the regulations and the practice, and particularly, 'in respect that the pursuer has pointed out no instance of a decret of the Commissary Court in a consistorial question being brought under reduction beyond year and day from the date of the sentence.'

Pursuer's
Pleas.

To which the pursuer answered—That in the case of *Donald* there were two other good defences, each of them conclusive. The Instructions were addressed, not to the Court of Session, nor even to the four Commissaries of Edinburgh, but to the inferior commissaries throughout Scotland. Art. 16. evidently applies to reduction of decrees of inferior commissaries pursued before the Commissaries of Edinburgh, and not to decrees of the Commissaries of Edinburgh pronounced before the Supreme Court; see *Ersk.* i. 5. 31. Besides, John Menzies survived year and day, and till his death the

pursuers had no title. Thus the limitation of the right of reduction would operate against a party all the while non valens agere. 21 Nov. 1838.

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Opinion of
Court.

The Lord Justice-Clerk referred to the Notes of Lord Reston, in Gardner's case, and said, that in deciding the case of Donald v. Thom, the Court held themselves imperatively bound to give effect to the instructions; and accordingly found, that the prescriptive limitation of year and day applied as a bar against the reduction of every species of divorce.

Lord Meadowbank concurred.

Lord Medwyn.—After stating the facts, his Lordship proceeded. I think the third plea in defence is well founded. It is plainly contrary to natural justice, and most highly inexpedient, that such interesting questions of status, on which the peace of society depends, should remain long questionable. The instructions to the Commissaries, 1563, provided the limitation of one year to reduce a sentence, and I am surprised at this being questioned. The Ratification of the Commissariat of Edinburgh, by act 1592, c. 64, v. 3. 574, ratifies the Instructions to the said Commissaries, with the injunctions given to them, declaring the said jurisdiction to be as ample, of the same force and authority with the jurisdiction of the said officials to whom they succeeded. In 1609 their jurisdiction and the injunctions were again ratified. The Canon law allowed ten days to appeal from the sentence of the ecclesiastical judge to another, adopting one of the Novels of Justinian, (Nov. 23,) *Decret. ii. Pars. v. i. p. 164*; and it was required to follow out this appeal within a year, or in some cases two years, unless the judge, in particular cases, fixed a different period; *Greg. Decret. v. ii. p. 167*. When the progress of the Reformation led many to despise the process of cursing, or excommunication by the church, it was enacted, by 1535, c. 9, that when any remained forty days under that sentence, instead of caption as formerly merely, their creditors might have letters of four forms to poind or distrain their goods. And an addition was made by the act, c. 36, that though an appeal was entered, if the appellant did not bring home a commission within year and day, cessante justo impedimento, the poinding might then proceed, notwithstanding the appeal, on caution being found before the Lords of Council to refund, if the sentence should be retreated by the judge-delegat. This seems to have led to the adoption of a year within which reduction could be brought, when the Lay court of the Commissaries of Edinburgh was established, and when review by reduction was introduced, as in other civil courts.

The summons of reduction, or retreating the sentence, then, must be raised within year and day, as it was proper to limit the right of

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Court.*

appeal in this class of cases, that persons might not remain uncertain of their status for years. Now, Stewart Menzies lived more than a year and a day after the decree of divorce; nay, if it be thought there was no interest to set it aside till after the birth of a child under the second marriage, though I am not inclined to hold this, he lived more than a year after that event without bringing a reduction. I think the right to reduce is cut off by this prescription; and so it was found in *Donald v. Thom*, 16th May 1823, where reference is made to a case of *Gardner*, in 1818, as to a reduction of a decree of adherence by the Commissaries. The husband in that case died before it was advised by the Inner-House. The necessity of such a rule is shewn in this case, where both parties married and had children.

2. But there is another ground. I greatly doubt if the law admits of a third party, for a mere patrimonial interest, to pursue such a question as this, affecting not his own status, but the status of others. The summons calls upon the defenders to bring with them the decree of divorce obtained by Euphemia Christie, in order to have it set aside. Now, this is her decree, at her own instance, and for her own interest. No person can be custodier of it but herself; and how can it be brought into Court by any other person than her, or how can its merits be inquired into, or decree given, setting it aside, in any action in which she is not a defender? A mere patrimonial interest will not give a third party an interest to pursue an action of divorce; the heir, for example, to exclude the widow from her terce; *Clement v. Sinclair*, 4th March 1762, and *Tough*; and even an action of divorce stops with the death of either party. It did so in the case of *Gardner*, and in a later case, which created considerable interest, (*Sir James Colquhoun's*).

The heir is not allowed to carry on such an action, although it has been commenced by his predecessor. It is, in short, so personal an action, that it is competent to no other but the immediate parties. Now, can a divorce, when obtained, be in any other situation? Can a third party insist, for any mere patrimonial interest, upon setting it aside, and make them again married persons, and this too after the death of the parties? If death has effected a separation, and stops the pursuing a divorce, must it not also prevent the reduction of a divorce, so as to declare them again married persons, when the status cannot exist, owing to the death of one of them? Whether the pursuers could have raised a declarator of bastardy against the children, in which the effect of the decree of divorce might come incidentally to be considered, leaving it still good quoad Euphemia Christie, I shall not say; or what situation the pursuers would have been in if a process had been raised against

them for payment; and how far they might have called upon the children to establish their legitimacy as their title to insist: but sure I am, there is no example of a reduction of a decree of divorce made under such circumstances as the present.

Lord Glenlee concurred, and farther stated, that it seemed absurd to call on the widow to produce the decree. The pursuers themselves should produce it if they could; but they, clearly, could not call on these defenders to produce it.

The Court assolizied the defenders, with expenses.

21 Nov. 1835.

Menzies and
Tutors v.
Stevenson and
Others.

Opinion of
Court.

Judgment.

Lord Ordinary, Cockburn. Act. Keay, S. Keir jun. Alt. Dean of Fac. (Hope,)
and G. Bell. Macintosh & Ducat, W. S. and Alex. Stevenson, W. S. Agents.
F. Clerk.

R.

FIRST DIVISION.

No. X.

24th November 1835.

ANDERSON
against
MARSHALL.

EXPENSES.—JURY TRIAL.—*Where the defender makes a tender equal to, or exceeding the damages found due, he is entitled to expenses from the date of the tender.*

THE defender in this case, tried in the Jury Sittings after last session, reported ante, (15th July 1835,) moved for expenses, in respect of the tender of L.50 made by him, while the Jury had only returned a verdict in favour of the pursuer of one shilling damages.

Lord Gillies.—The general rule is, that where a party makes a tender equal to, or more than the sum found due by the verdict, he is entitled to his expenses.

Opinion of
Court.

The other Judges concurred.

The Court found expenses due from the date of the tender.

Judgment.

Act. Dean of Fac. (Hope.) Neaves. Alt. Sol.-Gen. (Cunninghame.) Hugh
Handyside, W. S. Pursuer's Agent. Allan Menzies, W. S. Defender's Agent.
Mr Brown, Clk.

C.

FIRST DIVISION.

No. XL

24th November 1835.

ALEXANDER S. BROOMFIELD

against

COLIN CAMPBELL, &c.

PROVISIONS TO CHILDREN.—MARRIAGE-CONTRACT.—CLAUSE.—

An obligation in a marriage-contract, providing certain sums to the children of the marriage, according to their number, held to import a conditional institution in favour of the survivor.

Narrative.

THE pursuer (4th September 1822) entered into an antenuptial contract of marriage with the now deceased Sarah Campbell, under which he received a portion of L.5000, provided to her by the settlement of her father, in consideration of which he bound himself to pay her a certain annuity, &c. The said contract contained the following clause: ‘ And the said Alexander Scott Broomfield binds and obliges himself, and his forebairs, to make payment to the child or children of the said intended marriage, of the following sums of money, viz. in the event there shall be only one child of the said marriage, the sum of L.5000 sterling; in case there shall be two children, the sum of L.7500 sterling; and in case there shall be three or more children, the sum of L.10,000 sterling; and which sums so provided to the said children shall be payable to them as follows, viz. to such as shall have attained majority or marriage, one-half at the first term of Whitsunday or Martinmas which shall first happen after the death of the said Alexander Scott Broomfield, and the other half at the first term of Whitsunday or Martinmas after the death of the said Sarah Campbell, their mother, if she shall survive him; the said provisions, if she shall predecease, not being payable till after the death of the said Alexander Scott Broomfield, and to such of them as shall not have attained majority or marriage, the proportions of their several provisions shall be payable at the first of the said terms after their respective majorities or marriages, with the legal interest of the said provisions from the respective terms of payment till paid.’ The said contract also contained, inter alia, the following declaration: ‘ Declaring also, that if any child or children of the said marriage shall die before the said sum hereby provided to him, her, or them, shall be paid or become payable, then the sum provided to such

'child or children shall revert and belong to the surviving children of the present marriage and their issue, who shall be entitled to their deceased parents' share.' There were three children procreated of the marriage, two of whom died before attaining the age of twelve months. The pursuer now raised a summons against the defender and others, as trustees under the marriage-contract, for the surviving daughter, Barbara Broomfield, to have it found and declared, inter alia, that the said Barbara Broomfield is, under the said contract, entitled, after the death of the pursuer, and at the first term of Whitsunday or Martinmas after her majority or marriage, to the foresaid provision of L.5000 only, with the legal interest thereof from the said term of payment till paid: Declaring always, however, that if she shall die leaving lawful issue before the said term of payment, her said issue shall be entitled to the said provision of their deceased parent.

24 Nov, 1835.

Broomfield v.
Campbell, &c.

The trustees pleaded, in defence, that, according to a sound construction of the contract libelled on, the provision of Miss Barbara Broomfield, the surviving child of the marriage, must be held to be L.10,000, and not L.5000, as concluded for by the pursuer.

The Lord Ordinary (12th May 1835) assoilzied the defenders from the conclusions of the action, but found no expenses due. His Lordship added the following note: 'It is not unlikely, that by the clause in the contract of marriage, which declares that the sum provided to a child who dies before it is paid or becomes payable shall revert to the surviving children, parties intended a substitution, that is to say, that the provision should revert only in the case of its having been previously vested by the majority or marriage of the child. This conjecture is more probable from the circumstance, that L.5000 is provided if there shall be only one child of the marriage; L.7500 if two; and L.10,000 if three or more. On the opposite construction, that is, if conditional institution was meant, one child born of the marriage would receive only L.5000; but one child surviving two or more, who died a day or an hour after their births, would be entitled to L.10,000, a distinction which cannot easily be accounted for. But, on the other hand, the words of the clause are express, clearly importing conditional institution; and similar provisions have been so construed in various cases cited by the defenders, as Denham, Jan. 1726, *M.* 6846; Dunlop, 2d June 1812, and Aitchison, 16th Feb. 1831. It may be remarked, that the words occur, not in a testament or a disposition mortis causa, in which, for obvious reasons, a greater latitude of construction is allowed, but in a contract inter vivos, which is stricti juris, and where the technical meaning

Lord Ordinary's Note.

24 Nov. 1835. *of words must be adhered to, unless it appear, by plain declaration or manifest inference, that the parties used them in a different sense. It is quite possible in this case, that the parties had not adverted to the contingency of children dying in infancy, or before their provisions vested; and if they made an imperfect contract, it is not for a court of law to supply the defect. The security of written obligations ought not to be shaken by conjectural interpretation, however plausible.*

Broomfield v. Campbell, &c.

The pursuer, in aid of his plea, has referred to various clauses of the context, but it is thought unsuccessfully. They are all as applicable to a conditional institution as to a substitution.'

Judgment. *The pursuer reclaimed, but the Court unanimously adhered.*

Lord Ordinary, *Corehouse.* Act. *Dean of Fac. (Hope.)* Alt. *Sol.-Gen. (Cunningham.)* *MacLachlan & Ivory,* W. S. Pursuer's Agents. *J. C. Reddie,* W. S. Defenders' Agent. *S. Clerk.*

C.

FIRST DIVISION.

No. XII.

24th November 1835.

JAMES AIKMAN, SUSPENDER,
against
DANIEL FISHER, CHARGER.

AGENT AND CLIENT.—EXPENSES.—*Circumstances in which it was held, that an agent who had conducted two conjoined actions in the names of two sets of pursuers, one of whom was liable in relief to the other, had not barred himself from proceeding with diligence against one of the set of pursuers who were entitled to relief, from the way in which he had transacted with the pursuers who were liable in relief.*

Narrative.

In the year 1829 the Reverend John Hunter was appointed, by the Town-Council of Edinburgh, assistant and successor to the late Dr Simpson. The appointment was opposed in the church courts by the suspender and others. Their proceedings resulted in a confirmation by the General Assembly of a judgment of the Presbytery and Synod, sustaining the appointment. The charger acted as agent for the parties opposing the appointment in the General As-

sembly. An action of reduction was then brought in this Court at the instance of Messrs Luke and Henderson and the suspender, in which the charger continued to act as agent. During the dependence of this action, a new Town-Council having come into office, they employed the charger to raise an action of reduction at their instance of the appointment by their predecessors, which was accordingly done, and the two actions were subsequently conjoined. On 10th February 1832, the First Division pronounced a judgment, affirming an interlocutor of Lord Moncreiff, which assoltized Mr Hunter from the conclusions of the conjoined actions, and found him entitled to expenses. This judgment was affirmed on appeal. On the return of the cause from the House of Lords to have the judgment applied, the charger presented a petition to have his accounts taxed, and decree was pronounced for the amount. The application was intimated to the suspender. On the termination of the cause a question as to liability for expenses arose between the town and the private pursuers, which resulted in a submission, under which it was found that the town was liable to them in relief. Mr Ellis, W. S. acted as their agent in the submission. On 20th May 1833, the charger extracted his decree for expenses, and charged Messrs Henderson, Luke and the suspender. On 25th June he raised letters of caption against them; and on the 28th Messrs Henderson and Luke signed an obligation for the debt, but the suspender declined to do so. The decree for expenses was directed against the town of Edinburgh conjunctly with the private pursuers; but in consequence of the embarrassed state of its affairs, it was, as stated by the charger, more advisable to take bills from them, in order to liquidate the debt under the parliamentary trust, which was then about to be carried into operation. Accordingly, on 28th June 1833, he took two bills from the city chamberlain, apparently with the approbation of Mr Ellis, at six months, for the amount of the expenses, along with other sums due to him.

The suspender denied that he had employed the charger, or authorised the legal proceedings which were carried on in his name; and he also denied that Mr Ellis had been authorised to act as his agent, or had been recognised by him in that capacity; and he contended, that as the town stood towards him in the situation of a cautioner, the chargers, by dealing with the town, and giving them indulgence, had destroyed his right of relief, and so was barred from proceeding against him for the debt. He farther alleged, that since the date of the bills granted to the charger by the chamberlain, a number of debts due by the town, amounting to a sum greatly exceeding the charger's accounts, were paid by the Magistrates in cash.

24 Nov. 1835.

Aikman v.
Fisher.

Narrative.

24 Nov. 1835.

Aikman v.
Fisher.

Note.

The Lord Ordinary (3d March 1835) found the letters orderly proceeded, and the suspender liable in expenses. His Lordship issued the following note :

Note.—‘ It is clear that the suspender was an employer, or suffered himself to be held out as an employer, of the charger, in the proceedings both in the ecclesiastical and civil courts relative to the settlement of Mr Hunter as a minister of the Tron Church. In that character he was found liable, conjunctly and severally, with Messrs Henderson and Luke, and with the town of Edinburgh, to the charger, for payment of his account, as agent, and decree passed against him accordingly. His liability at the time of the decree is not now disputed.

‘ In the proceedings subsequent to the decision of the appeal, Mr Ellis held himself out as agent for the suspender, as well as for Messrs Henderson and Luke. Mr Ellis’ conduct in that character was acquiesced in by the suspender, and distinctly homologated in the proceedings relative to the submission; and though well aware of all the subsequent steps taken by Mr Ellis, he never disclaimed him as an agent. Every communication, therefore, from the charger to Mr Ellis must be held as a communication to the suspender.

‘ The present question resolves into the simple issue, whether the charger, by taking bills from the town of Edinburgh, payable at six months after date, knowing that the town was bound to relieve the suspender, gave time to the principal debtor, and on that ground released the suspender as cautioner? The general rule of law, as to giving time, is well established; but, in the Lord Ordinary’s opinion, this case is taken out of the rule by circumstances.

‘ All the parties were conjunctly and severally liable to the charger: he obtained decree against them all: he gave a charge on the decree to Messrs Henderson and Luke, and the suspender, which charge they allowed to expire, and afterwards he raised letters of caption against them. He did not charge the town of Edinburgh, for its insolvency had been previously declared; and a bill was pending in Parliament, to place its property under trust, and to prevent preferences. A charge at that time must have compelled all the town’s creditors to do diligence: it would have produced an immediate and absolute stoppage, and defeated the measures in contemplation for extricating the affairs of the town. The suspender did not make payment when required. An arrangement was proposed by the charger, by which time was to be given, both to the town and to Messrs Henderson and Luke, and the suspender, on their granting liquid obligations for the debt; and he was desired to state if he would concar.

‘ But a series of letters, written by the charger to Mr Ellis, from 24 Nov. 1835. the 28th of March till the 26th of April, in so far as the suspender was concerned, remained unanswered. The charger then proceeded with his diligence: the suspender did not pay: he would not say whether he would consent that time should be given to the town: he did not require the charger to do diligence against the town. He did not do diligence himself for his relief, though he had the means in his hands, either by taking an assignation to the charger’s decree, or by charging on a decree, which the arbiter declared he was ready to pronounce. He refused to implement his own obligation: he refrained from taking measures for his relief: he maintained an obstinate silence for several weeks when required to say if he would or would not concur in an arrangement for the benefit not only of the charger, but of himself or his co-obligants, Messrs Henderson and Luke, and not till then were the bills in question taken from the town. Unable, or unwilling to implement his own obligation, he was not entitled, in the Lord Ordinary’s opinion, to defeat the only reasonable plan for enforcing it, as far as was possible, against his co-obligants. This accords with the law, as stated by Mr Bell, (Com. vol. i. p. 360, 5th edit.) ‘ that where the creditor makes a demand on the cautioner, and the cautioner either refuses, or is unable to pay the debt, and take his own relief, the creditor may take such prudent measures as, in the circumstances of his debtor’s affairs, may be advisable, without being held thereby to discharge the cautioner.’ Mr Bell’s doctrine is sanctioned by the decision in the case of Whitehead and Kirk, and by several other decisions which the charger has cited.’

Aikman v. Fisher.
—
Note.

The suspender *reclaimed*, but the Court, without hearing counsel for the respondents, unanimously *adhered*. Judgment.

Lord Ordinary, <i>Crookston</i> .	Act. <i>Rutherford, Crawford</i> .	Alt. <i>Dean of Fac.</i>
(Hope,) <i>Forsyth</i> .	<i>Robert Auld</i> , S.S.C. Suspender’s Agent.	<i>Daniel</i>
<i>Fisher</i> , S.S.C. Charger.	<i>D. Clerk</i> .	

C.

SECOND DIVISION.

No. XIII.

24th November 1835.

LAWRENCE, LORD DUNDAS,

against

W. SCOTT MONCREIFF, (MOODIE'S TRUSTEE.)

ANNUALRENT. — TACK. — *Found that interest was not exigible on arrears of rent, due by a Crown vassal, of lands in Orkney, there being no stipulation as to interest in the tack, and no usage of paying interest.*

Narrative.

IN a question of accounting betwixt Lord Dundas, as tacksman of the property-lands, and of the rents, revenues and superior duties belonging to the Crown in Orkney, and Mr Moodie of Melsetter and his trustee, proprietor of lands and others in Orkney, holding of the Crown, a question occurred as to payment of interest periodically on arrears of rent. The principal duties, as stated by Lord Dundas, consisted, 1. of feu-duties payable by the vassals to the Crown by virtue of their charters; 2. of a rent or tack-duty payable by the vassals, in consequence of a lease which they held of certain lands belonging to the Crown, and which the vassals occupied as ordinary tenants. The rent payable for these lands was an ordinary land-rent, payable by virtue of a tack. Mr Moodie stated, that the duties which were prestable for possession of the lands, in virtue of the Crown lease, consisted of oil, bear, &c. deliverable according to use and wont. He never refused to settle these, payment being deferred by proceedings of Lord Dundas. The duties were prestable in kind.

Lord Dundas claimed accumulated interest on the arrears of these duties, which accrued during the discussion as to the mode of settlement, and founded on *Ersk.* iii. 3. 80; Dawson, 15th June 1808, *Dict. App.* 5. Mr Moodie's trustee objected, on the ground, that neither by law, stipulation nor usage, was interest on arrears exigible.

The Lord Ordinary, in a note to an interlocutor, by which he decerned for a certain balance, with interest from the date of citation, stated, 'It is simply giving Lord Dundas interest on the arrears of all the duties from the dates of citation in the several actions, but without any accumulation of interest, and charging him interest on his intromissions with the rents, from the dates of his

'receiving them. The Lord Ordinary is satisfied that this is both
'the legal and the equitable principle of settlement in the circum-
'stances of the case.'

24 Nov. 1835.

Lord Dundas
v. W. Scott
Moncreiff.

Lord Dundas having *reclaimed*, *Rutherford* *pleaded*, that it was
fixed that arrears of feu-duty did not bear interest. But here he
claimed interest on tack-duties—land-rents. It was nowhere laid
down that the tenant was not liable for interest on rents from the
time they fell due.

Pursuer's
Pleas.

Lord Justice-Clerk.—There is no stipulation in the tack, that, if
duties be not paid, interest shall be due.

Opinion of
Court.

Lord Medwyn.—These are not payments in money, but in kind.
In *Moir v. Graham*, 17th May 1821, the tenants were expressly
bound by their lease to pay interest on the rent past due. They
were found liable, as they had neither consigned, nor offered pay-
ment to account.

Lord Glenlee.—Unless there be a clause in the tack, or usage of
payment, I never heard of interest on arrears, under such circum-
stances, being exigible.

Rutherford gave up the point.

The Lords *adhered*.

Judgment.

Lord Ordinary, *Moncreiff*. Act. *Rutherford*, *H. Bruce*. Alt. *Keay*, *Marshall*.
Ker & Dickson, W. S. and *John Phin*, S.S.C. Agents. T. Clerk.

R.

FIRST DIVISION.

No. XIV.

26th November 1835.

WATSONS

against

WATSONS.

PROCESS.—PROOF.—This cause, reported ante, (1st July,) having
been appealed, the House of Lords directed an issue to be sent to a
jury. The pursuer now moved for a commission to examine aged
witnesses, &c.; but without naming any witness in such situation.

The Court declined to entertain the application without such spe-
cification.

Act. *A. M'Neill*. Alt. *Pyper*. C. F. *Davidson*, W. S. *Mackenzie & Macfarlane*,
W. S. Agents. Mr *Brown*, Clk.

C.

FIRST DIVISION.

No. XV.

26th November 1835.

JOHN BRAIDWOOD
against
 THOMAS BRAIDWOOD.

MUTUAL CONTRACT.—REVOCATION.—*A disposition omnium bonorum by a father to a son, and by which the father also conveyed acquirenda, in consideration of certain obligations by the son, (partly set forth in the deed, and partly undertaken in a separate writing,) held to be irrevocable.*

Narrative. THE pursuer raised an action of reduction of a disposition executed by him (15th July 1830,) in favour of his son, the defender, in which he libelled fraud and circumvention; and farther alleged, that the deed was sua natura revocable, and had been revoked by him by a deed of revocation, executed by him 29th May 1833. The said disposition narrated love and favour, and other good causes and considerations; and the granter thereby gave, granted, assigned and disposed, ‘to and in favour of Thomas Braidwood, baker in ‘Uddingstone, my son, and his heirs and assignees whomsoever, ‘heritably and irredeemably, all and sundry lands and heritages, ‘tenements, heritable bonds, annualrents, adjudications, tacks, ‘debts heritable and moveable, heirship moveables, and whole goods, ‘g  ar, sums of money, household furniture and plenishing, crops, ‘corns, horses, cattle, farming utensils and effects, and in general ‘my whole means and estate, heritable and moveable, of whatever ‘nature or denomination, or wherever situated, then belonging or ‘which should belong to me at the time of my death, with the ‘whole vouchers, instructions and conveyances of the said debts, ‘and the writs and evidents of my said heritable estates; and particularly, without prejudice to the foresaid generality,’ all and hail certain lands belonging to him, ‘but always with and under the ‘burden, first, of all the lawful debts that I may be owing at the ‘present time, at the date hereof, which the said Thomas Braidwood and his foresaids, by acceptance hereof, oblige themselves ‘faithfully to discharge as soon as possible; and, second, under ‘the burden of payment of L.50 sterling to each of my daughters, ‘Grizel and Elizabeth Braidwoods, payable at the first term of ‘Whitsunday or Martinmas that shall happen after the death of the ‘longest liver of me or my present wife, which shall be in full of

‘all my said daughters, or their present or any future husbands, can claim by or through the decease of me or my said wife, in any manner of way whatever.’ The said disposition contained a clause of warrandice, delivery of title-deeds, and precept of sasine. Of the same date the defender executed and delivered to the pursuer a letter of the following import: ‘To Mr and Mrs Braidwood, Uddingstone.—Dear Father and Mother, In consequence of the disposition granted by my father to me, of this date, I bind and oblige myself, and heirs and successors, to pay you, and the survivor of you, an annuity of L.50 sterling a-year, for your liferent use alienarly, and to cease at the death of the longest liver of you; payable at four terms in the year, Candlemas, Whitsunday, Lammas and Martinmas, by equal portions, beginning the first quarter’s payment at Martinmas first, and so on, during your lives. I am yours, (Signed) THOMAS BRAIDWOOD.—Uddingstone, July 15. 1830.’

96 Nov. 1835.

Braidwood v.
Braidwood.

The Court being of opinion that the question, whether the disposition was or was not revocable, should be considered before a trial of the question of fraud, the parties proceeded to discuss the first point before the Lord Ordinary.

The pursuer *pleaded*—The disposition having been granted *mortis causa*, and for the purpose of settling the succession to the pursuer, as at the time of his death, is revocable, *sua natura*, or as a *donatio mortis causa*, by the pursuer, both as to the heritage and moveables conveyed.

Pursuer’s
Pleas.

II. As a testamentary deed conveying the moveable property which should belong to the pursuer at the time of his death, the disposition was, at all events, revocable *sua natura*, as to the moveables.

The defender *pleaded*—The disposition in question, containing no power of revocation, and not being a *mortis causa* disposition, but one granted for an onerous cause, and for the purpose of immediately and absolutely conveying over the property contained in it, upon the conditions which have been mentioned, the same is not subject to revocation by the pursuer; and any deed of that nature which he may have executed can have no effect whatever.

Defender’s
Pleas.

The Lord Ordinary found, ‘That the deed sought to be reduced was not revocable, and has therefore not been effectually revoked by the granter’s subsequent deed of the 20th of May 1833; sustains the defences against this reason of reduction, and decerns: and finds the pursuer liable in the expenses of this part of the discussion.’

Lord Ordinary’s
Interlocutor.

26 Nov. 1835. but then it must be considered that this was a mutual contract. Here the principle in Sir Thomas Ramsay's case applies, (11th July 1833, 11. *Shaw*, 467.) It is true that was the case of a marriage-contract, but the principle extends to other onerous contracts. The case of Curdy is in all respects the same as the present, except that there the onerous cause was inadequate. But it is said that in Curdy there was a declaration that the deed should be irrevocable. The necessity of introducing such a clause in any deed, except it be *sua natura* revocable, is not apparent. What necessity can there be for introducing that which the law will declare for you? The cases of Sommerville and Miller merely shew, that if a deed is properly of a testamentary nature, delivery does not take away the effect of it. If it should be said that the deed was revocable as regarded *acquirenda*, it would not follow that it was on that account revocable in *toto*. The case of Leckie is an authority upon the point; (*D. Presumption*, App. No. 1.) See also opinion of Lord Glenlee in Duguid, 9. *Shaw*, 844.

Braidwood v.
Braidwood.

Defender's
Pleas.

Opinion of
Court.

Lord Gillies.—This is a general disposition of all the estate of this person, heritable and moveable. Suppose a great part of the estate is personal, then attend to the clause excluding the legitim. Say that this person died worth L.100,000, would this clause preclude the daughters from claiming legitim? If you hold it does not deprive them of legitim, what becomes of the irrevocable nature of the deed? If I make a settlement excluding the legitim, would it not depend on whether or not the settlement was irrevocable, that it would be effectual in this respect? Can a father by any thing but an irrevocable deed disappoint the legitim? If then you hold that these daughters might claim legitim, can you say that this deed was irrevocable?

Lord Mackenzie.—Two things are necessary to exclude the legitim,—that the deed should be irrevocable, and that it should take effect during life. If it does not take effect till after death, it will not exclude the legitim.

Kearney.—Suppose a person possessed of a sum of money enters into a fair and bona fide transaction to purchase an annuity, and agrees at the same time to pay over any further sums he may acquire in consideration of the annuity, and has no view of defrauding his children of their legitim, such a transaction as that could not be held revocable.

Lord Balgray.—Looking to the deed itself, I am satisfied it is completely irrevocable. When this deed was delivered, and the party was allowed to possess the subject, the granter put it out of his own power to revoke.

Lord President.—Ex facie of the deed it appears to be a mutual contract, and is now irrevocable. The fact of its being irrevocable may enter materially into the question of fraud, which still remains behind. 26 Nov. 1835.
Braidwood v. Braidwood.

Lord Gillies.—I am not inclined to disagree with your Lordships, but I have great difficulty on the subject. Opinion of Court.

Lord Machenzie.—I am of the same opinion. Looking to the deed with all its qualities, it is impossible not to find it irrevocable.

The Court then pronounced the following judgment:

‘The Lords having advised this reclaiming note, and heard the counsel for the parties, recall the interlocutor reclaimed against; but find, that the disposition of John Braidwood is ex facie irrevocable; and remit to the Lord Ordinary to proceed farther in the cause, reserving all questions of expenses.’ Judgment.

Act. Dean of Fac. (*Hope*), *Paterson*. Alt. *Keay, Wood*. Lockhart, Hunter & Whitehead, W. S. Pursuer’s Agents. Alexander Fleming, W. S. Defender’s Agent. D. Clerk.

C.

SECOND DIVISION.

No. XVI.

26th November 1835.

WALTER STEWART

against

JOHN STEWART’S REPRESENTATIVES.

SOCIETY.—A partnership was dissolved by the death of one of two partners: The surviving partner brought a summons of partition and sale of the heritable property of the company: Being opposed by the representatives of the deceased partner, the Lord Ordinary ordered a report from a competent person, as to whether the subjects were capable of beneficial division: Certain of the subjects being reported incapable of such division, his Lordship ordered a public sale, which order was confirmed by the Court.

WALTER and JOHN STEWART held considerable heritable and other property as brewers. The company was dissolved by John’s death in 1825. In the course of certain proceedings in regard to the division and settlement of the property and funds, Walter brought a summons of partition and sale of the lands of Netherfield, Narrative.

26 Nov. 1835.

Stewart v.
Stewart's Re-
presentatives.

Narrative.

and houses thereon, and the lands of Haghill, brewery, dwelling-houses and malt-barn, and other erections. The widow and children of John resisted the sale on various grounds, and pleaded, (plea 3.) in so far as related to the subjects which were not capable of being divided, that the pursuer was not entitled to insist upon the same being sold, in respect that he had not allowed the defenders to exercise the option to which they were entitled, of either taking his half, or giving their half to him at a certain price.

The Lord Ordinary, before answer, remitted to the Sheriff of Lanarkshire to appoint a fit person to report whether the subjects were capable of division, and if not, the most advantageous mode of disposing of them.

Mr Robert Ferrie reported, that the lands of Netherfield and others were capable of division, but that Haghill, brewery and others 'cannot be divided into two beneficial divisions of equal value.' The Lord Ordinary (10th July 1835) approved of the report; and as to Haghill, brewery and others, appointed articles of roup to be prepared, with a view of bringing the same to sale.

Defenders'
Pleas.

The defenders *reclaimed*, and in support of their plea, above quoted, *Mr Solicitor-General* referred to Ersk. iii. 356; Stair, i. 16. 14; 1. Bell, 64, and Milligan, 8th Feb. 1782. In *Marshall v. Marshall*, 23d Feb. 1816, *F. C.*, there had been no proposition to give or take a price. In *Aitken's Trustees v. Shank*, (18th May 1830, *S. S. & D.*) also, no such proposition was made. The only way in which joint proprietors can proceed is by a proposal such as is here pointed out.

Pursuer's
Pleas.

Dean of Faculty (Hope).—The Court was not dealing with a right of property *pro indiviso*, settled by deed, which is the case referred to by Bell in the passages quoted on the other side. There, one owner cannot capriciously insist on the property being put up for sale. But see 2. Bell, 645, as to a case like the present. There was no special agreement betwixt Walter and John as to division, in the event of death or dissolution; but it is clear, that, in either event, the surviving partner may insist that the partnership property be disposed of, and the Court may order a sale. Here the question is in regard to property not admitting of division. The pursuer concludes for a sale, which of course implies fixing the upset price. I am not bound to take, neither can they compel me to take, the price they offer. If they wish, they can bid at the sale.

Lord Justice-Clerk.—A public sale, the price being fixed judicially, can do no harm.

Solicitor-General.—The property has lost the character of co- 26 Nov. 1835.
 partnery property, there having been no company since 1825. It
 is now pro indiviso heritable property.

Lord Justice-Clerk.—It is still on the basis of copartnery. No-
 thing has occurred to take it out of the copartnery property.

Lord Medwyn referred to the case of Aitken. Till the funds be
 ascertained, and the debts settled, they remain company stock.
 The proper way of disposing of the property has been adopted.

The Court adhered.

Judgment.

Lord Ordinary, Jeffrey. *Act. Dean of Fac. (Hope,) and A. McNeill.* *Alt.*
Bot. Gen. (Cuninghame) and Marshall. *A. P. Henderson, S. S. C. and Wm.*
Waddell, W. S. Agents. *T. Clerk.*

R.

SECOND DIVISION.

No. XVII.

26th November 1835.

WILLIAM EWING

against

CHALMERS AND COLLINS.

PROCESS.—JURY TRIAL.—EXPENSES.—*A verdict was obtained for £25, the value of shelving in a shop belonging to the pursuer, which had been occupied by the defenders. The defenders having previously offered to pay the expense of said shelving, or to replace it,—the pursuer was found liable in costs to the defender.*

THIS case was tried before Lord Fullerton, at Glasgow, in the Narrative.
 autumn circuit. There was a verdict for the pursuer, damages L.25.
 Both parties now applied for expenses.

Lord Fullerton, at the request of the Court, explained that the
 summons concluded for L.500 of damages, as the price of the shel-
 ving of a shop belonging to the pursuer, which the defenders were
 bound to leave in a sufficient state, and for damages for their not
 having put up the shelving. He had informed the jury that there
 was an obligation to leave the shelving in a proper state, and that
 this had not been done, and directed them to find damages. The
 valuations of the expenses of shelving, as proved, ran from L.20 to
 L.30. The jury found L.25 as the value of the shelving, and read
 from a paper that they meant to give that sum, but not expenses.

26 Nov. 1835. They were told the question of expenses was not for them, but for the Court. They retired, but returned with a verdict for the same sum of L.25. His Lordship's idea was, that the jury went on the value of the shelving, and gave damages for nothing farther.

*Ewing v.
Chalmers and
Collins.*

It also appeared from the record that the defenders had offered to perform what they were bound to do. They proposed either to give L.19, 19s. as the price of the shelving, or to get the work done themselves.

Lord Glenlee.—Was there any evidence tending to shew any other damage?

Lord Fullerton.—I rather think I directed the Jury that there was no sufficient evidence of any other damage.

Rutherford, for pursuer, moved for expenses.

Opinion of
Court.

Lord Meadowbank.—I am clear that the pursuer, by refusing the reasonable proposals of the defenders, is not entitled to expenses.

Lord Medwyn.—I am of the same opinion. There was not only an offer to put right the shelving, but that offer was not agreed to. An action is brought for L.500 : it is clear it was not for the shelving alone this jury trial was had. The damage could not have been estimated beyond the value of the shelving.

Lord Justice-Clerk.—I am satisfied nothing was given for the other claims. The pursuer got nothing but what was offered. The case of *Ballendene* was different. There, there was a tender of L.25 ; but the Jury gave L.88, and so expenses followed.

Lord Glenlee concurred.

Judgment.

Pursuer's motion refused.

The defenders then moved for expenses.

Opinion of
Court.

Lord Meadowbank.—I am for giving expenses to the defenders, on the precedent of *Hallam v. Gye*.

Lord Medwyn.—I am of the same opinion. It is a more favourable case than *Hallam's* for giving expenses : Mr Ewing just got the value of what was offered. Expenses are given not so much as a claim for indemnification, but that the party who gains what the other refuses to give must get expenses. Here the pursuer ought to pay expenses.

Judgment.

The other Judges concurred, and the pursuer was found liable in the expenses of the action.

Judge at Trial, *Lord Fullerton*.
Fac. (Hope,) and Monteith.
Howden, W. S. Agents.

Act. *Rutherford and Maitland*. Alt. *Dean of*
Wotherspoon & Mack, W. S. and Mowbray &
Mr Russell, Clerk.

R.

FIRST DIVISION.

No. XVIII.

27th November 1835.

JOHN BURNET

against

GEORGE M'KIMMING AND JOHN FORBES.

TACK.—TITLE.—*Circumstances in which, in an action of reduction, it was held that a document purporting to be a missive of lease, holograph of, and signed by the granter, was an unobjectionable title, if followed by possession.*

THE pursuer raised an action of reduction, in which he set forth, as Narrative. his title, a disposition, executed by a person named M'Coll, of certain subjects situated at the Broomielaw of Glasgow, of which M'Coll was proprietor, dated 29th September, and infeftment thereon, 7th October 1830. He called for production of a missive of lease of said subjects, executed by M'Coll in favour of the defender, M'Kimming, dated 13th November 1828. The defender produced a missive letter * of said date, which bore to be holograph

* Glasgow, Guildry Court, November Thirteenth day, one Thousand Eight Hundred and Twenty-Eight years, George M'Kimming, Bresch Maker, Glasgow, having receivid your Letter, promising to Free and Releive Me of the Two Hundred And eighty pounds Sterling, I Borroed from you within Last Fifteen Mounths By past, upon Condishions that I, James M'Coll, Book Binder in Glasgow, bear By this My Hollygraph Missive, as heiritil prppter of thes Houses, Seatuauteyd in wood Lan, Brooielaw, Glasgow, hereby upone the above considerhion For Thirty years, commansing as Martimus next, notwithstanding the Date hearof wich is Declared to Bee youre Term of Entry To the Rents, During the Term of this Leise or tack, it is expresly under stud That you pay Me, My heirs, sucerss or assignees, Thirty pounds Sterling yearly as Tack Duty, payable Eather in Advanse or Mounthly, or Quarterly, or half yearly, or yearly, as is most Convenient For you, or your heirs, sucerssers or Assignees, or Factor or Trustees, at is howiver understude that All publick and parish Burdens, repeirs and Keeping the property in good order, shal be Deeducted from the Abuove rente, and wich Acontus is takeing or recaved in part payment of the Above Rent yearly, you are at Liberty to Inshure the said property at youre own expences as far as your Interests is Concerned : For your own Advantage, you are refered to the Title Deeds for A more puticlar Descripshon of my propety, wotch I bind and oblige Myself to ratetasy in Legell Manner on Stamp paper, under a penalty of Four Hundred pounds Sterling, and Anay Dout that May Arise in this Messive of Tack shal be interpretated in yours Favers, thais are the Names of Tenents in posseshion ; front land, John M'Niel, M'Kay, Alexander Strange, Will. Drew, Janet Wallace ; back land, Peter Douglas, Peter Gibson, Hugh

27 Nov. 1835

*Burnet v.
M'Kimming
and Forbes.*

of, and to be signed by M'Coll, and which he had got stamped with a mortgage and agreement stamp; and he averred, that he had been in possession of the subjects since Martinmas 1829, and that the subrents had been since drawn by himself or the other defender Forbes, in virtue of a letter of authority* from him. The summons contained various grounds of reduction, but the only question under the consideration of the Court at present was the ex facie validity of the lease. The nature of the pursuer's objections on this head sufficiently appears from the following interlocutor of the Lord Ordinary:

Lord Ordinary's Interlocutor.

'The Lord Ordinary finds that the missive under reduction, dated 13th of November 1828, if followed with possession of the subjects, is not objectionable, on the ground that it does not expressly bear to be a lease of the subjects, or that it does not sufficiently specify or identify them, or that it does not contain an acceptance by M'Kimming, or that it does not contain a sufficient stipulation or obligation as to the rent or term of payment, or that the rent, supposing it to be under the value of the subjects, is elusory; and, with these findings, remits the case to the roll of Jury causes.'

Judgment.

The pursuer *reclaimed*, but the Court unanimously *adhered*.

Lord Ordinary, *Corehouse*.*Rutherford, Thomson.**Nairn, S.S.C. Defenders' Agent.*Act. *Dean of Fac. (Hope,) A. M'Neill.**Charles Fisher, S.S.C. Pursuer's Agent.**B. Clerk.*

Alt.

John

C.

Kelly, Stuarat, James M'Intire, Your ar at Liberty to Make Anay Alterations or improvements you think proper one the said property, at my expences, this and the Three preceeding pages are my Hollygraph Writing. I Consent to the Regastrashion in Books of Counsell and Sesshion, or others Competent to Remain For preservation. Signed JAMES M'COLL.

* Glasgow, 14th December 1829, Mr John Forbes, Brush Maker, 57, Gallougate, I herby upon the understanding that Mr Robert Simpson, Wright, Gallougate, is prepared to the Repairs of Wright work of sade propertay, and glasing the windows, give you the Libertay to dray the Rents of propertay Within Refared to, and dray the Rents Quarterlay, the one half of profit you Ceep yourself, the other half to be payd as I may afterwards Derect you, onlay you Shall not assine your Right to aney other pars, or shall it be attatchibell By your Credeters for the thartay yers to Run from this date, your Entray to Comanese this day, of the propertay within Refared to. Signed GEORGE M'KIMMING.

SECOND DIVISION.

No. XIX.

27th November 1835.

JAMES JOHN FRASER, W. S.

*against*JAMES, MARQUIS OF ABERCORN, AND T. GUTHRIE
WRIGHT.

INHIBITION.—TACK.—RENUNCIATION.—*Found, in regard to a lease by which assignees and subtenants, legal and conditional, were excluded, and where bankruptcy, sequestration, or trust for creditors, or being in arrear of rent due for a year, annulled the lease,—*
 (1.) *That the tenant being a year in arrear, was under a legal obligation by his lease to remove:* (2.) *That a renunciation, granted by the tenant, was not struck at or affected by an inhibition anterior in date, and recorded subsequent to the renunciation:* (3.) *That inhibition could not secure the lease to a creditor; and even supposing that the tenant could have put in a manager, the inhibiting creditor could not have compelled him to do so:* (4.) *That sequestration terminated the tenant's right to the lease, and superseded the diligence of inhibition, independently of the renunciation.*

JOHN JOHNSTONE held a lease of the Marquis of Abercorn's farm of Southfield, for seventeen years from 1825, at a high rent. Assignees and subtenants, legal and conventional, were expressly excluded. It was also provided, that if Johnstone should become bankrupt, or sequestration be awarded against him, or if he should execute a trust for behoof of creditors during the currency of the lease, or if one year's rent should remain unpaid after the expiry of the terms of payment, the lease should ipso facto be void. Narrative.

Johnstone incurred large arrears of rent. Mr Wright, as commissioner for the Marquis, after giving every indulgence, making inquiry of the clerk of Mr Fraser (in the absence of the latter) as to certain claims against the estate of Ashkirk, which Johnstone proposed to assign in security of the rent, communicated to Johnstone that legal proceedings would be necessary to protect the interests of the landlord. Johnstone offered to renounce the lease, and on 4th December 1832 delivered to Mr Wright a missive letter of offer, prepared by Mr James M'Innes, S. S. C. which offer, of the same date, Mr Wright accepted, and, in implement of the agreement, Johnstone executed a deed of renunciation on 26th December

27 Nov. 1835. 1832. The farm was taken possession of for the Marquis, a sequestration followed, and the stock and cropping were sold by judicial authority, after which a large balance still remained due to the landlord.

Fraser v. Mar-
quis of Aber-
corn, &c.

Narrative.

Mr Fraser, a creditor of Johnstone, raised an action to constitute his debt, on the dependence of which he executed letters of inhibition upon the 3d December 1831, which were recorded upon the 9th of January 1833. In October 1833, Mr Fraser brought a reduction of the missive of offer and deed of renunciation, and for payment of the debt due to him, alleging that these writings were obtained by a fraudulent device on the part of Mr Wright, who had called upon the pursuer's clerk in his absence, and unduly asked and obtained information as to the state of the pursuer's advances to Johnstone; that the pursuer intended to have conducted the affairs by continuing Johnstone as manager in the farm; that Johnstone was illegally prevailed on to grant the offer of renunciation; and with a view to concealment, Mr Wright had employed Mr M'Innes. There were other statements imputing improper conduct to Mr Wright. Mr Fraser pleaded, 1. That the renunciation and assignation were reducible ex capite inhibitionis, which was anterior in date: 2. That he was entitled to have kept Johnstone in the farm as manager, until the profits arising therefrom repaid his advances: 3. That he was entitled to payment of the debt covered by his inhibition.

The defenders denied in every particular the allegation of fraud, and pleaded, 1. That the lease not having been transmissible or attachable by creditors, a conveyance or renunciation of it did not fall under the operation of the inhibition of the pursuer, who could never adjudge the same: 2. The lease became extinct by the failure to implement its conditions: 3. There being no evidence of the debt said to have been due by Johnstone, the pursuer can have no right to claim it from the defender: 4. The inhibition could have no effect against the defenders, who were ignorant of it at the date of the transaction, besides it has lapsed through mora: 5. The transactions complained of were not struck at by the inhibition; and such inhibition could not render the defenders liable for any debt of the party inhibited.

Lord Ordinary's
Interlocutor.

The Lord Ordinary pronounced the following interlocutor, adding a note: 'The Lord Ordinary having considered the closed record, and heard the counsel for the parties, sustains the defences, as-
'soilzies the defenders, and decerns: Finds the pursuer liable in
'expenses.'

Note.—'The defenders have now produced sufficient evidence of

'the arrear of rent due by the tenant; but the interlocutor in absence against Samuel Johnstone, produced by the pursuer, is not a sufficient constitution of the debt said to be due to him by John Johnstone, the tacksman.

27 Nov. 1835.

Fraser v. Mar-
quis of Aber-
corn, &c.

—
Note.

'But, assuming the debt to have been constituted, the Lord Ordinary is of opinion that the pursuer's case cannot be maintained.

'This case is rested in the summons and in the condescendence partly on a charge of fraud against the defenders at common law; but this charge must be held to have been departed from, as none of the pleas are applicable to it.

'As to the inhibition, which is the only other ground of action, 1d, Subtenants and assignees, legal and conventional, are excluded, and therefore this diligence could not secure the lease to the creditor; and even though the tenant could, as has been argued, have put in a manager, the inhibiting creditor could not have compelled him to do so; 2d, The tenant being a year in arrear when the missive of renunciation was granted, was under a legal obligation, by his lease, to remove; and, 3d, Even though the missive were struck at by the inhibition, the tenant was soon afterwards sequestered; and, by his tack, this sequestration terminated his connection with the farm, and superseded the diligence, independently of the missive.'

The pursuer *reclaimed*.

The Court entertained no doubt of the soundness of the interlocutor.

Lord Meadowbank said—On the merits there could be no difficulty. As to the other matter, the charges against Mr Wright, as there is no plea in law in reference to that, it is unnecessary to say any thing about it. But when an officer of the Court is attacked in the way Mr Guthrie Wright here is, I am bound to say the charges are quite unfounded, and ought not to have been made. His conduct, and that of the Marquis, was in every respect most lenient and correct.

Opinion of
Court.

The Court *adhered*, with additional expenses, and remitted to Judgment Mr Richard Mackenzie, W. S. to tax the same.

Lord Ordinary, Cockburn.
and James Nairne, W. S. Agents.

Act. Maidment.
F. Clerk.

Alt. Marshall.

Party,

R.

FIRST DIVISION.

No. XX.

28th November 1835.

WILLIAM ALLAN AND SON, SUSPENDERS,
against
 ARCHIBALD FYFE, (FRASER'S TRUSTEE).

BANKRUPT.—ARRESTMENT.—STATUTE, 54. GEO. III. c. 137.—
Suspension of a charge by the interim factor on a sequestrated estate; for the expense of certain proceedings against an arrester of certain goods belonging to the bankrupt, within the sixty days, on the ground that the interim factor should have applied at once to the judge ordinary for a warrant to obtain delivery from the arrestee.

Narrative. THE suspenders, as creditors of a bankrupt named Fraser, executed an arrestment (10th March 1835) of a quantity of fruit belonging to him, lying in a bonded warehouse in Leith. Fraser having been sequestrated within sixty days of the arrestment, the charger, as interim factor, applied to the arrestees to deliver over the goods to him. He declined to do so without the consent of the arresters. He then applied to the arresters to loose their arrestments, or to consent to the delivery of the goods. This the arresters declined to do, unless they were paid the expense of the arrestment, and a decree of constitution obtained by them against the bankrupt. The charger then presented an application to the Sheriff for delivery of the goods, directed not against the arrestees, but against the arresters. The arresters gave in answers, in which they objected to the proceedings as directed against them, and contended, that they could not be called upon to interfere in respect to the delivery of the goods, unless upon receiving payment of the expenses incurred by them. After replies and duplies, the Sheriff-substitute pronounced the subjoined interlocutor*, which was affirmed by the

* The Sheriff-substitute having resumed consideration of this process, grants order for delivery, warrant and authority, under reservation, all as expressed in the petition: And in respect that the defenders were bound to consent to the interim factor getting possession of the sequestrated effects in question, and that the interim factor was not bound to pay the expense of the defender's arrestment before getting possession of the effects, or definitively to guarantee or admit their claim of preference for such expense, but only to reserve their claim of preference, if such were ascertained to exist, and that he only asked their consent to delivery under an express reservation to that effect; finds them liable in expenses, allows an account to be given in, and decerns.

Sheriff. The arresters presented a bill of suspension of the decree, 28 Nov. 1835. which was passed by Lord Balgray, (9th September 1835,) on caution, in common form.

Allan & Son v.
Fyfe.

The charger *reclaimed*, but the Court unanimously adhered. Judgment.

Lord Balgray.—I conceive that the interim factor was entitled *Opinion of Court.* *brevi manu* to take possession of the goods; and if he was opposed by the arrestee, his course was to have immediately applied to the judge ordinary for a warrant; but the arresters were not bound to interfere, either by consenting to the delivery or by loosing their arrestment.

Lord President.—The chargers got the warrant at last, which they might have got at first; and they must just take the consequence of proceeding in the way they did.

Lord Ordinary, Balgray. Act. M'Neill, Meir. Alt. W. Bell. M. W. Smellie,
Suspender's Agent. John Johnson, Charger's Agent. B. Clerk.

C.

FIRST DIVISION.

No. XXI.

2d December 1835.

A. T. F. FRASER, ESQ. OF ABERTARFF,
against

T. A. FRASER, ESQ. OF LOVAT.

ENTAIL.—STATUTE 10. GEO. III. C. 51.—*Found, that the subscription of the periodical accounts required by the statute by a factor or commissioner, is a sufficient compliance with the statute. (2.) That the expense of the introduction of water into an existing mansion-house, the building of a milk-house and ice-house, and other accommodations of a like nature, as also the building or repairing of a garden-wall, are improvements falling within the provisions of the statute. (3.) Terms of a notice to next heir held sufficient to include said particulars. (4.) Circumstances in which it was held there was no necessity for a renewal of the original notice.*

THE late Honourable Archibald Fraser of Lovat, intending to take advantage of the above statute, sent the subjoined notice *, (28th

Narrative.

* I. I have come to the determination, to new roof the family residence of Beaufort Castle, which has had no roof since the estate came to me in 1782.

2 Dec 1835.

Fraser v.
Fraser.

Narrative.

Lord Ordinary's Interlocutor.

January 1803) to Archibald Fraser, Esq. of Strichen, the heir entitled by the statute to receive the same. Thereafter, large sums were expended by Lovat upon the estate, during a course of years, terminating in 1814. A question now arose between the pursuer and the defender, the heir in possession, as to the proportion of expenditure properly chargeable against the estate. A report was made upon the subject by Mr Richard Mackenzie, W. S. by direction of the Lord Ordinary. A variety of objections were taken to the report on both sides, but the only points at present under consideration of the Court will sufficiently appear from the following interlocutor and note of the Lord Ordinary :

‘ The Lord Ordinary having heard parties’ procurators, and considered the closed record, report and whole proceedings, *First*, In respect of the interpretation which the act 10. Geo. III. cap. 51, has received in this particular from very general practice recognised in some cases by the Court, finds, That the subscription of the accounts by a factor or commissioner is a sufficient compliance with the clause of the act; *2dly*, finds, That in the circumstances

2. That there being but two spare bed-chambers in the whole mansion, I mean to add an attic story at the same time, and (3.) Also to complete the wings.

4. I further mean to complete the fences of the Mains of Beaufort.

5. And the wall round the garden, in suitable manner.

6. And build a square of offices with accommodation for carriages, horses, implements of husbandry, cattle and poultry, from time to time.

7. I mean, from experience gained by practice, to subdivide the inclosures into more regular fields.

8. And, where needful, to trench and bring waste land into tillage, or permanent grass.

9. I propose to repair the family burying-place, now dilapidated.

10. It has also become necessary, and I accordingly propose to inclose the two Lovats, Balblair, Donaldstown, Easter and Wester Kirkhills, Wester Dunballoch, the Muir of Easter Dunballoch and Meikle Phones, and throw the same and Commonsides into safe inclosures, being fit lands to grow wheat, and shew the example of improvement before the inspection of the farmers of the estate, and thereby complete that face of the country.

11. The Davochs of Ardrennich and Fannellan will be inclosed at the same time, and on the same public principle, for the benefit of posterity, and for the immediate employment of those who propose to emigrate for want of work at home.

12. I shall also (God willing,) build a quay at the port of Loveth, where the mid-channel of the river, under the old castle, there are two fathoms and a-half depth at low water, neap tides.

13. And further, to build a wharf at Beauly.

14. To repair and feu out stances for houses and workshops, and arrange the circumjacent lands into proper lots for gardens, small parks, and the like, for the benefit of the inhabitants, and immediate meliorating the income of the estate.

15. The farms of Tornich, Barnyards, Beauly, Croyard and Bridgend, being now liable to every sort of depredation, will also be inclosed, and scientifically divided by approved surveyors.

‘of this case, in which the course of operations under the notice originally given was uninterruptedly continued for years, a renewal of notice was not necessary: 3dly, finds, That the notice so given was sufficient to cover the expense of the introduction of water into the mansion-house of Beaufort Castle, as well as the building of a milk-house and ice-house, and other accommodations of a like nature; 4thly, finds, That the building or repairing of the garden wall was an improvement falling within the provisions of the statute; and therefore to the extent of the above findings, repels the defender’s objections to the accounts as originally given in, and sustains the objections by the pursuer to the report of Mr Mackenzie, and decerns quoad ultra; and in respect that the greater part of the other objections taken by the defender to the different items of the accounts involve questions of fact on which the parties are at variance, appoints the case to be enrolled, that parties may be heard upon the mode of ascertaining them, as well as on any remaining parts of the cause.’

2 Dec. 1835.

Fraser v.
Fraser.

Lord Ordinary’s Interlocutor.

Note.—‘These accounts include so long a period, are composed of so many different items, and are met by the defender in objections so very detailed and critical, that both parties seemed to be aware at the debate of the impossibility of exhausting them in an interlocutor, and confined themselves for the present at least to the ascertainment of certain points affecting large heads of the general expenditure, and it is with this view that the above interlocutor is pronounced.’

‘The first and most comprehensive objection is, that a great part of the accounts for improvements were not signed by the late Lovat himself, but by his factor. Considering that the law of Scotland recognises the sufficiency of a signature by procuration, that the statute is neither in letter nor spirit absolutely conclusive against such a mode of attestation, that the practice is unquestionably very general, and that in some cases referred to by the pursuer, as those of Chisholm, Blytheswood, &c. the practice, though not the subject of express decision, has been at least recognised by the Court, the Lord Ordinary considers himself bound to refuse effect to the objection.’

‘2dly, The statute does not seem to require a renewal or repetition of notice when parties proceed during a course of years in the execution of improvements covered by the notice originally given; and the decision of the House of Lords in the case of Torrance, *Wilson and Shaw*, ii. 429, was evidently pronounced on the specialty, that new and separate intermediate notice had been given from year to year, and that, during three years following the last notice, all further operations had been suspended; in

2 Dec. 1885.

Fraser v.
Fraser.

Note.

‘ which circumstances it was held, that the party was not entitled
 ‘ to go on with the improvements under the notice first given, and
 ‘ without a new intimation to the next heir of entail.

‘ *3dly*, Considering the fair construction which the statute is en-
 ‘ titled to receive, the Lord Ordinary thinks that the operations
 ‘ mentioned in the third finding were sufficiently covered by the no-
 ‘ tice; it being always understood, that they were actually planned
 ‘ and executed in such a way as to form improvements in the ordi-
 ‘ nary sense of the term.

‘ *4thly*, It appears to the Lord Ordinary that the garden wall is
 ‘ equally protected as an improvement under the statute. He un-
 ‘ derstands that this item, too, has been repeatedly authorised by
 ‘ the Court, though, perhaps, not the subject of express decision.
 ‘ In the case of Torrance, under the head of improvement on the
 ‘ mansion-house, the claim for a ‘ garden house’ was strongly con-
 ‘ tested, and was ultimately sustained; though it must be admitted
 ‘ that it does not distinctly appear from the report what the true
 ‘ nature of this improvement was. Upon this point, too, it was a
 ‘ circumstance not to be lost sight of, that while the notice given to
 ‘ the defender, or those acting for him, expressly mentioned the gar-
 ‘ den wall, and while a protest was taken, on the part of the de-
 ‘ fender, at the time, against certain heads of the notice, as not
 ‘ forming improvements within the statute, no objection was stated
 ‘ to the article in question.

‘ Besides these objections, there are a great many others which
 ‘ truly involve questions of fact. Thus, in regard to many of the
 ‘ articles, such as the introduction of water into the house, the build-
 ‘ ing of towers, the ice-house, &c. it is said that they were either in
 ‘ themselves utterly useless, or constructed in such a way as to be-
 ‘ come utterly useless during the lifetime of the late proprietor; on
 ‘ the other side these averments are denied. It is clear that these
 ‘ questions can only be extricated either by a remit to a person of
 ‘ skill, or some other competent investigation of the facts. The
 ‘ same remark applies to various other articles, such as the charge
 ‘ for sheds for the workmen employed in the repairs, and for the
 ‘ agent or other person paying the workman’s wages, &c. Al-
 ‘ though these items are not of course substantively improvements
 ‘ under the statute, still if they were bona fide parts of the expense
 ‘ of executing such improvements, as it is quite possible they might
 ‘ be, if executed by the proprietor himself instead of by contract,
 ‘ there would be no room for any objection. Accordingly, it is
 ‘ upon the proper mode of extricating all these questions that the
 ‘ Lord Ordinary wishes to hear the farther suggestions of the par-
 ‘ ties.’

The defender *reclaimed*, and, in respect to the first point decided, 2 Dec. 1835. *contended*, that there had not been a sufficient compliance with the statute. An act such as this did not fall under the ordinary acts of administration of a factor or commissioner; on the contrary, it was manifest that the statute required the heir of entail personally to pledge himself for the accuracy of the accounts, by his own subscription. The statute bestows only a conditional right to claim; and if the conditions are neglected, the benefit is lost.

Fraser v.
Fraser.

Defender's
Pleas.

It was *answered*—That subscription by a factor had been sanctioned by the Court, in *Chisholm*, 1st Dec. 1820, (not reported,) and *Crawford v. Torrance*, 1st Dec. 1820, *F. C.*, and 26th May 1826, *W. & S. App. C. ii.* 429; Judgment of House of Lords in *Campbell*, 26th May 1826. Had it not been so sanctioned, it was plain the factor's subscription was the principal's subscription in such a case, and, at all events, it had been corroborated by the principal.

Pursuer's
Pleas.

Replied.—The point was one of great importance, and had not received the express decision of the Court in any of the cases cited.

Lord Balgray.—The vouchers given in, though signed only by the factor, if not disputed by the principal, must be held to indicate an intention on his part to comply with the statute. I have no doubt as to its being a sufficient compliance. In a much more important part of the procedure, viz. giving notice of the improvements, the statute authorises the intervection of the known attorney of the party. Trustees also take advantage of the statute, and they sign the notice. I have reason to know well that the case of *Chisholm* was most keenly contested, and most minutely investigated in every particular. We there took a report from the different sheriffsdoms, which satisfied us also that the practice had been established.

Opinion of
Court.

Lord President.—I know that the case of *Chisholm* was maturely considered, and I do not think we should interfere with the practice without consulting the other Judges.

Lord Mackenzie.—It strikes me that the act may admit of the interpretation, that the signature may be made by the factor; but still I have some doubts upon the subject. It may have been intended that the heir should pledge his veracity by his own subscription; and if this had been the first case upon the subject, I should have had some hesitation about it: But as the Court have adopted the interpretation, which has certainly been understood in practice, I do not think we can draw back.

Lord Gillies.—I also admit the propriety of sustaining the practice; but were the matter coming before us for the first time, I

2 Dec. 1835.

Fraser v.
Fraser.Opinion of
Court.

should have great doubts upon the point. It is true the act authorises intimation to the party, or his known agent; but from this I would draw an opposite conclusion to Lord Balgray. I should be inclined to say, *exceptio firmat regulam in non exceptis*. The act says expressly that the accounts are to be signed by the heir himself; and if it had intended the same licence as in regard to intimation, would it not have made use of words to that effect? I certainly have great doubts; but as the practice seems to be admitted, I don't wish to differ upon the subject.

In respect to the renewal of notice, the defender contended, that although the expenditure extended over a series of years, it was not, properly speaking, continuous; that there had been an interruption of a year from 1806 to 1808, and that the very general terms of the notice required a renewal, in respect to many of the items.

In respect to the expense of introducing water, the defender drew a distinction between the case of a party building a house in the present day, and making additions to or repairing an old one. He contended, that none of the items admitted by the Lord Ordinary could properly be termed improvements in the sense of the act, and that, at all events, they did not fall under the notice.

The Court concurred with the Lord Ordinary as to the second finding.

Lords President, Balgray and Mackenzie concurred as to the third. Lord Gillies was understood to hesitate as to the expense of the water.

Lords President, Balgray and Gillies concurred as to the fourth. Lord Mackenzie dissented as to the garden-wall.

Judgment

The Court adhered.

Lord Ordinary, Fullerton. Act. Sol.-Gen. (Cunninghame,) Mailland. Alt. Keay,
Dunbar. Aeneas Macbean, W.S. Pursuer's Agent. John Morison, W.S.
Defender's Agent. S. Clerk.

C.

FIRST DIVISION.

No. XXII.

2d December 1835.

GEORGE YOUNG TERTIUS, PETITIONER,
against

EBENEZER WATSON, (YOUNG'S TRUSTEE,) RESPONDENT.

MARRIAGE-CONTRACT.—CONSTRUCTION.—*Words in a marriage-contract held to import a jus crediti in the children, in respect to*

funds which had belonged to the wife, and so to entitle the only child of the marriage to rank upon the father's sequestrated estate, who had intromitted with said funds, to the extent of his intromission.

2 Dec. 1845.



Young v.
Watson.

THE petitioner presented a complaint against the respondent, the trustee on his father's sequestrated estate, in respect he had rejected a claim preferred by him upon said estate, for a certain sum which had been uplifted and intromitted with by his father after his mother's death, being part of the estate of his mother, to which she had succeeded through her uncle, Mr Rodger, and from which, he contended, his father's power of administration had been excluded by his contract of marriage. Narrative.

By the contract of marriage entered into between the bankrupt and his deceased wife, the spouses, in contemplation of the marriage, 'assigned and disposed to and in favour of each other, and the 'longest liver of them two, in liferent, and the children to be pro- 'created of the marriage in fee; whom failing, the one-half to the 'nearest heirs or assignees of the first deceiver, and the other half 'to the nearest heirs or assignees of the survivor, all and sundry 'lands, &c., which may happen to pertain and belong, or be due 'and indebted to the said parties, or either of them, at the time of 'the first deceiver's death.'

In respect to Mrs Young's succession to her uncle, who had died previous to the marriage, but which had not then been realised, the contract provides thus: 'And whereas the said Jean Brown 'has right to a certain share of the means and estate which be- 'longed to the deceased Charles Rodger, Esq. late of the island of 'St Croix, her uncle, which has not hitherto been realised; there- 'fore it is understood, that when recovered, in whole or in part, 'the said parties bind and oblige themselves to lend out the same, 'from time to time, on good personal or heritable security, and to 'take the bonds or other vouchers therefor payable in terms of 'the foregoing destination; and so far as respects all sums to be 'recovered from the estate of the said Charles Rodger, as the same 'shall be instructed by authentic documents under the hands of the 'said parties or otherwise, the said George Young hereby resigns 'and renounces his jus mariti, and all other right and pretension 'competent to him by law in consequence of such marriage, saving 'and reserving his interest, in terms of the said destination: But 'declaring, that no part of the said sums so to be recovered shall 'be affectable by the debts or deeds of the said George Young, or 'by the diligence of his creditors; it being understood that the same 'shall be preserved as a fund for the comfortable subsistence of the 'parties and their children, if any, and that it shall and may be

2 Dec. 1835.

Young v.
Watson.

‘ competent for the said Jean Brown, by herself alone, to grant all receipts, discharges and acquittances in relation thereto, which will be equally valid and effectual to the receivers as if granted by her with her husband’s consent.’ The contract also contained this clause : ‘ Providing and declaring always, as it is hereby provided and declared, that in case there shall be more than one child procreated of the said marriage, the said parties hereby reserve full power to divide and apportion the said heritable and moveable subjects among them as they shall see cause, by a writing under their hand ; and failing such writing, then they appoint the same to fall and belong to the said children equally, share and share alike.’

Lord Ordinary’s Interlocutor.

The Lord Ordinary found, ‘ that the trustee has not done wrong in rejecting the claim of the petitioner ; therefore dismisses the complaint, but finds no expenses due.’

Note.

His Lordship added the following note : ‘ The first clause in the deed confessedly vests the fee in the father. Now, though the second clause makes a peculiar provision for the funds to be derived from the wife’s uncle, this peculiarity merely enlarges the powers of the wife, during her life, by excluding the *jus mariti* of the husband, and does not change the legal character of the destination quoad the children. On the contrary, even as to this particular fund, this money, by the second clause, is made payable “ in terms of the foresaid destination,” and the husband’s interest under that destination is expressly reserved. The case of the husband committing a fraud on the contract, by taking and using the money during his wife’s life, in violation of her right, and the child claiming any thing in consequence of this, as in her right, has not occurred ; for it is admitted that the husband only obtained the money after her death, and it is now claimed in virtue of the child’s own right. There are no words which confer such a *jus crediti* on the child as entitles him to compete with the father’s onerous creditors ; especially since, even as to the uncle’s fund, the father had an absolute power of division among any children he might have.

‘ The Lord Ordinary has not given expenses, however, because it was not unreasonable in the petitioner to take the opinion of the Court on this rather peculiarly constructed deed.’

Petitioner’s Pleas.

The petitioner *reclaimed* ; and while he admitted that the deed had been awkwardly worded, he contended, that its import plainly was to vest the fee of this succession in the children of the marriage, and to exclude the husband’s right of administration.

Anderson, in answer, *argued*—The effect of the deed is clearly to vest the fee in the father. It cannot be disputed that the first clause in the deed gives the children nothing but a spes successionis: the fee is in the father. The clause relating to the uncle's succession binds the parties to lend out whatever shall be realised on good personal or heritable security; but the subject of said security is to be put precisely in the same situation as the subjects conveyed by the previous destination. It was clearly the intention of the spouses, that the rights of the children to the whole of their property without distinction should be the same, and accordingly they reserved to themselves full power to distribute the whole of it among the children in such proportions as they thought fit.

2 Dec. 1835.

Young v.
Watson.Defender's
Pleas.

Although Mrs Young might, in virtue of the clause excluding the *jus mariti*, have claimed during her lifetime the interest on her uncle's funds as it fell due, yet her death has withdrawn this restraint on the husband's power of administration; and there is no stipulation in the contract, nor any principle at common law, in virtue of which the children can claim that the privilege of this clause shall be transferred to them, seeing that there was no effectual conveyance of the fee in favour of the children of the marriage.

It matters very little to this discussion, whether the fortune derived from Mr Rodger had been lent out on heritable bonds, in terms of the contract, or whether it has been spent by the bankrupt. The latter supposition appears to be the least favourable to the petitioner, as it cannot be alleged that the neglect to invest the money in securities, in terms of the destination, proceeded from any improper or fraudulent motive to injure the children of the marriage.

Lord Balgray.—I never saw a deed more completely blundered. When, however, I compare all the parts of the deed together, and take a rational view of them, I am clear for altering this interlocutor. The two destinations are separate and distinct. It is said the parties bind and oblige themselves to lend out the money according to the previous destination; but then that is qualified by the declaration, that the husband renounces his *jus mariti*, and subsequently it is provided, that no part shall be affectable by his debts or deeds. There is another very strong feature of the deed, and which affects my mind still more, viz. that it is stated, that it shall be preserved as a fund for the comfortable subsistence of the parties and their children. It was the clear and obvious intention of the parties that this fund should be preserved from alienation, to the prejudice of

Opinion of
Court.

2 Dec. 1835.



Young v.
Watson.

Opinion of
Court.

the children. As to the power of division, that point was well considered in the case of Redcastle.

Lord Gillies.—I am of the same opinion. This is certainly a most confused deed. Supposing we were to give the disposing clause the strict interpretation which is contended for, then there would be an absolute inconsistency between it and the clause which follows, declaring that the husband should have no power over it, and that it should not be affectable by his debts or deeds, or the diligence of his creditors. Is it consistent with the fee being in the husband, to say, that it shall not be affectable by his debts or deeds? When a deed contains two clauses inconsistent with each other, to which of them are we to give effect? Clearly to that which appears, from the whole tenor of the deed, to have been the intention of the parties. We are not entitled, in such circumstances, to give to one part of the deed such an interpretation as would render its other provisions nugatory.

Lord President.—I am of the same opinion.

Lord Mackenzie.—I am of the same opinion. The principal provision regards the distribution of the funds at death: nothing is to take place at the time of the marriage. Then how does the matter stand? If the husband was to be made sole fiar, how could his *jus mariti* be excluded? There is not the least doubt the husband was not the fiar at the time of the marriage: Was he to become fiar on the death of the wife? If so, what would become of this provision as to his *jus mariti*? These are words as good as a limitation, similar to the words *allenary*, or such like. We are driven to give the deed this construction. We must construe it so as to give effect to its provisions. I take it to be the true construction of this deed, and one not contrary to the intention of the parties, that the fee of this fund was vested in the children.

Judgment.

The *Court*, therefore, pronounced the following interlocutor:
 ‘The Lords having advised this reclaiming note, and heard counsel, alter the interlocutor of the Lord Ordinary reclaimed against, and remit to the trustee, with instructions to admit the claim of the petitioner, as the same shall be ascertained, into the ranking, and to sustain the same, to the effect that he may draw his proportion of the funds along with the other creditors of the said George Young; and further, find the petitioner entitled to expenses, and remit the account thereof, when lodged, to the Auditor of Court, to tax the same, and to report.’

Lord Ordinary, Cockburn.	Act. More.	Alt. Anderson.	J. W. Mackenzie,
W. S. Petitioner's Agent.		Home & Rose, W. S. Respondent's Agents.	
S. Clerk.			

C.

SECOND DIVISION.

No. XXIII.

2d December 1835.

GEORGE NICOL
against
 JAMES MORTIMER.

PROCESS.—FOREIGN.—*Found*, (1.) *in regard to the constitution of a debt, England being the locus contractus, that it is not necessary to aver what the law of England is in regard to the facts set forth on record* : (2.) (*Adhering to the Lord Ordinary's interlocutor,*) *that the constitution of the debt by an advance of money made in England by a person domiciled in that country, and by a cheque on his London banker, may be proved by such evidence as would be sufficient to constitute such a debt, according to the law of England.*

In a multiplepounding raised by George Nicol, before the Sheriff of Aberdeenshire, as executor-dative, with a view to the division of funds belonging to the deceased John Nicol, Mortimer claimed L.155, being 'cash advanced and lent by the claimant to the defunct 'on the 21st September 1829, the claimant having at that date 'given the defunct an order on his bankers, Messrs Barnetts, 'Hoare and Company, Lombard Street, London, for L.155, of which 'the defunct received payment from Messrs Barnetts, Hoare and 'Company, and which was put to the claimant's debit in his account 'with them, and accounted for by him to them.' He further averred, that he was 'also a just and lawful creditor of the defunct for 'the sum of L.7, being cash advanced and lent by the claimant 'to the defunct upon the 21st September 1829;' and he produced, with his claim, the order on the bankers, and a letter from the deceased to the claimant, dated 4th June 1830, acknowledging a debt.

The executor denied the debt, and pleaded, that it was not duly vouched. The replies for the claimant contained the following passage : 'He has only one other observation to make, viz. that 'this question must be decided by the *lex loci contractus*, (*Tait's Law of Evidence*, p. 301.) If your Lordship, therefore, shall entertain any doubt that the evidence offered is sufficient for instructing his claim, the claimant will find it necessary to move 'that the opinion of English counsel should be made upon the case.'

2 Dec. 1835.

Nicol v.
Mortimer.Advocator's
Pleas.

The Sheriff found that the claim was not instructed, and that no competent proof was offered to instruct the same.

Mortimer advocated, and *pleaded*—(1.) The transaction out of which the claim in this process arises having taken place in London, and the parties, when entering into this transaction, having in view the rules of the law of England relative to such a transaction, and in particular the evidence by which it could be established, it is competent for the advocator to prove, by evidence which would be admissible by the law of England, the transaction on which the claim made by him in this process is founded; even though such evidence would not be admissible to prove a similar transaction entered into in Scotland; *Glynn v. Johnston*, 8th June 1830. (2.) The locus solutionis, as well as the locus contractus, was in England, so that in every respect the transaction must be regulated by the rules of the law of England. (3.) The advocator having offered to prove, by parole evidence, not merely the original constitution of his claim against the late John Nicol, but also the recognition and acknowledgment of this claim by Mr Nicol, and such proof being competent by the law of England in support of such a claim, the advocator ought to have been allowed to adduce the proof offered by him in support of his said claim.

Respondent's
Pleas.

It was *pleaded* for Nicol—(1.) Questions as to the constitution or subsistence of contracts said to be entered into in a foreign country fall to be regulated according to the law of the country where the solution of the contract was intended by the parties to take place, and not according to the law of the country where the contract was entered into. (2.) The alleged debtor in this case being admittedly domiciled in Scotland, and only accidentally in London, the presumption of law would be that Scotland was the intended place of solution of the contract, and therefore all questions in regard to it must be regulated by the law of Scotland. (3.) Even if the question fell to be determined by the law of England, no judgment on the law of England could be pronounced on the present record, because the law of England or any foreign country is matter of fact which requires to be averred upon the record, so as to be capable of being admitted and denied, while in this case there is no averment whatever as to the law of England in regard to the evidence admissible in alleged contracts such as the one in question, and no application has been made in this Court for leave to make up a new record, in terms of the 25th section of the Act of Sederunt.

• The Lord Ordinary pronounced the following interlocutor :

2 Dec. 1833.

• The Lord Ordinary having resumed consideration of the debate, with the closed record, and whole process, advocates the cause, alters the interlocutor of the Sheriff complained of, and finds that the constitution of the complainer's debt, by an advance of money made in England by a person domiciled in that country, and by a *cheque* granted on his London bankers by that person, may be proved by such evidence as would be sufficient to constitute such a debt, according to the law of England : And, before farther answer, appoints the cause to be enrolled, that the respondent may state whether he admits that the facts set forth on the record would be sufficient to support the claim of the complainer according to the law of England, or requires that law to be put regularly in evidence.'

Nicol v.
Mortimer.

Lord Ordinary's Interlocutor.

Note.—' There is certainly some difficulty as to the sufficiency of the complainer's recorded averment, as to what the rule of the law of England actually is. This, no doubt, is, in this Court, a matter *of fact* merely, and must be set forth as such on the record ; nor can it be received as a sufficient answer to the objection, that the fact is distinctly set forth, though in a wrong part of the record, viz. in the pleas in law. Where this is the case, however, (as it seems plainly to be here, see 3d additional plea for complainer,) the objection must be allowed to be critical, especially considering how naturally an averment *of this particular kind* may be mistaken for a plea in law. But the answer which the Lord Ordinary is inclined to sustain is, that the averment is in substance sufficiently made, though in rather an indirect form, in the concluding section of the replies in the inferior court, where the complainer, after contending that the case must be governed by the law of England, proceeds to state, that if the evidence offered is not allowed to be sufficient (of course by that law) to instruct his claim, he craves that an opinion of English counsel may be taken. To the Lord Ordinary it appears impossible to doubt that this necessarily, and without any stretch of construction, imports an averment and an undertaking to prove that by the law of England such evidence is actually sufficient.

Note.

' On the merits, the Lord Ordinary conceives that there is a clear distinction between the *extinction* of obligations and their *constitution*. As to the former, the *locus solutionis*, where that is clear, will generally give the rule ; as to the latter, the *locus contractus*. Now, the question here is as to the constitution of the contract of loan, which undoubtedly took place (if at all) by an advance made in England by a domiciled Englishman. If, in proof of his contract, he had taken a bond in the English form,

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‘ it would clearly have been sufficient to support his present claim
 ‘ that it was regular according to the *lex loci*, though altogether
 ‘ improbable by the law of Scotland. But if parole proof be equally
 ‘ available as such a bond, by the *lex loci*, it seems equally impos-
 ‘ sible to reject it. The case of Glynn, 8th June 1830, (8. *Shaw*,
 ‘ 889,) which was founded on by the respondent as adverse to this
 ‘ doctrine, will be found, when carefully considered, truly to support
 ‘ it; for, in so far as regarded any thing but the extinction of the
 ‘ obligation, it was not as the law of the *locus solutionis* that the law
 ‘ of England was preferred, but as the law of the *locus contractus*,
 ‘ that is, of the new and accessory contract of *deposition*, which
 ‘ was relevantly averred by the defenders to have taken place in
 ‘ London; and as to the *constitution* and effects of which, therefore,
 ‘ the law of England alone could determine.’

Pursuer's
Pleas.

Nicol having *reclaimed*, *G. Moir argued*, in the first place, That there was no specific averment by Mortimer on record as to what the law of England was, on which the question was said to depend. The passage in the replies could not supply the want of a proper averment of this fact in the condescendence.

Defender's
Pleas.

J. S. More, in answer, *argued*—That it was sufficient that facts were stated sufficient to raise the question, and that it was for the Court to direct whether the opinion of foreign lawyers should be taken. The replies were undoubtedly to be held as part of the record of the inferior court.

Opinion of
Court.

The *Lord Justice-Clerk* said, it was not necessary to state how the law of England stood in regard to the facts set forth on the record.

Lord Medwyn.—It is not requisite to state in a condescendence how the law of England stands. If the party give us facts sufficient to enable us to say whether it ought to be decided by foreign law, that is all we can require.

The other *Judges* concurred, and held that the mode suggested by the Lord Ordinary was the best way of disposing of the question.

Judgment.

The *Court* adhered.

Lord Ordinary, *Jeffrey*.
G. Moir.
T. Clerk.

For Mortimer, *J. S. More*.
James Ross, S.S.C. and *Gordon & Barron*, W. S. Agents.

For Nicol, *M'Neill*.

R.

FIRST DIVISION.

No. XXIV.

3d December 1835.

DUNCAN M'RA

against

JAMES PEDIE.

AGENT AND CLIENT.—*A law-agent, in the course of a suit, drew bills on his client, which he discounted, but without rendering his account : On a settlement between the parties, it turned out, after the agent's accounts were taxed, that the sums received by him exceeded the sum due to him :—Found, that he was entitled to deduct from the balance the expense of stamps and discount on the bills.*

THE defender was the law-agent of the pursuer in certain suits before this Court. In the course of his employment he drew bills upon his employer, which he discounted, but without rendering any account of the amount due to him. When his accounts were rendered and taxed, it turned out that the sums in the different drafts exceeded the sum due to him ; and a dispute having arisen as to the mode in which the balance was to be adjusted, the pursuer raised the present action for the sum which he conceived to be the overplus. The only question brought under the consideration of the Court was, whether the defender was entitled to debit his employer with the value of the discount and stamps on the drafts ? On a remit to the Auditor to adjust the balance, the Auditor disallowed the defender these charges, ' upon the ground that the ' bills in question were drawn by the defender for his own purposes ' and accommodation, and that they were almost without exception ' for more than had fallen due at the time.' Narrative.

The Lord Ordinary admitted the charges, and added this note : Lord Ordinary's Note.
Note.—' Had the report of the Auditor, in regard to the disputed ' articles, rested on any rule of practice, the Lord Ordinary would ' not have been disposed to disturb it. But that is not the case, ' and the articles are disallowed, on the ground, as he understands, ' that the bills having been drawn by the agent on the employer ' before the accounts were given in, and before sums to the full ' amount were due, must be held to have been granted for the ac- ' commodation of the agent. The Lord Ordinary does not con- ' sider this circumstance to be conclusive. It is quite competent ' and reasonable for an agent to ask, and a client to lodge, money

3 Dec. 1835. *in advance ; and although an agent may not be entitled to draw*
on his client while his accounts are unsettled, yet if the client
chooses to accept and pay drafts without objection, and without
receiving or asking for his accounts, the presumption is, that pay-
ments in advance were contemplated, on which supposition, the
expense of stamps, &c. on the bills, is fairly chargeable against
the client.

M'Ra v. Pedie.

'As these articles form the whole point in dispute, and truly
'gave rise to the litigation, the Lord Ordinary holds the defender,
'who has been successful on that point, to be entitled to expenses.'

Pursuer's
Argument.

The pursuer *reclaimed*, and contended, that the defender, by taking the bills, had received them as a proper set-off against the same sums standing against the pursuer in his books at the time ; that if he chose to convert them into cash before they came to maturity, he did it for his own accommodation, and was thus of course bound to pay the expense of so doing. The bills were his ; and if he chose to dispose of them at an undervalue for ready money, he was not entitled to saddle his client with any loss he might thereby sustain.

The defender's counsel was stopped by the Court.

Opinion of
Court.

Lord President.—The stamps are one thing ; the discount another. If the client chooses to pay his agent by a bill, he must pay the stamp. The agent is entitled to receive payment in Edinburgh, and the client must pay the expense of remitting it.

Lord Balgray.—It is only the clear money that a person gets that he is bound to debit himself with.

Lord Gillies.—Suppose this account is L.40, and you remit him L.50 by a bill, which he discounts, you can't say he gets more than the sum in the bill, under deduction of the discount.

Lord Mackenzie concurred.

Judgment.

The Court therefore *adhered*.

Lord Ordinary, Fullerton.	Act. Dean of Fac. (Hope,) Wood.	Alt. Keay,
Buchanan.	James Macdonell, W. S.	Pursuer's Agent.
Defender's Agent.	D. Clerk.	James Pedie, W. S.

C.

FIRST DIVISION.

No. XXV.

3d December 1835.

JAMES LISTON, ADVOCATOR,
against

MISS ISABELLA GALLOWAY, RESPONDENT.

POSSESSORY JUDGMENT.—TITLE.—*A proprietor who has possessed an access through a neighbour's grounds for seven years, is entitled to a possessory judgment, though his title be a bounding charter, having no clause of parts and pertinents, or of ish and entry.*

THIS was an advocation from the Sheriff of Perthshire, who had found the respondent entitled to a possessory judgment, in respect of a right of access possessed by her through the close of the advocator. The Lord Ordinary 'finds it proved, that, during a period 'far exceeding seven years, the proprietors and possessors of the 'garden now belonging to the respondent have constantly used the 'close belonging to the advocator as an access to the said garden : 'Finds it not proved that the access to the garden in that line arose 'from tolerance on the part of the proprietors of the close, or from 'the circumstance of the same parties happening to be, for a considerable time, the possessors of both : Therefore repels the reasons 'of advocation, remits the case simpliciter to the Sheriff of Perthshire, and decerns : Finds the respondent entitled to expenses.' His Lordship added this note :—' The Lord Ordinary enters no doubt on the import of the proof ; and, in regard to the 'respondent's title, it appears to him, that a bounding charter, 'though it may be conclusive against a claim of property beyond its 'limits, is not necessarily exclusive of any of the known rights of 'servitude over adjacent properties, such as that of ish and entry 'forming the subject of the present discussion, and therefore does, 'if supported by the requisite proof of possession of such servitude, 'afford a sufficient title for a possessory judgment.'

Lord Ordinary's Interlocutor.

Note.

The advocator *reclaimed*, and while he denied that the possession was otherwise than by tolerance, he *argued* principally, that *esto* there had been possession, the respondent was not entitled to a possessory judgment, in respect her title to the subject, from which she claimed right of access through the property of the advocator, was a bounding charter, and did not contain a clause of parts and perti-

Advocator's Pleas.

3 Dec. 1835. nents, or of free ish and entry, as had been in terminis decided in the Second Division, in Saunders and others v. Hunter, 26th Feb. 1830, *F. C.*, 8. S. & D. 605.

Liston v.
Galloway.

Respondent's
Pleas.

Answered—The possession being undoubted, it is clear that a party may acquire a right of servitude over the property of another, though his own title be a bounding charter, and have no clause of parts and pertinents, or of ish and entry. The respondent has a sufficient *ex facie* title to insist in a declarator, if she can prove the requisite possession; and if so, has a right, by shewing possession for seven years, to obtain a possessory judgment.

Judgment.

The Court, being satisfied that seven years' possession had been proved, *adhered*.

Lord Gillies.—I doubt very much the decision of the Second Division, as reported. Free ish and entry is implied in every disposition.

Lord Ordinary, Fullerton, Act. Dean of Fac. (Hope,) A. McNeill. Alt. Keay,
J. Anderson. Isaac Anderson, S.S.C. Advocator's Agent. Touse &
Bonar, W. S. Respondent's Agents. B. Clerk.

C.

SECOND DIVISION.

No. XXVI.

3d December 1835.

SIMON FRASER, (DOUGLAS'S CURATOR BONIS,) PETITIONER.

CURATOR BONIS.—*Special circumstances in which the Court, with consent of certain parties nearest of kin, granted authority to a curator bonis to grant charters to enter and receive vassals.*

G. BELL, for petitioner, craved the Court to interpose its authority to enable him to grant charters, and to enable the vassals to make up titles connected with the property of Mr Douglas, who was a very old man, and founded on Craigie, 8th Jan. 1828; Bushby, 1st Feb. 1823; Blaikie, 1st Feb. 1827; Campbell, 20th Jan. 1829, which was similar to the present application, and Pulteney, 21st Feb. 1832, in which the authority now asked was given by the First Division.

A. Anderson consented to the prayer on behalf of Lady Douglas,

and other connections of Mr Douglas, as it was a measure that would be advantageous to the property. 3 Dec. 1835.

The Court entertained the strongest doubts of its powers to grant the authority asked, and considered that, but for the consent now given, the proposal could not be listened to. Lord Meadowbank held, that if the Court had not the powers here asked, and his Lordship thought it had not, consent would not mend the matter.

Fraser,
Petitioner.

The Court, however, in respect of the age of Mr Douglas, the consent by parties interested, the urgency of the case, and whole circumstances, granted the authority prayed for.

For Petitioner, G. Bell.

For Lady Douglas, A. Anderson.

R.

FIRST DIVISION.

No. XXVII.

4th December 1835.

WILLIAM HAGGART, SUSPENDER,

COOPER AND PEARSON, CHARGERS.

AGENT AND CLIENT.—*Suspension of a charge by an agent against his client, for business charges, in respect of an error committed by him in preparing a disposition omnium bonorum in favour of the client, by a party incarcerated at his instance.*

A PERSON by the name of Maule had been incarcerated at the instance of the suspender: he was liberated under the act of grace. He possessed a small heritable property, and the suspenders were employed to prepare his disposition omnium bonorum. The disposition contained the following clause: ' But declaring always, that, so soon as he shall have effected payment of the debts due to himself and my other creditors, with the interest which shall accrue, and the expenses which shall be incurred thereon, then this present disposition and infeftment to follow hereon shall, ipso facto, become null and void, and of no force, or strength or effect: And the said William Haggart shall be bound and obliged, as by acceptance hereof he binds and obliges himself, to reconvey the whole estates and effects hereby disposed to me and my heirs and

Narrative.

4 Dec. 1835.

Haggart v.
Cooper and
Pearson.

‘ assignees.’ After different ineffectual attempts to dispose of the subjects, a minute of sale was at last entered into, and a disposition was prepared by the chargers and offered to the purchaser ; but he declined to proceed with the transaction, on the ground of defect of title. It was for business charges connected with these proceedings, for which the chargers had prevailed upon the suspender to grant them a bill, that the present charge was executed against the suspender.

The Lord Ordinary suspended the letters simpliciter, and issued the following note :

Lord Ordinary's Note.

Note.—‘ The chargers were employed by the suspender, in their professional capacity, to recover a debt of L.20 from a person named Maule, and they rendered an account for their trouble, amounting to L.46 : 2 : 9½. The whole of that account, with the exception of a few articles at the beginning, was for business which became altogether useless, in consequence of a gross and palpable blunder of their own in framing a disposition omnium bonorum, which the debtor granted under the act of grace,—a blunder admitted by themselves to be fatal, in a writing afterwards prepared by themselves for the purpose of having it rectified. It was their duty to have had it rectified entirely at their own expense. But they did not do so, until the suspender, who is not a professional person, had been induced to grant the bill charged on for this account, under the trifling deduction of L.3. The pleas of a settlement of accounts, and of an acquiescence or homologation on the part of the suspender, are altogether unavailable as in a question between agent and client, more particularly in circumstances similar to the present.’

Judgment.

The suspender *reclaimed*, but the *Court adhered*.

Lord Ordinary, *Corehouse*. Act. Sol-Gen. (*Cunninghame*,) *Maidment*.
of Fac. (*Hope*,) *W. Bell*. Alex. Millar, Suspender's Agent.
Charger's Agent. R. Clerk.

Alt. Dean
J. Stuart,

C.

SECOND DIVISION.

No. XXVIII.

4th December 1835.

ANN JOHNSTONE
against
 MACKENZIE'S REPRESENTATIVES.

PACTUM ILLICITUM.—LEGACY.—PROCESS.—*An offer of proof that an annuity was bequeathed to a female in consequence of a stipulation on her part, or agreement between her and the party bequeathing the annuity, as the consideration of her entering into, or continuing a criminal intercourse with him,—found relevant as a defence by the executors against payment of the annuity.*

Issue to this effect approved of, and remitted for trial.

By a latter will and testament, John Mackenzie, after bequeathing various legacies, directed his executors to pay to Ann Johnstone, presently and for some time back residing with me in Dingwall, a yearly annuity of L.200 sterling during her life, 'to be payable quarterly;' recommending to my executors to make the necessary advances to meet the quarterly payments of this annuity from their private funds, until funds adequate to discharge the same are realised by them from my own proper means and estate. Narrative.

Ann Johnstone brought an action against Mackenzie's trustees for payment of this annuity, which was resisted, on the ground that the annuity had been granted under an illegal contract, founded on an immoral and illegal consideration, being the price of a criminal intercourse between the pursuer and Mackenzie. The Lord Ordinary (Mackenzie) held the averments relevant, if proved, to afford a defence, and remitted to the jury clerks, who prepared a draft of an issue in the following terms: 'It being admitted that, by a last will and testament, dated the 6th January 1829, of which No. 3. of process is an extract, the late John Mackenzie appointed the defenders his executors, and that by the said testament he bequeathed to the pursuer an annuity of L.200, payable by quarterly instalments from the term of Candlemas 1829, after his decease, and that the said John Mackenzie died on the 28th day of January 1829,—Whether the said annuity was bequeathed to the pursuer in consequence of a stipulation on her part, or agreement between the parties, as the consideration of her entering into, or continuing in a criminal intercourse with the said John Mackenzie?'

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tives.

Pursuer's
Pleas.

The pursuer having objected to the relevancy of the proposed issue, the Lord Ordinary ordered cases.

Pleaded for pursuer—Assuming the truth of the defenders' averments, their defence is founded upon the allegation of 'contract.' Now, a contract must create a legal right. It is an engagement for something, which one party may legally enforce, and the other cannot resist. The defenders say that an obligation not capable of being legally enforced may nevertheless be voluntarily implemented; but it is obvious there can be no covenant within the understanding of the law, when the matter to be given or done is admitted to remain, in despite of the agreement, at the pleasure of the party undertaking the burden. A contract to grant a legacy cannot be enforced: the agreement to grant cannot be less revocable than the thing which is to be granted. Unless legacy and contract be held as equally conferring positive rights as of the dates of the deeds in which they are contained, there can be no question of law founded on the allegation of agreement to grant a legacy; *Cvj. Op. I. Com. in lib. 15. Quæst. Pauli. c. 273*. The right created under a contract is immediate and complete. The right, or rather expectation created under a legacy, is contingent and eventual. The one is necessarily irrevocable; the other may be cancelled or revoked.

The term 'consideration,' employed in the issue, is misapplied, and is opposed to the essential character of legacy. Consideration is applicable only to cases of positive contract or obligation, and if once received or incurred, must originate a permanent and legal right. Bequest can import only the bounty of the testator, and needs no consideration, being exclusive of any such. Not only is donation, by testament, valid though no consideration be stated in support of it, but even if a false or erroneous origin be ascribed to it by the will; *Inst. 2. 20. 31; Voet ad Dig. 35. 1. 9; Stair, iii. 3. 24; Ersk. iii. 9. 31 & 29*. The will of a testator is no mutual transaction between him and his legatees: there is no bilateral paction, nor reciprocal obligation. Legacy, by presumption, and in its very essence, is donation alone. It is neither the payment of past services, nor the purchase money of future favours, but a mere expression of benevolence. Although it be the doctrine of the law, 'Turpiter datum quod meretrici datum,' it is nowhere said, Turpiter legatum quod meretrici legatum; *Cvj. Op. 4, l. 29. Com. in Q. Papin. D. 4. l. 3. § 3*. An immoral condition in a deed inter vivos may destroy the obligation; but in donation by way of testament, neither an impossible nor immoral condition, even if set forth in the will, could be validly pleaded against a claim under it; *D. 28. 7. 14*.

Looking to the authorities and decisions, this plea has never been sustained as applicable to a legacy. Generally, the law will not sustain a stipulation for iniquity; 1. *Bell*, 299; 1. *Cuj.* p. 554, *Com. in lib.* 14, *Q. Paul*. But the tendency of later decisions in England and Scotland has been to enlarge the number of exceptions to the general rule; *Durham v. Blackwood*, 16th July 1622, *M.* 9469; but contrary found in *Ross v. Robertson*, 25th June 1642, *M.* 9470. In *Hamilton v. De Gares*, 26th June 1765, *M.* 9471, it was found that no action lay on a bond in favour of a mother who lived in adultery with the granter; but it was sustained in favour of the daughter. The distinction betwixt bonds given as the price of prostitution, and bonds granted subsequent to such connection, is admitted; 1. *Bell*, 299. In *Whaley*, 18th Nov. 1687, 1. *Vernon*, 483, referred to in note 1. *Bell*, 299, it was alleged that the defendant was a common strumpet. In *Matthew*, 2. *Vernon*, 1827, the female, it was alleged, was at the time of the granting of the bond a 'common harlot;' but no such imputation is here insinuated. In *Gray v. Matthias*, 28th Jan. 1800, 5. *Vesey jun.* 286, 'voluntary bond during cohabitation to a woman formerly of loose life: soon afterwards another bond expressly securing the continuance of the connection by an annuity in case of separation: bill by the executors to have the bonds delivered up dismissed; the former being considered unimpeachable, the latter void at law, as pro turpi causa.' Thus, it is not essential to support the obligation, that de facto the intercourse should have terminated. In *Franco v. Bollon*, 3. *Vesey jun.* 368, investigation of an alleged covenant previous to intercourse, that a bond should be granted as the price of prostitution, was refused. In *Hamilton v. Scott Waring*, 21st May 1816, *F. C.*, during the subsistence of the intercourse betwixt two married persons, a trust of advantageous leases had been executed in favour of the lady and her children, procreated or to be procreated of the connection; the trust was sustained by the Court of Session, and the decision was reversed (2. *Bligh*, 196) only on the express ground that the trust was a contravention of an entail, the plea of turpitude being abandoned. See also *Priest v. Parrot*, 2. *Vesey jun.* 160; *Nye v. Mosley*, 6. *Barn. and Cress*.

Besides, the will cannot be altered or controlled by extraneous investigations; 1. *Powell, Devises*, 445, notes; 6. *T. R.* 672; 4. *Dow*, 76. 89. 90; 1. *Cuj. Com. in C.* 544. *Qu. Paul*.

The defence now pleaded has never been available to an executor. In *Gordon*, 1. *Merivale*, 142, a legacy was sustained, though the nature of the connection appeared from the deed. In *Fischer v. Earl of Seafeld*, 24th May 1822, *F. C.*, (not reported on this point,) where a proof was allowed before answer, the ground of challenge

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really turned upon the allegation of undue or overpowering influence obtained by Fischer, resulting from the improper acts alleged, and in consequence of which the deeds were granted.

The *jus domini* of the legacy must be held to have vested in the pursuer by the death of the testator, the trustees being mere depositaries for the benefit of the grantor: in turpi causa melior est conditio possidentis.

Defenders'
Plea.

Pleaded for defenders—It may be admitted that a deed, whether granted *de præsenti*, or as a legacy to a person with whom the grantor has lived in a state of immoral connection, may be good, if granted after the intercourse has ceased, without any view to its resumption, and not in consequence of an obligation undertaken before or during the connection. But if a deed, (of whatever kind,) though granted or to take effect after the cessation of the intercourse, was only the implement of a promise or obligation undertaken before its commencement, or during its subsistence, such deed will not be sustained. The pursuer's argument, that no promise to leave a legacy is binding, or could produce an action for implement, because it is only an obligation to perform an act, which implies a power of revocation, is founded on a fallacy. It might be true that Mackenzie was not legally bound by his promise; but surely the power he possessed of violating his engagement can afford no reason for saying, after it was implemented, that the execution of the deed could not be considered as done in implement of the promise. Neither can it be maintained, that because the pursuer did not obtain an absolute security, or complete obligation from Mackenzie, she cannot be presumed to have entered into the connection in consequence of the promise to leave her an annuity. She may have entered into and continued the connection, upon the chance of his keeping his promise, which he did, just as much as she might have done, if she had at once got into her hands a formal, delivered and irrevocable deed. A distinct promise to grant an annuity is in a more favourable position, as regards the pleas of the defenders, than the mere granting of a legacy, and communicating to the pursuer the contents of the deed, would have been. An obligation to leave a sum by will gives a very different right to the party in whose favour the obligation is undertaken, than if the obligor had merely executed a testament, leaving a legacy: in the last case, if he had recalled it, after granting, the legatee would have had no remedy: On the other hand, it has been decided in England, that an obligation to grant such a legacy may be enforced against the representatives of the obligor; *Randal v. Willis*, and *Jones v. Martin*, 5. *Vesey*, 262. Suppose that

Mackenzie, instead of merely verbally promising to leave the pursuer an annuity at his death, had entered into a binding obligation, in consideration of the connection, to dispose to her his estate, this obligation, though not *sua natura* revocable, yet either bearing on its face the immoral nature of the consideration, or this being proved, it could not receive effect. Now, a deed void in the eye of law cannot be more justly viewed as likely to induce a criminal connection, than one which may be voided at the pleasure of the granter. If nothing can be held as a contract or obligation, in a question of this sort, except it be one on which action would follow, then even a formal, delivered bond *inter vivos* would be no obligation, because the moment the cause of granting was known, it was known also to be void. It might with just as much truth be said, that a woman could not have made, or a man have granted, such a deed as the consideration of criminal intercourse, because both must have known that it truly was not binding, if the party chose afterwards to object to it, as it is to say, that the pursuer could not have entered upon a course of criminal connection on the faith of his leaving her an annuity, because, even if he did execute a testament in such terms, he had the power of revoking it. But if Mackenzie had subsequently disposed his estate in the pursuer's favour, to take effect even after the cessation of the intercourse, could it be contended, that because the original obligation could not legally have been enforced, it was to be thrown out of view entirely, and the disposition to be viewed as an insulated, spontaneous deed, having no connection with the obligation to dispose?

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tives.

Defenders'
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As to the authorities: With one exception, the question here raised, whether an annuity or legacy left to a guilty party by testament can be set aside, upon undertaking to shew that it was granted in implement of a previous illegal promise, has not occurred. But the leaning of the decisions in England and Scotland is, that all deeds granted as the price of prostitution are null, with this exception, that if the deed is granted after the criminal intercourse has ceased, without a previous promise entered into while the connection lasted, it will be presumed to be granted, not as an incentive to crime, but as reparation for past injury; 1. *Bell*, 232, Durham's case; Ross; Hamilton, in 1765; Scott Waring; in which last case the point never came to trial. The party there was not seeking, as the pursuer is, the aid of the Court to enforce the objectionable grants. She was already in possession of the leases, and in that situation the rule applied, in *turpi causa melior est conditio possidentis*; *Voet*, l. 12. 5. § 6, 2; 2. *Comyn on Contracts*, 109; *Selwyn's Nisi Prius*, p. 81, 3; 1. *Bac. Abrid.* 162. In the case of Fischer, the point now raised, whether the plea of *turpis causa* could be

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applied at all to legacies was fully argued, and most deliberately considered, prior to the ultimate decision of the Court, which allowed a proof, thereby establishing the relevancy of the statements of fraud to afford a defence. There, too, there was no offer of proof, or stipulation or agreement to grant the legacies. The defender then left the connection betwixt the legacies and the guilt, of which they were assumed to be the price, to be inferred from the circumstances themselves. Fischer met the case, upon the footing that this was the substantial meaning of the defence; and attempted to shew, as the pursuer now does, that, in the case of legacies, the defence of *turpis causa* could not apply; that these were voluntary, and excluded all inquiry into the motives; and, consequently, that though the defenders were to prove the alleged turpitude of the parties, all inquiry, whether the legacies had been granted as the inducement to crime, was excluded. But the Court, in allowing the proof, held the plea applicable as well to legacies as to deeds *inter vivos*. The English cases quoted by the pursuer do not apply, particularly the case in 1. Merivale, 142, where the suit did not in any measure relate to the objectionable bequest.

The Lord Ordinary made *avisandum* to the Court with the cases, observing in a note, 'that this is a case which ought to be disposed of by the Court.'

Judgment.

The Court approved of the draft of the proposed issue, and remitted to the Lord Ordinary to proceed accordingly.

Opinion of
Court.

The *Lord Justice-Clerk*.—This point was most fully considered in the case of Scott Waring, and I have my notes in that case, which I might read, were any doubt entertained on the point. There, the party was in possession of the leases, and the rule clearly applied, in *turpi causa melior est conditio possidentis*.

Lord Glenlee.—I agree.

Lord Meadowbank.—I concur. The proof is undertaken, though I cannot see how such an agreement will be established.

Lord Medwyn.—I entirely concur in approving of the issue. Indeed, under it the defenders undertake a burden of proof, fully as great as the pursuer was entitled to expect.

I think the doctrine of the civil law has not been stated correctly, the passage quoted plainly referring to future conditions of the legacy; and I hold, that by our law, a bond or a legacy, in the circumstances the defenders undertake to establish, cannot be valid. That the annuity is testamentary, and might have been revoked, can make no difference if it had been granted in consequence of a stipulation or agreement to continue in a criminal intercourse.

Whether the agreement was binding or not, the testator at least felt it was binding on him, and acted upon it. 4 Dec. 1835

If the legacy had been given on the termination of such a connection as is here alleged, it would not be liable to objection: It would then be reparation for a wrong done, not an inducement for continuing immoral conduct.

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Lords Ordinary, Mackenzie, Moncreiff.
Dean of Fac. (Hope,) and Geo. Moir.
W.S. Agents. F. Clerk.

Act. Rutherford, Macdougall. Alt.
Geo. Monro, S.S.C. and James Arnot,

R.

SECOND DIVISION.

No. XXIX.

5th December 1835.

ADAM COUTTS
against
WILLIAM KEITH.

PROCESS.—REDUCTION.—*Circumstances in which it was held incompetent to bring a reduction of certain interlocutors, or decrees of absolver, by an inferior judge, before decree had been extracted.*

ADAM COUTTS presented a petition to the Sheriff of Aberdeen-shire, praying for sequestration, and for a warrant to bring back articles of furniture, removed by William Keith from a house or floor belonging to the petitioner, and occupied by Keith, as his alleged tenant, at a yearly rent of L.5, 5s. The Sheriff in the meantime sequestrated the effects, and ordered them to be brought back. Keith, in answer, denied that he had taken the pursuer's house for another term; that he had removed from the house; and that his furniture was not hypothecated for the rent. After certain procedure, the Sheriff, (22d October 1830,) 'in respect it is admitted that the respondent took, and got access to the house in question, on the 4th June 1829, finds, that it must be presumed he took it for one year from that date, or until what is understood to be the removing term in Aberdeen, namely, 4th June; finds it admitted, that part of the respondent's effects were removed on the 3d June; finds it not averred, that the effects sequestrated were not removed on the 3d and 4th days of June; therefore finds, that the petitioner had not acquired any right of hypothec over the sequestrated effects; recalls the sequestration; finds the pe-

Narrative.

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Coutts v.
Keith.

Narrative.

‘petitioner liable to the respondent in L.3, 15s. of expenses, and dues of extract.’ The Sheriff-substitute, upon advising a reclaiming petition and answers, adhered (10th November 1830) to the above interlocutor, ‘with 18s. of additional expenses, and decerns.’ An appeal having been taken to the Sheriff, the following interlocutor was pronounced: (26th November 1830,) ‘Having advised with the Sheriff, who has considered the process, recalls the sequestration; and finds expenses due, as in the interlocutors appealed from, and decerns.’ Thereafter the petitioner lodged a minute of reference to the respondent’s oath, and the Sheriff, (10th December 1830,) ‘in respect the reference does not embrace the whole libel, nor such parts of it as would be conclusive of the cause, finds it incompetent, and refuses the same; finds the petitioner liable to the respondent in 16s. of additional expenses, and decerns therefor, and the dues of extract;’ which interlocutor the Sheriff-substitute, (25th December 1830,) adhered to. Upon appeal to the Sheriff, this interlocutor was pronounced: (7th January 1831.) ‘Having advised with the Sheriff, &c. adheres to the interlocutor appealed from, without prejudice to the petitioner giving in an amended minute of reference, and paying 16s. of previous expenses, before the expiry of the days of extract.’

The petitioner did not give in an amended minute, and the above interlocutors became final.

During the dependence of the above proceedings, Keith presented (4th December 1830) an application to the Sheriff, founding upon the interlocutors final in his favour, and praying for a warrant to have the effects belonging to him in Coutts’s house delivered up. The warrant was granted. But, in his answers to the petition, Coutts pleaded that the new application was premature and incompetent, as the previous action was still in dependence on 4th December 1830, when the deliverance on Keith’s petition was served on Coutts, there being a reference to oath sub judice, and neither the decree founded on, nor an extract, had been produced. The Sheriff (6th December 1830) sisted execution of the warrant, so far as concerned the bringing back the sequestrated effects. On 30th March 1831, the Sheriff found Keith entitled to expenses, modified the same to L.1, 5s. ‘and decerns against the respondent, Adam Coutts, therefor, and for dues of extract;’ but, upon advising a reclaiming petition for Coutts, the Sheriff (15th June 1831) ‘recalls the interlocutor reclaimed against, and on payment of
 * of expenses *, allows the said Adam Coutts to lodge answers to the original petition, No. 1, in order that a record may be prepa-

* Sum blank in interlocutor.

'red in terms of the act of sederunt, and that against the 25th current;' to which interlocutor the sheriff-substitute, and, upon appeal, the Sheriff adhered.

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Coutts brought an action of reduction, calling on the defender 'to bring with him, exhibit and produce, &c. the foresaid pretended interlocutors or decrees,' dated respectively as above quoted.

The reasons of reduction, and defences on the merits, embraced the inquiry, whether Keith had really entered upon a new lease of the house as from Whitsunday 1830 to Whitsunday 1831.

The Lord Ordinary, on the merits, assoilzied Keith from the conclusions of the action of reduction, and stated his views in a note, which it is unnecessary to give.

Coutts having *reclaimed*; at the moving of the reclaiming note, *Lord Medwyn* observed,—That he entertained great doubts of the competency of a reduction while the process was in the inferior court in the unconcluded state in which this cause was when the reduction was raised. The pursuer ought to have given in his amended minute of reference, have got it disposed of, and a final decerniture by the Sheriff. Here he called for production of pretended interlocutors or decrees. This appeared an incompetent mode of reviewing the proceedings of an inferior court, those proceedings not having been brought up in the shape of an extracted decree, nor being properly before this Court. It was just bringing the case into this Court, to save the necessity of finding caution if an advocacy or suspension had been brought. If these modes had been adopted, or even the review, by reduction, calling for the extracted decree, the record before the inferior court would have been brought into this Court, and the parties restricted to the averments in it; but as nothing but the interlocutors were called for, or produced, or judicially before the Court, a new record of the whole case had necessarily been made up, without reference at all to the record of the inferior court, contrary to the spirit and object of the Judicature Act.

Parties having been allowed time to consider this objection, the note was this day again moved.

McNeill, for the reclainer, founded upon the terms of the interlocutors under reduction, as containing distinct decernitures against the pursuer, particularly those of 10th and 26th November 1830. Expenses were found due. Nothing occurred to make those interlocutors not final. A minute of reference is competent after decree, and any time before extract. A reference had been given in, but it was refused, and then there was decerniture of new. The last interlocutor allowed an amended reference so many days before extract. No new reference was given in, and the decree was extractable. It

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Pleas.

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was not competent to the pursuer to compel the other party to extract; and, as this was not an advocable cause, the only course open was by reduction.

Judgment.

The *Court*, without calling on the respondent's counsel, unanimously sustained the objection; and, without entering into the merits, 'in respect of the tenor of the libel, and the state of the processes' in the inferior court, dismissed the action as incompetent.*

Opinion of
Court.

Lord Medwyn.—My opinion as to the incompetency of this reduction is still the same as before. If it was incompetent to obtain a review, by advocacy, of the right to bring back the furniture, and sequester it on the premises, which may be doubted, at least when the defender charged for the expenses, the pursuer would suspend, and a reduction of the decree absolvitor would have brought the whole cause into this Court; or if the other party was dilatory in moving to recover his expenses, by extracting the process, the pursuer might then raise a process of reduction, calling for the extracted decree, in the usual manner, to be reduced and set aside, and not merely for interlocutors. The pursuer himself, if the defender had no interest in extracting the decree, must extract it himself to satisfy the production, as was found in the case of *Clark v. Watson*, 24th Feb. 1804, where I recollect well that President Campbell laid down that doctrine, referring to former precedents. It never entered into the imagination of any one at that time, that there could be reduction of interlocutors merely of an inferior court; for this does not admit of the whole proceedings being brought before the Court of review, which can only be in the form of the extracted decree, which came in place of the original record, or, as it was called, the Rollment of Court, which, under the old form of appeal, enabled the superior court to review the grounds of the proceedings in the inferior court. In the present case, it is stated that the pursuer has paid the defender his expenses in the inferior court, and thus removed the necessity of his extracting the decree; but such a device will not make the present proceeding a competent mode of review*.

Lord Ordinary, Cockburn. Act. *M'Neill, G. Moir.* Alt. *Buchanan, R. Robertson.*
Gordon & Barron, W.S. and John Gilmour, S.S.C. Agents. T. Clerk.

R.

* In the case of *Holmes against Tassie*, 19th January 1828, which, as reported, at first sight appears inconsistent with this decision, it may be observed that the process was already advocated, and in this Court at the instance of the arresters, and it might not be thought so inconsistent with form to make the original defenders also a party by a reduction. It seems not very easy to see how the process could be put into an extractable shape, having been brought away from the inferior court by one set of parties. It was in both these respects different in the present case.

SECOND DIVISION.

No. XXX.

8th December 1835.

MRS RACHEL BOOTH OR BLACK AND HUSBAND
against
JOHN & LIVINGSTON BOOTH.

PRESUMPTION.—DONATION.—*Circumstances where, in reference to payments by a father to his sons, the rule debitor non presumitur donare was held applicable.*

THE late Patrick Booth, merchant and shipowner in Aberdeen, Narrative.
father of the defenders, and grandfather of the pursuer, Mrs Black, by antenuptial contract, in 1770, bound himself and his heirs to pay to the children of the marriage, one or more, L.400,—L.200 to be payable on their attaining majority, and L.200 at the first term after his death. He also became bound to provide the half of the heritable and moveable subjects, to be acquired by him during marriage, to the children of the marriage. In 1783, Patrick Booth disposed to trustees his whole property of every kind; (1.) for payment of his debts, &c.; and, (2.) for providing an annuity for the widow; and ‘that all my children who shall be alive’ at the period of his death ‘shall be entitled to the whole free residue of my whole heritable and moveable estates, equally, share and share alike, without any preference to the one before the other.’ The marriage was dissolved in 1787, by the death of Mrs Booth; and the only children who attained majority were Alexander Booth, now deceased, father of the pursuer, Mrs Black, and the defenders John and Livingston Booth. Alexander, who had hitherto lived with his father, married in 1801, when Patrick assigned to each of his three sons a portion of his estate; and this division was recorded in a book called a Clatt-Book, holograph of Patrick, the title of which is as follows: ‘A Clatt-Book of Alexander, John and Livingston Booth’s portions, as put by to them in July 1801, on Alexander being married, who receives all the profits himself that arises from his portion from this time; but J. and L.’s profits that arises from their portions, P. Booth keeps, and must account to them for it when any settlement takes place, that they may want it up. J. and A.’s portions, it’s to be observed, is about equal to each of them; but L.’s is far short, which must be afterwards made up, as will appear in each of these accounts as stated in this book.’ The value allowed to each of the

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three brothers was L.1650, consisting chiefly of shares of vessels, to which, soon after, an addition was made of L.224, 4s. to each, being one-tenth share of the vessel Primrose. The business of ship-owner was continued by the father and the two younger sons, who lived in family with him, John till his marriage in 1809, Livingston till his father's death. John was engaged in a cloth concern till 1805, and in 1806 entered into a printing concern, which he continued till after his father's death. They gave Patrick their services and assistance in business. Alexander was engaged in a separate business, as a sea-insurance broker, receiving from his father such advances as his business, or support of his family, required. The profits arising on Alexander's portion were for the most part uplifted by Patrick as ship's-husband of the vessels, the shares of which had been assigned to him, and were placed by Patrick to Alexander's credit, in account-current betwixt them.

In that account payments or advances by Patrick to Alexander, several of them expressly stated as advanced for the purpose of purchasing shares in shipping, were debited to Alexander. The defenders denied, however, that every payment or advance by Patrick to Alexander was taken credit for. The profits arising upon John and Livingston's portions were for some time uplifted and retained by Patrick, and afterwards they were invested from time to time in shipping, in the names of his sons, many of these investments being necessary to supply lost ships. The extent of John and Livingston's services was disputed by the pursuers, who alleged that the services rendered by Patrick to his sons, in the management of their affairs, and the separate concerns of John Booth, were considerable. Patrick confessedly attended to business down to his death.

Alexander died in 1805, leaving a widow and three children, of which last the pursuer alone survived her grandfather. Alexander's property, as assigned by the Clatt-Book, was in future managed, for behoof of his family, by Patrick and his sons, the defenders.

On Patrick's death in March 1825, the disposition 1763 was found in his repositories. The defenders (the trustees named having predeceased) were confirmed executors, and intromitted with the whole of their father's estate.

The parties having attempted ineffectually to come to an extrajudicial settlement of their respective rights to the succession of Patrick, the pursuers raised the present action of count and reckoning before the Sheriff of Aberdeenshire, in March 1826, and in 1829 the present defenders brought an action of declarator in the Court of Session, to have their respective rights to Patrick's succession determined. They also brought up the count and reckoning

by advocacy ob contingentiam. The advocacy stood over till the disposal of the declaratory action, in which the Court, on 8th February 1831, (see vol. vi. *F. C.* p. 292,) 'found Mrs Black (the pursuer) entitled to that share of her grandfather's succession that 'would have belonged to her deceased father, under the grandfather's deed of settlement referred to.' This decision was affirmed by the House of Lords, 11th August 1832.

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In the course of the attempted extrajudicial settlement of accounts, the agents in Aberdeen for the present defenders lodged an abstract of accounts, in which they debited themselves with two sums of L.3000 and L.4000, paid respectively to John and Livingston Booth by Patrick Booth on 1st February 1825. But in a letter, dated 2d October 1827, their agent wrote to the agent of the pursuers, that 'as the two sums of L.4000 and L.3000 were contained 'in two bills taken in the names of my clients, delivered to them 'as a free gift, unconnected with any account, and given credit for 'solely under the impression that the accounts would be amicably 'settled, it is expressly to be understood, that in the event of any 'action at law, &c. John and Livingston Booth shall be entitled to 'withdraw the two sums.' To which the agent for the pursuers answered, 'I decidedly differ from you in the understanding in regard to the two sums of L.4000 and L.3000 credited by John and 'Livingston Booth.' Mr Blaikie, the agent of Mrs Black, also wrote, upon 31st December 1827, to the defenders' agent, 'that 'without considering it necessary to enter upon the grounds on 'which it is thought that Mrs Black will be found entitled to a very 'considerable sum under her grandfather's settlement, I beg you 'will communicate to Messrs J. and C. Booth, that she will accept 'of L.3000 in full of her share of the late Mr Patrick Booth's estate.' This offer was declined by the defenders, who intimated, by letter from their agent, that 'my employers withdraw the accounts rendered by them, and declare them to be void and of no effect.'

In the present process of count and reckoning, the defenders lodged a new abstract of accounts connected with Patrick Booth's affairs, which differed from that previously rendered, bringing out an apparent deficiency of L.8544 : 2 : 1½ on Patrick's estate. The difference betwixt the two abstracts was stated to arise exclusively upon the personal accounts betwixt the defenders, John and Livingston Booth and their father, the balances against the father in the second set of accounts being greatly larger than those in the personal accounts referred to in the first state of accounts. The two entries in the newly rendered accounts, chiefly objected to by the pursuers, were the two sums of L.3000 and L.4000, with which, in the first set of accounts rendered, the defenders had debited themselves, but which,

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in the second set of accounts now produced in process, they placed to their own credit as free gifts made to them by Patrick intuitu mortis. The question, whether these payments were to be held as donations, formed the principal subject of discussion in this action.

In the personal accounts produced in process by the defenders, betwixt Livingston Booth and Patrick, the pursuers founded upon an omission to credit Patrick's estate with L.3000, paid by Patrick to Livingston on 12th February 1825, about five weeks prior to Patrick's death, with interest to December 1826, when the account was made up. This sum was credited to Patrick, of date 1st February 1825, as a payment in the first set of accounts extrajudicially rendered to the pursuers. It was paid by an order from Patrick, on his account-current with the Aberdeen Bank, conform to the following entry in his bank-book, holograph of the defender, Livingston: '1825, February 12. By order to L. B. for Three thousand pounds.' The defenders admitted that the accounts produced and founded on by them in process were differently made up from those previously rendered; but they averred that the latter were made up and rendered extrajudicially, and with a view to a compromise, and that, on this footing only, they offered to give credit for this sum, though not bound to do so. In Livingston Booth's account also Patrick's estate is debited with L.620, as at 1st July 1801, and progressive interest, said to be the 'sum set aside of this date by Patrick, as belonging to Livingston, to make up his portion equal to his brother's,' and bearing interest till paid, as per Clatt-Book, holograph of Patrick. This sum and the L.3000 formed the reconciliation of the first and second set of Livingston Booth's accounts with Patrick's estate. The defenders admitted that the estate was not debited with this L.620, for the same reason which induced Livingston to offer to give credit to the estate for the L.3000.

In the personal accounts produced by the defenders as betwixt John Booth and Patrick's estate, the pursuers founded upon an omission to credit Patrick's estate with L.4000, paid by Patrick to John on 16th July 1825, with interest till December 1826. This sum, with interest, was credited as a payment in the first set of accounts rendered, and it forms the reconciliation betwixt the two personal accounts of John Booth. The payment was instructed by the bank-book, admitted by the defenders to have been made and entered in the first set of accounts, on the second footing, as the L.3000 and L.620. The defenders farther stated on record a variety of circumstances, from which they inferred that these payments ought to be held as donations, and that the rule, *debitor non presumitur donare*, was thus elided by contrary presumptions.

The pursuers also objected to the defenders debiting Patrick's

estate with the prices paid by him for shares of vessels which were purchased from time to time, and of which the venditions had been taken in the names of the defenders respectively, and the circumstances connected with the purchase of which are minutely specified in the record. These shares of shipping, and certain payments in money, were stated by the defenders to be free gifts by their father, and that they ought not to be imputed in payment of their provisions, or profits thereon. The prices of shipping thus taken credit for by the defenders form the subject of the first finding of the interlocutor, as explained in the relative portion of the note of the Lord Ordinary, to be quoted, and were claimed by the defenders as donations made to them by Patrick. The defenders stated, in regard to these prices of shipping, that in return for the use of their portions, and for the long and extensive services rendered to him in his business, as well as from love and favour to them, Patrick was in the custom, from time to time, of making them presents of shares of shipping and money, which he intended as free gifts to them, and not to be imputed in extinction of the provisions already allotted to them, or the profits thereon; and they condescended specifically on record on the shares of vessels and sums of money so gifted to them by their father, as well as various facts and circumstances, from which they deduced the legal inference, that the prices of the vessels and sums of money in question were to be held as free gifts. The pursuers, on the other hand, stated facts and circumstances from which they held that these payments could not be considered as donations, and that as Patrick stood indebted to the defenders in the amount of the provisions made for them, the plea of debtor non presumitur donare applied, unless the defenders could, which they had not done, prove facts sufficient to remove that legal presumption.

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The facts and the circumstantial evidence mainly relied on by both parties are adverted to in the note issued by the Lord Ordinary, along with his interlocutor of 9th June 1835, and in the opinions expressed by the Court.

The following interlocutor and note were pronounced by the Lord Ordinary, (9th June 1835) :

‘ The Lord Ordinary having resumed consideration of the debate, Lord Ordinary’s Interlocutor.
 ‘ with the closed record, documents produced, and whole process;
 ‘ finds, *Imo*, That in estimating the amount of the free succession
 ‘ of the late Patrick Booth, (to one-third part of which the pursuers
 ‘ have been found entitled,) the different shares of vessels acquired
 ‘ by the defenders subsequent to July 1801, (with the exception of
 ‘ the Primrose,) and paid for from funds in the hands of the said
 ‘ Patrick Booth, are not to be held as free gifts or donations by the
 ‘ said Patrick to the said defenders, but that the prices of such

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‘ shares must be placed to the debit of the defenders in their several accounts with their father’s estate: *2do*, finds, That the sum of L.3000 paid to the defender, Livingston Booth, on the 12th of February 1825, by an order on Patrick Booth’s account with the Aberdeen Bank, and the sum of L.4000 paid to the defender, John Booth, on the 16th of the said month of February, by two orders on Patrick Booth’s accounts with the Aberdeen and with the Commercial Banks respectively, (and by a small balance paid in cash,) are, in the whole circumstances of this case, to be considered as donations made *intuitu mortis* by the said Patrick Booth to the said defenders respectively, and are not to be put to their debit in settling the amount for which they are entitled to claim respectively as creditors on the estate of the said Patrick; and before farther answer, appoints the cause to be enrolled, that parties may suggest what order or decerniture may be necessary to give effect to those findings.’

Note.

Note.—‘ The Lord Ordinary has much more doubt about the second of the above findings than about the first, there being, in his view of the matter, several features in the case, any one of which seems separately sufficient to exclude the supposition of *donation* as to the prices of the vessels in question. *First*, Donation is never to be presumed, especially in the case of a debtor. *Second*, There is not a single expression in any letter, account, or other written document in process, which indicates any purpose of donation on the one hand, or any sense of consciousness of having received or accepted of a donation on the other. *Third*, The relative wealth and ability of the parties, for the greater part of the time after the provisions made in 1801, appear to have been such, as to have made such donations as are here in question altogether extravagant and unlikely. *Fourth*, It appears from one of the admitted states in process, that the proceeds of the funds originally gifted in 1801, (with the profits on the after purchases,) left at the period of each successive purchase a much larger sum belonging to each of the defenders in the hands of the father than was required to pay the prices of the shares which were then respectively acquired by them; from which the plain and apparently irresistible presumption is, that as the father confessedly was to manage those funds for behoof of the defenders, so he did then invest them in those purchases, and meant *pro tanto* to discharge himself by such investments. *Fifth* and *finally*, The whole strain and tenor of the ample correspondence which took place between the parties is of itself conclusive upon the subject, and not only affords no particle of evidence of donation, (which it lay with the defenders to establish,) but it is such as to be altogether irreconcilable with the supposition that any such thing was intended. That correspondence

‘ is a complete record of the whole proceedings in the purchase of some of the most valuable of the vessels of which shares were assigned to the defenders, these purchases being negotiated by one of those defenders in London, with the constant advice of his father and brother, who write almost daily from Aberdeen; and throughout the whole of this record, from the first inception of a purpose to buy down to the final settlement and adjustment of the shares among the members of the family, there is not a syllable, on the one side or the other, about the expectation of a gift, or the intention of making a gift, or the gratitude for a gift bestowed, which must inevitably have been conspicuous in every line of the correspondence, if any such thing had actually occurred. It is needless to refer to the letters in proof of this, the fact being undeniable on the face of them, that the whole three parties communicate, from first to last, exactly in the style of three indifferent persons consulting, as for a joint adventure, for the general benefit, and finally arranging their shares in it, with a view to their several interests and convenience. Sometimes they give a joint mandate to a third person to purchase for them, with directions as to the extent of their respective shares to be expressed in the vendition, but generally the defender, Livingston Booth, tells the other two that he thinks of making a purchase for the common advantage. They help him with their counsel, and give their views as to the shares in which it should be taken; and the matter is arranged accordingly, in a most quiet and business-like manner, without the slightest expression either of a liberal purpose on the one hand, or a sense of obligation on the other. There is not one case in which the defenders do not speak of the purchase as a joint concern from the beginning, and that in the most open and direct manner. Nay, one of the brothers several times cautions the other not to make more purchases, as ‘ *our funds*’ are not disposable to a greater extent; and on one occasion, another of them very coolly declines taking so large a share in one of the vessels, as the father (the supposed *donor*) had proposed for him. If the other circumstances of the case, in short, had raised a presumption that these shares were gifts from the father, it appears to the Lord Ordinary, that the perusal of this correspondence would make the supposition altogether ridiculous.

‘ But, in truth, there are no such circumstances; for against all these considerations, what is it on which the defenders have to rely in support of their theory of donation? Independent of some vague references to the undeniable favour and affection with which they were regarded by their father, and to the services which they appear to have rendered him in his business, the Lord Ordinary sees nothing but the fact, that while he does debit them in his books

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‘ with many small payments and advances, he has no where entered
‘ the prices of those shares to their debit in any part of his accounts.
‘ The fact may at first appear startling, but its importance and bear-
‘ ing upon the case seems entirely destroyed, when the *whole fact*
‘ is stated, viz. that he nowhere enters the value of these shares,
‘ or the accruing profits either upon them, or even on the shares
‘ conveyed to them before 1801, as articles of *credit* in any book
‘ or account posterior to 1805 ; nay, that he has no where entered
‘ in any general book of accounts the prices paid for *his own* shares
‘ of those vessels, or the profits arising on those shares. The sys-
‘ tem of book-keeping, indeed, adopted by Patrick Booth, though
‘ sufficient for parties having such exuberant confidence in each
‘ other, was of a most anomalous and imperfect description. He
‘ kept no *general cash-book*, but merely a series of bank accounts
‘ with different banks in Aberdeen, and after 1803 he kept no ac-
‘ count whatever of the prices or proceeds of the different shares
‘ held either by himself or his sons the defenders, in the vessels
‘ jointly owned by them, except a separate ship-book for each ves-
‘ sel, in which the charges incurred for the ship, and the profits de-
‘ rived from it, are regularly entered, and from which, of course,
‘ when compared with the registered venditions, the profit and loss
‘ of each owner could be ascertained with sufficient exactness. It
‘ appears also that he *never*, at any time, made a *general balance* of
‘ *his books*, either as to his own concerns, or those of the defenders, for
‘ whom he acted in keeping them ; so that there is not, in the whole
‘ record of their transactions, any statement of the funds and debts
‘ of any of the three parties, or of the way in which their accounts
‘ truly stood in relation to each other.

‘ The sum of the matter, in short, is, that subsequent to 1803
‘ Patrick Booth kept his own funds and those of the defenders, all
‘ mixed up together, in accounts with various banks in Aberdeen,
‘ and drew upon those accounts for such sums as were wanted to
‘ pay the prices of vessels bought for the family, and shared among
‘ them in such proportions as they mutually agreed upon, neither
‘ debiting nor crediting any of the three with advances or profits,
‘ as in account with any of the others, but leaving the actual state
‘ of their interests, as well as their profit and loss, to appear by the
‘ state of the bank accounts on the one hand, and by the registered
‘ venditions, and the detailed accounts of the charges and profits
‘ on every particular ship, in the separate books kept for each such
‘ vessel, on the other. And though this system of book-keeping
‘ was, in a certain sense, loose and slovenly, and could not well have
‘ been adopted among strangers, or except among persons having
‘ the most entire confidence in each other, the Lord Ordinary
‘ thinks it does not, when considered in its whole extent, afford the

'slightest countenance to the notion that the shares held by the sons were *gifts* from the father, while the result has shewn that it preserved the materials for an ultimate accounting in a very sufficient form.

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Note:

'With regard to the payments of L.3000 and L.4000 made, in the way stated in the interlocutor, by Patrick Booth to the defenders, within a few months of his death, the case is materially different. Those, whatever else they were, certainly were *not* investments or advances made in the ordinary business of the parties, like the purchases already mentioned. They are payments of large *round* sums, altogether unlike any others that occur in the whole course of the connexion. They are palpably not made to answer any exigency in the business of the defenders, since the whole L.3000 paid to one of them is immediately afterwards lent out on a bill; and the L.4000 to the other seems to be simply handed over to the credit of his own cash-account, and neither the books nor correspondence of any of the parties give the slightest indication of there having been, about that time, any balancing of accounts, or any application either for such a settlement, or for advance of money. But what seems almost conclusive in favour of this not being a business transaction at all, is, that the sums severally paid over on this occasion bore no proportion whatever to the sums standing at the credit of the defenders respectively, on the supposition that they were to be debited with the prices of the vessels. The L.3000 paid to the defender Livingston Booth still left at his credit a sum of L.1987 : 16 : 2, while the L.4000 paid to the defender John Booth exceeded his credit by no less than L.1788 : 13 : 10.

'Among strangers, the Lord Ordinary is satisfied that those circumstances would not be sufficient to overcome the legal presumption against donation; and accordingly it is only by taking them in combination with the relation, habits, and history of the parties, that he has been enabled to come (though not without difficulty) to the conclusion, that in this particular case he is warranted in rejecting that presumption. The defenders were his only surviving children; one of them lived in family with him till his dying day, and both were not only closely connected with him in business, but had, for many years, taken the laborious part of the management on themselves, and shewn the most affectionate solicitude for his comforts; above all, he was then in the eighty-eighth year of his age, and, as it proved, within a few months of his death, and when, in those circumstances, this frugal parent, apparently unasked and unexpectedly, makes over these large sums, without receipt, discharge, or acknowledgment, the

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‘ Lord Ordinary cannot resist the belief that they were meant as
 ‘ donations *intuitu mortis*, and intended mainly to save the expense
 ‘ of a testament, and evade payment of the legacy-duty. It is a
 ‘ strong corroboration of this conclusion, that *subsequent* to those
 ‘ large payments in February 1825, which do not appear at all in
 ‘ any of the books of Patrick Booth, *there is* a comparatively small
 ‘ advance of L.70 to John Booth, and another of L.140 to Living-
 ‘ ston, both in the succeeding month of March, and evidently for
 ‘ purposes of business, which are regularly entered in these books,
 ‘ one in Patrick Booth’s own handwriting, and the other in that of
 ‘ Livingston. It may be added, that in the view taken by the
 ‘ Lord Ordinary of the other branch of the case, these *mortis causa*
 ‘ donations did not by any means exhaust the property of the father,
 ‘ but left about L.4000 of free funds to be divided among the par-
 ‘ ties to the present action, after paying debts of all descriptions.’

Both parties *reclaimed*; the defenders craving an alteration, in so far as regarded the first finding, relative to the prices of the shipping; and the pursuers objecting to the second finding, by which the L.3000 and L.4000 were held to be donations, instead of being placed to the debit of the defenders, in accounting with Patrick’s estate.

Judgment on
first finding
of Lord Or-
dinary’s Inter-
locutor.Opinion of
Court.

Counsel were first heard fully upon the reclaiming note for the defenders, when the *Court*, (19th November,) unanimously *adhered* to the first finding in the Lord Ordinary’s interlocutor.

The *Court concurred* in opinion that the rule, *debitor non presumitur donare*, applied to the present case; and, of course, the onus of proving donation lay with the defenders. The deceased chose to anticipate his succession by dividing it into three parts, and throughout he remained debtor to his sons for their portions. These portions had been embarked in trade; and, of course, as in a joint adventure, the sons were entitled to participate in the profits, and share the loss to the extent of their respective interests. The question of remuneration could not be mixed up with the question of donation. The sons had lived with their father at bed and board; and their maintenance must be presumed a sufficient return for any services they might have rendered to their father, in the absence of any stipulation to the contrary; the more especially as he appeared to have continued capable of managing his affairs till his death. Upon examination of the whole correspondence and other papers from beginning to end, there was not a single expression indicating an intention to confer a donation.

Lord Medwyn fir-
 sion, indicati-
 powerful
 the pre-

that the absence of any expres-
 correspondence produced, was a
 law, which must be applied in
 Lordships also concurred.

Counsel were then fully heard upon the reclaiming note for the pursuers, applicable to the second finding of the interlocutor. The cause having been delayed till the production of any further correspondence that might have taken place in relation to the abstract of accounts first rendered, certain correspondence was produced.

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At the final advising, *Rutherford*, for the defenders, stated, that if the opinion of the Court should, upon the admitted facts and evidence already adduced, be adverse to his pleas, and in case the opinions of their Lordships should proceed in any respect upon the statements contained in the abstract of accounts, first rendered by the defenders' agent, he wished to be allowed to give in a minute of offer, to prove, that the abstract so rendered was made up entirely with a view to an extrajudicial and amicable settlement and compromise of the claims of the parties respectively; that this was explained at the time by Mr Hutcheon, the agent for the defenders, to the agents for the pursuers; and that when it was stated that the accounts were not to be settled amicably, the defenders stood upon their rights as distinctly and unqualifiedly reserved throughout the attempted settlement.

Offer of farther proof by
Defenders.

Lord Justice-Clerk.—We have given every attention to this case. It required some explanation to shew how, and on what footing, these accounts were first rendered. The whole matter is now before us, and we have to decide whether we are to adhere to that part of the Lord Ordinary's interlocutor, which his Lordship has stated to be attended with great difficulty, but in which he has come to the conclusion that certain of these claims made by the defenders ought to be sustained.

Opinion of
Court.

When it is considered that we have complete proof of an existing settlement made by this old gentleman in 1783, that it continued unaltered, and was in his contemplation till the day of his death; when I take this in connection with the whole of the transactions in which this party was engaged, and also take into consideration the conduct of these defenders themselves, I am not able to concur in this part of the interlocutor, and shall give my voice for altering it. I cannot overlook the attempt by the defenders to exclude the family of the elder brother, Alexander, from all share of the succession. I remember perfectly that the persons acting for the pursuers in the declarator most obstinately contended for this; and it was decided against them both here and in the House of Lords. In the present process of count and reckoning, we are led to look to the nature of the defence in that action. Here, again, it has been maintained, that a great variety of the purchases of shipping were to be held as free gifts,—paying no regard to the solemn obligation

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by the old man, on making up the Clatt-Book, shewing what he was ready to account for to the eldest son on the one hand, and the rest of the family on the other; that though, at the time their father was confessedly debtor in the obligations, these were to be held as free gifts, and to be reckoned in accounting as such. That part of the case has been already decided. This old man having considered himself all along as a debtor, all these purchases are to be imputed only as payments pro tanto of the debt.

But then there were two other sums, of L.3000 and L.4000, which appear to have been taken out of the fortune of this old man, and given to John and Livingston Booth. In considering how these sums are to be imputed, it does appear to me to be very material, and I lay very considerable stress upon it, that at the time when these parties were engaged in a sort of investigation of what was due to Alexander's estate, from the way it was managed by the old man, and what was due to the family of Alexander on the general settlement of the old man, an account was prepared and given in. Now, these parties are seeking for information as to what was due to the deceased Alexander Booth on the one hand; on the other what was likely to be the share of the inheritance which they communicated to the defenders, as advised by eminent counsel they had a right to. They had full notice that, notwithstanding the death of Alexander, his daughter was to come in his place; and they also knew that a full account of intromissions was required. Now, at this time, an account was prepared—prepared by, it is said, the agents of these defenders. It must be held as the preparation of the defenders themselves; and it is sent to near relations, with whom they had not then quarrelled. There was then no litigation between them: there was nothing to compromise. This is a very important fact in the case. They gave in a general account of the inheritance of the old man, in which they bring out only a small balance. This balance is brought out on their own state of accounts. It is prepared by these parties themselves; and it is under these circumstances that they now come forward, and offer, as a defence in this action, that there were two sums of L.3000 and L.4000 which were free gifts to them. After stating the obligations of the father in the Clatt-Book, they state sums they received on 1st February 1825 as follows: '1825. Feb. 1. By cash paid L. Booth, this date, L.3000:' and again John's account under the same date, 'Cash paid J. B. of 'this date.' Then they state what they believe the balance due to them on the state rendered by themselves. (His Lordship then fully went over, and commented on the correspondence betwixt the agents at the time the first set of accounts was rendered.) It is not till 2d October 1827, that your Lordships have the first indication of intention to change their ground with regard to the L.3000 and

L.4000. So far as I can discover, it was only when one or two articles in these accounts had been asked to be explained,—trifling articles,—that this letter of 2d October makes its appearance. Though I am the last person who would ever think of allowing any proposition made directly with a view to a compromise, or for adjusting disputed claims, to be afterwards used mala fide, as a document by the one party against the other, yet I think this state of accounts in the additional appendix in a different situation. It is a voluntary preparation of accounts when there was no offer of a compromise. These accounts are voluntarily produced by these parties, and they distinctly state, that these sums were advances in liquidation of claims of debts which they then had against their father in the Clatt-Book, and not as gifts. It was on second thought altogether they came to insist that these sums were to be held as gifts, not as payments. If I am right in thinking that it was a second thought, I am obliged to ask myself this question, under the circumstances, are we called on to sustain this plea in defence, looking to the whole conduct of Booth in the management of his affairs for his two sons; looking to our own decision; seeing that there is not a vestige of proof that he intended these sums as free gifts, but that he was merely making an investment in shipping for these sons: I ask, whether, with the meagre proof we have, we can arrive at an opposite conclusion? I ask, whether it is not clear that the onus of establishing that they were free gifts lies on the defenders alone? It is by no means necessary for the pursuers to prove to your satisfaction the opposite proposition. The onus lies on those who have put themselves in opposition to the clear rule of law, that a debtor is not to be presumed to be making largesses. If you set forth a proposition of this kind, you must prove it. As these claims were to be liquidated, the fair presumption is, that payments made to the debtor were made in liquidation; and the presumption is strengthened in this case, from the way in which Patrick Booth managed business. We have evidence that an order was got from the old man and carried to the bank, and that these large sums were drawn: we have evidence that they were lent out, the one on a bill, the other on the security of a company in Aberdeen, yielding a fair remuneration to be used in trade, and this at a time recently before his death. Therefore we have just the fact that he drew money out; that one got his draft for L.4000, the other for L.3000, and no doubt lent out to these individuals. He kept books in an extraordinary manner; and it is argued there is no special evidence that he did give these sums as part of his sons' claims: but if he intended them as free gifts, would he not have put that in his books, cancelled his will, or left evidence of it in some other way? It is a material fact in regard to Livingston, that he was largely

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indebted beyond the sum received. No doubt, when we take into view the printing account, the balance is diminished; but still he was largely debtor at the time. When you add to that the first preparation of the accounts, when you remember that at that time it was distinctly stated that the balance was trifling, and that they were ready to settle on that basis, you must take that not as part of the proof in their favour, but a strong ingredient of evidence against them. These sums are just to be viewed in the same light as any other profitable investment for these sons. At one time he made purchases of ships; at another time he paid them these sums. We must apply the same measure of justice in regard to these payments as to the purchases of shipping. I for one cannot say that because, forsooth, instead of having the matter amicably settled,—because they have been obliged to resort to this Court,—the defenders are entitled to take the liberty of intimating that they will withdraw these accounts and declare them void, and that they are entitled to make out such a state of accounts as they choose. I don't deny their right to produce what they call corrected accounts, but I deny that they are entitled to remake them in such a way as they think proper. Taking into view the whole circumstances, and that the old man always considered himself to be regulated by the will,—and there is no evidence that he ever swerved from it,—I consider that we are bound to alter this interlocutor in respect to the latter conclusion of the Lord Ordinary, at which he states he has arrived with great difficulty.

Lord Meadowbank.—I am clear, as I was from the beginning, that this was a mere second thought altogether, and that there is nothing to support the allegation which is now made in respect to these payments.

Lord Glenlee.—I agree. I don't go so far as to say that they would be foreclosed, if, going on good ground, they really were in error in making the first statement, or that they might not be restored against it. But then it is incumbent on them to shew why the original account should be altered. They might have some view to a compromise; at the same time when they do charge themselves, they would not have done it if they had not had good reason for doing so. What would it come to if they charged themselves for what they were not bound to do? It would just increase the divisible fund, and that is what they are not called on to do; therefore I think this charge of L.7000 must be held as payments by Patrick on account of his original obligation. Laying that aside, there is no sort of doubt that claims to a large extent were due them. We are told the old man handed over money without saying any thing about it one way or other. Something is said as if it were of importance; and that is also mentioned in the interlocutor,

that there is no notice of it in any book. There have been instances of this kind; therefore I should be inclined to say this was of no consequence at all. It is said he entered two small payments: this is quite another thing. These large sums had no connection with the printing concern: he entered these payments in that particular account. Considering the near connection, and that he was not dealing with a stranger, I rather think it increases the presumption, because it may be just the result of excessive confidence. The old man just had so much money: he gives it without any acknowledgment, which may be accounted for in the case of such near connections. On the whole, I take the same view as has been stated.

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Lord Medwyn.—The question as to the payment of L.4000 and L.3000 to the defenders by their father is a different one, and more difficult than that which we have already disposed of in this cause; and so it has appeared to the Lord Ordinary, who, while he has sustained the one claim, has rejected the other, though with much more doubt in coming to his conclusion in the latter case than the first. The difficulty arises from the necessity of disposing of the point upon presumptions, in the absence of any written document, indicative of the intention or understanding of the parties, or either of them, at the time of the payments; and the scantiness of the facts connected with them, from which the presumption is to be drawn; and that some even of these few facts admit of easy solution on either view of the case; and it is the more necessary to attend to these minutely, as the Lord Ordinary declares he would not have sustained these donations as payments among strangers, but draws a different inference from the facts, ‘in combination with the relation, habits and history of the parties.’

I may premise, that although Patrick’s settlement in 1783 intended an equal distribution among his children, by the distribution of his effects made on Alexander’s marriage, he had fulfilled the obligations under his marriage-contract; so that if he had thought an equal partition less applicable to the altered situation of his family, it was perfectly within his power to make a different distribution, by altering his settlement, or by paying such sums in his lifetime as the L.4000 and L.3000 to the defenders.

The facts then are these:

1. By the distribution of this property in 1801, Patrick acknowledged himself the debtor of the two defenders in a specific sum, and undertook to account to them for the profits of the capital, with which he was to continue to trade for their behoof.

2. In February 1825 he stood indebted to John on this account for L.5021 : 2 : 7½, but was in advance for him on account of the cloth-spinning concerns L.2809 : 16 : 5. At the same period Patrick was debtor to Livingston L.4987 : 16 : 2½.

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3. John resided with his father till he married in 1808, and Livingston till his father's death in 1825, and were, till those periods, maintained by him. The latter engaged in no other business, and continued to assist his father in his shop and in his outdoor business. John also assisted till he engaged in the cloth and printing concerns, when his services are denied, but, at all events, must have been less than before.

4. Patrick seems to have retained his faculties and capacity for business till within a short period of his death, which took place 21st March 1825, in the 88th year of his age, as the defender states he was attending his shop 12th February 1825.

5. In February 1825 it appears that Patrick had a sum of nearly L.7000 lying in the Aberdeen Bank, at bank interest; and on 12th February he gave an order for L.3000 in favour of Livingston, who drew out the money, and he lent it in his own name to a company in Aberdeen; and on 16th February Patrick paid to John L.4000, by orders on the two banks, and cash L.39, 2s. This also was lent out in his own name by John.

6. These payments are not entered in any account as payments to them, nor is any voucher or acknowledgment of the payment taken from them. In the inventory of the effects of Patrick, given up for confirmation, these sums were not included.

7. The only other fact, (but a very material one,) is, that in the state of accounts rendered in December 1826, these two sums were stated respectively as payments on the credit side, and not treated as donations *mortis causa*.

Now, it does not appear to me to be of much consequence that these payments were not made as business transactions, to commence trade, or carry on a trade; but that the money was laid out at interest. It might be in the one case, just as much as in the other, reckoned by the parties payment of a debt, or a donation. Such a sum, lying at bank interest, evidently not wanted for the business of the shop, or shipping concerns, might be thought better invested at higher interest; and the very circumstance that this large sum was kept out of the inventory for confirmation, (though certainly admitting of the explanation given by the defenders, that it was omitted because it was a donation, and no longer part of the estate of the deceased,) satisfies me, when it was, as at first stated, as a payment in discharge of a debt in 1826, that it had been partly with the view of saving all discussion about residue-duty at the stamp-office, which could not be far off in the case of a man, in declining health, in his eighty-eighth year.

Now, if these were intended as donations, how easy was it to have taken a little memorandum to that effect under Patrick's hand, instead of the ceremony alleged to have taken place on handing the

sum over to Livingston; or even if this had been done with the distinct expression of its being a donation, before witnesses, the donation would probably not have been questioned; and since this was not done, as Patrick was debtor to Livingston at the time, the presumption of debtor non presumitur, &c. applies most strictly. With regard to John, he would be overpaid about L.1800, so that the maxim is not so strictly applicable; but supposing it to that extent only a payment intuitu mortis to a person who by deed was entitled to a share of the succession along with others, assuredly, on that ground, John must account for what is not covered by the presumption of payment of a debt. That no document of debt was taken from them, merely shews the confidence he had in them, and that they would admit it as a debt, without any voucher to that effect, or that they would be obliged to account for the application of these large sums. It was not till eighteen months after his death that they disappointed this confidence.

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The difference of the sum paid to the two, forms perhaps the greatest difficulty in the case; that the largest sum should be paid to the one to whom the father owed least. But this difficulty is not solved by the theory of the defenders; for the ground on which it is said that these donations were made was the services respectively rendered by the sons. These were probably considered fully compensated by maintaining them when they lived with him, and by the assistance, by money and otherwise, to John after his marriage. Indeed, if the services were considered at all, it is singular that the longer and greater services of Livingston were rewarded with a gift of L.3000, while John's lesser ones were rewarded with L.4000. I consider it of no importance that two sums of L.70 and L.140 are subsequently paid and entered in John Booth and Company's account, as business transactions. If the entry of the L.4000 fell to be in the same account as these other payments, the omission would certainly have been of importance; but, as these regarded the business of the printing concern, whereas the L.4000 was not a payment to that account at all, the entry of the one set of payments, and omission of the other in that account, is of no consequence. If the account in the Clatt-Book had been continued, and if the sums paid for the ships and profits had been there entered, and this payment of L.4000 omitted, the inference would have been strong; but he dealt with this payment as he did with payments for the shares of vessels purchased for his sons.

But the important fact, and which I presume has not been pressed upon the notice of the Lord Ordinary, for it is not once alluded to, is, that in the states of accounts given in, in December 1826, after a good deal of delay, and repeated demands for them, these sums are stated as payments to account, and not donations. I do

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not say that this tied down the parties to this state of accounts, if they can be shewn to be erroneous; all I mean to infer is, it shews what at that time was their idea of the footing on which these payments were made. This, then, was the defenders' own account of the matter at that time; and I have not a doubt, that if the interest of the pursuer had been excluded, the two brothers would have settled between themselves on that footing. Seeing the importance of this original mode of stating these payments, they now wish to say that this mode of stating the account was with a view to an amicable settlement. If they had said it was out of pure generosity to their niece I could have understood it; but how it could be with a view to an amicable settlement, I don't see. No dispute had then arisen, for the accounts had not been previously exhibited; and why was any dispute anticipated, which required such a sacrifice on their part as L.7000? But there is not the slightest vestige of evidence that the accounts were originally framed with any such view; and it is quite clear that the idea of donation is entirely an after-thought, first communicated by the letter, 2d October 1827, and more especially when the accounts were formally withdrawn, 10th January 1828, when they saw, by the offer to take L.3000 in Mr Blaikie's letter of 31st December 1827, that the other party would not admit of the accounts as stated by the defenders; and this is still more anxiously repeated in the letter of 27th February 1828.

Upon the whole, I am persuaded their own impression of the nature of these payments, which existed probably up to October 1827, was the true one,—that they were not donations, and must be accounted for by them as payments, in settling with the pursuers.

Rutherford, for defenders, resumed his offer of proof, which was over-ruled, as inadmissible at the termination of the cause.

Judgment.

The Lords 'adhere to the first finding of the interlocutor of 9th June 1835, and refuse the desire of the reclaiming note for the defenders; alter the second finding of that interlocutor, and find that the sums of L.3000 and L.4000 therein referred to are not to be held as donations to the defenders severally, but must be put to their debit in settling the amount for which they are entitled to claim respectively as creditors on the estate of their deceased father, and remit to the Lord Ordinary to apply these findings, reserving all claims as to expenses.'

Lord Ordinary, *Jeffrey*.Act. Dean of Fac. (*Hope*), *Keay* and *G. Monro*.Alt. *Rutherford* and *G. Moir*.*Patrick Irvine*, W.S. and *H. Inglis &**Donald*, W.S. Agents.

T. Clerk.

R.

FIRST DIVISION.

No. XXXI.

10th December 1835.

MARY EMOND

against

THE MAGISTRATES OF HADDINGTON.

PRISONER.—PROCESS.—A. S. 1671.—*It is not necessary to intimate an application for liberation under the above A. S. to the incarcerating creditor, or his known agent. The A. S. does not require the physician's certificate to be immediately recorded in the burgh court-books.*

THE pursuer (8th March 1834) incarcerated a person named Mrs Munro or Emond in the tolbooth of Haddington for debt. On the 15th March the prisoner applied to the Magistrates under the Act of Grace; and the petition being intimated to a writer in Haddington, as the pursuer's agent, he appeared for her, and resisted the application, which was not further persisted in. On the 31st May the prisoner presented a petition to the Magistrates, setting forth, that she was affected by a nervous disorder to such an extent as to put her life in danger if longer confined, and praying for liberation, on finding caution to return to jail. Along with the petition the prisoner produced a certificate by John Burton, M.D. certifying, 'That her life is endangered by further confinement, in consequence of an excessive state of nervous excitement.' On 3d June the Magistrates examined Dr Burton, who emitted a deposition, in which he inter alia deponed to the verity of his certificate, and further stated, 'That he had again visited the prisoner, and that her health continues to suffer both mentally and corporeally.' On the same day the Magistrates granted warrant for liberation as follows: 'The Magistrates having considered the within petition, and the certificate and deposition of Dr Burton, In respect of said deposition, grant warrant to liberate the petitioner from the tolbooth of Haddington, security being previously found that she shall reside within the burgh, and not remove therefrom, and that she shall return to jail as soon as the state of her health will admit of her doing so with safety.' The prisoner then lodged a bond of caution by James Grinton, merchant in Edinburgh, and James Anderson, merchant in Haddington, binding and obliging themselves, 'that the said Mary Magdalene Munro or Emond shall reside in the house of Mrs Thomson, residing in Haddington, within the burgh of Hadding-

Narrative.

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Narrative.

‘ton, and shall not remove from the same, but return to the toll-booth of Haddington as soon as she can do so with safety to her health.’ Thereafter the prisoner was liberated.

On the 5th June the Provost of Haddington wrote to the pursuer’s agent as follows: ‘*Haddington, 5th June 1834.* Dear Sir, ‘I think it right to inform you, that, after sufficient evidence of ‘the great danger of longer confining Mrs Emond, the Magistrates ‘have granted warrant in the usual terms for her liberation; and, ‘so far as I can see, it will be a considerable time before her health ‘will be so far established as to admit of her being again confined; ‘and as I learn her friends are prepared to offer reasonable terms of ‘compromise, I think it would be well if you could second their ‘endeavours. In this way a part of the debt might be secured, ‘while other measures will lead to expense and trouble, particularly to the poor, old woman.’ On 30th June the pursuer raised the present action, alleging that the proceedings above detailed had been irregular, 1. In respect the application for liberation should have been intimated to the pursuer or her known agent before the same was granted. 2. The physician’s certificate did not attest the ‘party’s sickness and extreme danger of life.’ 3. The certificate was not recorded in the town court-books, as required by the Act of Sederunt 1671. 4. The Magistrates did not allot a house for the prisoner to reside in during her liberation, nor was the same set forth in the bond of caution, the words, ‘Mrs ‘Thomson, residing in Haddington,’ having been recently filled up in the same. The summons concluded for the amount of the prisoner’s debt, interest and expenses. The Magistrates, in defence, justified their proceedings, and denied the allegations in the summons.

Lord Ordinary’s Interlocutor.

The Lord Ordinary pronounced this interlocutor, adding a note: ‘The Lord Ordinary having heard counsel for the parties, and ‘having afterwards considered the closed record, productions, and ‘whole process, assoilzies the defenders from the conclusions of the ‘action, and decerns: finds the pursuer liable in expenses, and remits to the Auditor to tax the account thereof, when lodged, and ‘to report.’

Note.

Note.—‘This is a highly penal action, which cannot be supported, unless the provisions of the Act of Sederunt 1671, relative to ‘bills of health, have been clearly contravened.

‘The pursuer pleads, that the petition was not intimated to the ‘incarcerating creditor. But no such intimation is required by the ‘Act of Sederunt, because the prisoner’s life being in danger, it may ‘often happen that there is no time for it. The creditor cannot

'suffer from the want of intimation, because the prisoner is kept
'within the jurisdiction, ready to be sent again to prison, if there
'be reason to do so.

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'That the prisoner's life, in this case, was in danger by her confinement, is proved by the certificate of the physician, confirmed by his oath; and the original deposition being committed to writing, is preserved among the records of the town, which is equivalent to an entry in the town's book. The provision in the Act of Sederunt on that subject is evidently meant to prevent liberation on a verbal and unrecorded oath.

'The pursuer does not aver that the prisoner, when liberated, ever went beyond the limits of the jurisdiction; and in the bond of caution the house is specified in which she was to reside.

'The proceedings in the process of aliment do not bear on the case at all.

'None of the cases cited by the pursuer are similar in circumstances to the present. Thus, in *Fullerton and Kennedy v. the Magistrates of Ayr*, the certificate was not upon oath, and the Magistrates, after the prisoner's recovery, allowed him to leave the jurisdiction, and go about the country in the exercise of his profession. On the other hand, the cases of *Forbes, Fordyce and Ritchie* are precedents a fortiori in favour of the defenders here.'

The pursuer *reclaimed*, but the Court unanimously *adhered*.

Judgment.

Lord Balgray.—The proceedings from the beginning appear to have been correct in every respect. The whole question is, whether the Magistrates proceeded in terms of the Act of Sederunt. I think their proceedings were precisely in terms of that act. The warrant of liberation bears that they had considered the certificate and deposition, and security was found previous to liberation. I conceive that the Act of Sederunt does not require intimation to the creditor at all.

Opinion of
Court.

Lord President.—As to the objection that the certificate was not recorded in the burgh books, the Act of Sederunt does not say that it is to be recorded within a certain time. If any person wishes to have an extract, he may apply to get it recorded. If it has been the practice to intimate the application for liberation, that has been for the security of the Magistrates, but it is not required by the Act of Sederunt.

Lord Gillies.—I think it was a very humane and proper proceeding.

Lord Ordinary, *Corehouse*. Act. Dean of Fac. (*Hope*,) *J. Anderson*. Alt.
Sol.-Gen. (*Cuninghame*,) *Marshall*. Isaac Anderson, S.S.C. Pursuer's Agent.
Peter Crooks, W. S. Defenders' Agent. B. Clk.

C.

SECOND DIVISION.

No. XXXII.

11th December 1835.

INCORPORATION OF FLESHERS OF CANONGATE
against
 WILLIAM WIGHT AND OTHERS.

BURGH.—CORPORATION.—EXCLUSIVE PRIVILEGE.—STATUTE 1703, c. 7.—*Found, (1.) That the fleshers of Canongate, by virtue of their seal of cause—possession following on it—and the judicial recognitions thereof that have taken place—do constitute a legal incorporation, entitled to the exclusive exercise of the trade or craft of fleshers within the bounds limited, but subject to the effect of the provisions of the act 1703, c. 7, in so far as that act is still legally in force. (2.) That the act 1703, c. 7, is still in force, and must receive effect, in so far as it provides that ‘it shall be leisome to all persons ‘whatsomever to sell and break all sorts of fleshes on every lawful ‘day of the week, and that in all the towns and burghs of this kingdom, free of any imposition whatsomever, the petty customs of burghs ‘excepted.’ (3.) That the general right and liberty declared by the statute does not extend to the act of slaughtering cattle within burgh, or within the bounds of the privileges of the incorporation of fleshers of Canongate.*

Narrative.

THE fleshers of Canongate brought an action of declarator, setting forth the immemorial existence of the Canongate as a burgh of regality—the exclusive privileges granted to the fleshers,—the possession following upon their seal of cause,—and repeated judicial recognitions of their rights, (see *Fleshers of Canongate v. Magistrates of Edinburgh*, 7th July 1809, and *Fleshers of Canongate v. Magistrates of Canongate*, 22d June 1826,) and concluded, that it ought to be found and declared, ‘that the Incorporation of Fleshers and ‘Candlemakers of Canongate, and the members or freemen of the ‘body associated under that name and designation, are a lawful incorporation, and that the incorporation possesses the exclusive right ‘and privilege of exercising, and of admitting or licensing all persons ‘desirous of exercising the arts or crafts of fleshers and candlemakers, ‘or either of them, within the burgh of Canongate and liberties, ‘including North Leith, Coalhill of Leith, and Pleasance, and that ‘no person is entitled to exercise either of these arts or trades within the bounds, without being admitted or licensed by the incorporation;’ and that the defenders ought to be ‘prohibited from

'exercising these crafts' without admission or licence; and concluding for damages. 11 Dec. 1835.

The pursuers averred, (Condescence, Art. 28.) that the defenders are now exercising, 'or have recently exercised the art or trade of fleshers, and slaughtered cattle, and sold the flesh thereof, and practised the other parts of the said craft, or one or more of them, within the burgh of Canongate,' and were liable in damages, which were restricted 'to L.20 in the case of each individual, being the amount of the freedom-fine presently demandable by the corporation.' The defender, William Wight, admitted 'having at one period slaughtered cattle, and prepared them for sale within the boundaries claimed by the pursuers; but he denies having at any time made any sales within these boundaries, and since March last he has neither slaughtered nor sold within these boundaries. The defender, John Sommerville, buys all his meat, and merely retails it within the boundaries claimed.

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Others.

The defence was, That the seal of cause flowed a non habente potestatem, having been granted by a tutrix of the superior, at the time a minor, and was never confirmed as a title to exclusive privileges, and, generally, the pursuers' corporation had no good title to the exclusive privileges claimed; stat. 1703, c. 7.

The following interlocutor and note by the Lord Ordinary explain the grounds and decisions, in virtue of which, it was found by his Lordship, that the pursuers formed an incorporation, entitled to the exclusive privileges of the flesher craft, and to what extent these privileges are qualified and limited by the enactments of 1703, c. 7.

'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, finds, That in virtue of the seal of cause founded on in the record, the course of possession which was followed on it, and the judicial recognitions thereof which have taken place, the pursuers do constitute a legal corporation, entitled to the exclusive exercise of the trade or craft of fleshers, within the bounds limited, according to the terms of the said seal of cause, and the general law of the land, but subject to the provisions of the statute 1703, c. 7, in so far as that statute is legally in force: finds, That the summons is sufficient in its terms to entitle the pursuers to a decret of declarator to this effect, and decerns and declares accordingly: finds, That the said statute 1703 is still in force, and must receive effect in law, in so far as it provides that it 'shall be leisome to all persons whatsoever to sell and break all sorts of fleshes, on every lawful day of the week, and that in all the towns and burghs in this kingdom, free of any imposition what-

Lord Ordinary's Interlocutor.

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“somever, the petty customs of burgh excepted:’ Therefore finds
‘That the right and title of the pursuers, above declared, is qualified
‘and limited by the said enactment: finds, That the general right
‘and liberty declared by the statute does not extend to the act of
‘*slaughtering* cattle within burgh, or within the bounds of the pri-
‘vileges of the corporation in this case: finds it admitted on the
‘record, that the defender, William Wight, has slaughtered cattle
‘within the said bounds; and not denied that the defenders, Robert
‘Wight and John Anderson, have done the same; and therefore
‘finds that these defenders have invaded and violated the privileges
‘of the corporation, not being freemen thereof, and prohibits and
‘interdicts them from doing so in time coming: finds it not ad-
‘mitted by the defender, John Sommerville, that he has slaughtered
‘cattle within the said bounds; but in respect that he has concurred
‘with the other defenders in the general defence, denying the legal
‘existence and privileges of the corporation, and that no damages
‘are asked from any of the defenders, finds it unnecessary more
‘particularly to distinguish his case from that of the other defenders:
‘Therefore, on the whole, finds, decerns, declares and interdicts
‘in terms of the libel, but to the effect only, and under the qualifi-
‘cation and restriction above specially expressed: but, in the cir-
‘cumstances of the case, finds no expenses due.’

Lordordi-
nary’s Note.

Note.—‘It seems to the Lord Ordinary to be impossible, after
‘the long and clear state of possession by the pursuers and their
‘predecessors, as well as of other corporations in this burgh simi-
‘larly situated, to look back into the powers of the superior’s tatrix
‘to grant the seal of cause originally. The subsequent acknow-
‘ledgment of the rights constituted by it must exclude such inquiry,
‘and the judicial recognitions of the title are a good deal too strong
‘to be overcome now. The judgment in the case of the Wrights
‘of Canongate v. Braidwood, on a seal of cause granted in similar
‘terms, *on the very same day*, which was affirmed in the House of
‘Lords, would alone be conclusive. It is not reported, but was de-
‘cided in the time of President Blair, who delivered a full judg-
‘ment on it. But even after there are two judgments in the case
‘of the *fleishers*, in which the general validity of the title was assu-
‘med, and the legal construction and effect of it only brought into
‘question; *Fleishers, &c. of Canongate v. Magistrates of Edinburgh*,
‘July 7. 1809; *Fleishers of Canongate v. Magistrates of Canon-*
‘*gate*, June 22. 1826.

‘As the defenders have on the record denied the rights thus es-
‘tablished, there is therefore ground for the declarator demanded
‘by the summons. But, on the other hand, the Lord Ordinary
‘must hold these corporate rights to be still qualified by the statute

‘1703, c. 7; for though that act has been considered to be in desuetude in the first part of it, which prohibited fleshers from being graziers, it is not so in the part which is here material. The decision and the opinion of the Court in the case of *Dick v. The Fleshers of Stirling*, Feb. 1. 1827, appear to settle this point. Taking the act to be still in force, the Lord Ordinary is of opinion that all the corporate privileges are not thereby done away; and, in particular, that *slaughtering* of cattle is not within the meaning of the words, ‘sell and break all sorts of *fleshes*.’ The judgment in the case of the *Fleshers of Aberdeen v. Williamson, &c.* June 1. 1822, though only in form on the question of passing a bill, did clearly recognise the distinction.

‘The pursuers being right in their declarator, but wrong in the extent in which they maintain their privileges, the Lord Ordinary thinks that no expenses are due to either party.

‘The conclusion for damages was given up at the bar, the petitory claim being limited to the freedom fine, for all persons desiring to exercise the trade.

‘There is no plea in the record against the sufficiency of the summons.’

11 Dec. 1835.

*Fleshers of
Canongate v.
Wight and
Others.*

—
Note.

Both parties *reclaimed*—the defenders against the findings, that the pursuers formed an incorporation; that the general right and liberty declared by 1703, c. 7, does not extend to the act of slaughtering within the privileges of the corporation; that there had been an invasion of the pursuers’ privileges; that there had been a prohibition granted, and that no expenses had been found due to the defenders. The pursuers *reclaimed*, ‘in so far as the interlocutor was unfavourable,’ and did not decern for expenses.

Lord Justice-Clerk.—After the various judgments referred to, it is too late to question the rights of this corporation. As to the act 1703, we considered it fully in the *Stirling* case, and we held that the second clause was not in desuetude. In virtue of that clause every person may bring in carcasses to be cut up and sold for the benefit of the inhabitants; but the right of slaughtering is open to the members of the craft or incorporation alone.

Opinion of
Court.

Lord Medwyn.—If this question had only now come before the Court for the first time, I should have formed the same opinion as to the validity of the rights claimed by this incorporation, subject to the limitation in the statute 1703. The seal of cause is granted by the tutrix in the infancy of the baron, and might have been set aside by the baron on attaining majority; but, on the contrary, his

11 Dec. 1835.

Flethers of
Canongate v.
Wight and
Others.

Opinion of
Court.

baillie confirms the rules in 1624, and possession has followed on it. The baron had full power to grant such a seal of cause, this being one of the privileges of a burgh of barony or regality. In a royal burgh, the Crown may constitute such an inferior corporation; but the Magistrates, as delegates of the Crown, which they also are in granting sasine more burgh, have this power also. But in a burgh of barony or regality, this power is confined to the baron, and, so far as regards trade and manufacture within burgh, it requires no confirmation from the Crown. In the present case, this seal of cause, and the privileges consequent upon it, have been too often judicially sanctioned to admit of serious dispute now.

Lords Glenlee and Meadowbank concurred.

Judgment.

The Court, in respect the claim of damages had been passed from by the pursuers, adhered to the interlocutor of the Lord Ordinary on the merits, but altered as to the expenses, and found expenses due to the pursuers.

Lord Ordinary, Moncreiff.

(Hope,) G. Monro.

Burness, S. S. C. Agents.

Act. Rutherford, Penney.

Gibson-Craigs, Wardlaw & Dalziel, W. S. and James

T. Clerk.

Alt. Dean of Fac.

R.

FIRST DIVISION.

No. XXXIII.

12th December 1835.

ALEXANDER ROBERTSON, SUSPENDER.

WILLIAM GAMACK, CHARGER.

BILL OF EXCHANGE.—*Circumstances in which it was found, that there had been due intimation of the dishonour of a bill.*

Narrative.

SUSPENSION of a charge upon a bill against the drawer. The bill had been discounted at the branch of the Commercial Bank of Scotland in Peterhead, of which the charger is agent. The ground of suspension was, that the charger had not given due notice of dishonour to the suspender. The suspender joined issue upon the fact, and the parties went to proof upon commission. The bill was for L.95, and fell due on the 11th January 1833. The charger produced the bill, on which there was a marking thus, 'Intⁿ given

'12th Jan 1833.' He also produced his letter-book, in which 12 Dec. 1833:
there was the following entry :

'12th Jan. 1833.

Robertson v.
Gamack.

Narrative.

'Al. Robertson, Meiklemill, Esqlement.

'S^r,—Gt. Heron's acceptance to you for L.95, indorsed by
'you, which fell due on the 11th instant, lies at this office under
'protest for non-payment, to which I request your immediate at-
'tention.'

William Bisset, clerk in the Manchester and Liverpool Dis-
trict Bank, was examined for the charger, and deponed,* inter
alia, 'That the said entry is in his handwriting. Interrogated,
'Whether intimation was sent to the suspender in terms of
'the foregoing letter? depones, That he has no particular recol-
'lection of having written or sent that individual notification; but
'from the marking on the bill, and from the entry in the letter-
'book, combined with the uniformity of his practice, he has no
'doubt whatever that such an intimation was put into the Post-
'office by him; and the contents of such an intimation were in
'terms of the copy letter in the letter-book, by filling up the
'blanks in a printed form used for such purposes. Interrogated,
'depones, That it was his invariable practice to put the party's
'post-town on the back of the letter; and he has no doubt what-
'ever that he did so in this case: That he observes that Ellon, the
'suspender's post-town, is not inserted in the address in the letter-
'book; but when writing to persons in the neighbourhood of
'Peterhead, whose post-towns were familiar to the deponent, he
'did not always, and perhaps not usually insert the post-town in
'the letter-book; and he observes, on looking at the letter-book,
'that the post-town is very often not entered in such cases:
'That he has no doubt that the letter to the suspender was
'put into the Post-office by him of the date it bears, and he al-
'ways put such letters into the Post-office himself; and the let-
'ter to the suspender must, according to the invariable practice,
'have been signed by the charger, or by the deponent for him:
'That the practice of the bank was to send intimation of a bill
'about to become due a few days before it fell due; and the depo-
'nent had the charge of giving such intimations, in the same man-
'ner as the other intimations with regard to bills past due: That
'intimations of bills about to become due were not entered in any
'book, nor was any memorandum or note kept of them: That they
'were very rarely sent by post, because the parties were unwilling
'to be at the expense of postage, and therefore they were seldom
'sent except when private opportunities could be found by guards
'of coaches, or otherwise.' William Kirkton, farmer in Craighall,

12 Dec. 1835.

Robertson v.
Gamack.

Narrative.

was examined for the suspender. He deponed, inter alia, 'That he paid a bill in the office of the charger on the 16th day of January 1833, as he thinks: That he received a notice from the bank the day previous to his paying the bill, intimating that the same was to fall due on a certain day. Depones, and exhibits a pass-book which he keeps with Mr John Rae, postmaster at Ellon. Depones, That in said book he sees two entries under date the 15th and 17th January 1833, in these terms: '1833. Jan 15th and 17th, "letters 11d.:' That the charge for said letters is elevenpence: That the rate of postage from Aberdeen to Ellon, and from Ellon to Peterhead, is fivepence halfpenny each: That to the best of his recollection he received only two letters on these days, and so far as he can recollect the bank notice came on the 15th January. Being interrogated, If the witness has any doubt that the said bank notice came to him through the Post-office? depones, That he has no doubt, to the best of his recollection, it came through the Post-office: 'That he does not recollect the date of the bank notice before referred to: That so far as he recollects, it intimated that the bill fell due on the 16th January then current.' John Rae, postmaster at Ellon, examined for suspender, and asked to look at the account *, No. 19. of process, depones, 'That in said account he sees three entries of postages of letters in the month of January 1833: That the postages of these letters charged in said account are fivepence halfpenny each: That in making out Mr Robertson's account for postages he makes the entry of a postage of the date on which the letter is sent to Mr Robertson, and not of the date of arrival of the letter at the Post-office, though these sometimes may be the same: That he makes the entries in a book, and the account just shewn to the deponent is copied from said book. Depones, That only one letter came from Peterhead to Ellon on 13th day of January 1833: That the deponent recollects this from having looked at the post-bill of that day, in consequence of a letter from the charger, dated 2d May 1833, which he now produces, and which is marked by the deponent, commissioner and clerk, as relative hereto: That the deponent has not said daily post-bill now, having mislaid it: That he cannot say how many letters came from Peterhead to Ellon on the 12th of January, nor on the 14th or 15th days of said month. Being shewn the pass-book exhibited by the preceding witness, depones, That the deponent is a merchant, as well as postmaster. Depones, That he sees in that book,

* The account ran thus: No. 1.—Excerpt from Account titled 'P. O. Ellon. Alexander Robertson, Esq. to J. Rae.'

1833.	Jan. 10.	Postage,	-	-	-	-	L.O	0	5½
	24.	"	5½,	30th Jan.	5½,		O	0	11

'and in his handwriting, an entry or entries in these terms : 12 Dec. 1835. " 1833, Jan. 15 and 17, letters, 11d.' Depones, That the preceding witness, Mr Kirkton, had delivered to him, from the deponent's office, two letters, one on the 15th, and another on the 17th of said month and year, the postage of which were 5½d. each : That Mr Robertson's letters at the Post-office are sometimes sent to him by Mr Robertson's servants, or by any respectable person going his way : That the deponent generally embraces the earliest opportunity of forwarding the suspender's letters, but sometimes a few days may elapse before a suitable opportunity occurs. Depones, That the suspender, or any respectable person going the way of the suspender's house, would, on calling at the Post-office, and paying for any letter addressed to the suspender, receive delivery of such letter ; but that, if such were to happen, the postage of said letter would not appear in the suspender's account ; but the deponent has no recollection of any letter having been called for and paid, as deponed to : That he has no reason to think, that, during the currency of said account, any letters came addressed to the suspender through the deponent's Post-office, except those the postage of which is entered in said account.' The postmaster at Peterhead, also examined for the suspender, produced his book, from which it appeared that there was no entry of letters transmitted to Ellon on 12th January 1833 : there was a postage of a single letter on the 13th, none on the 14th or 15th, and a single letter on the 16th. The suspender examined several witnesses with a view to shew occasional irregularities in the receipt of notices from the charger's bank ; but only one witness positively stated that he had not received due notice of dishonour, and this witness happened to be in similar circumstances in respect to that bill with the present suspender.

' The Lord Ordinary having heard parties' procurators, and considered the process and proofs, finds it proved, that due notice of the dishonour of the bill was given by the charger ; and therefore repels the reasons of suspension, finds the letters orderly proceeded, and decerns : Further, finds the charger entitled to expenses.'

Robertson v.
Gamack.

Narrative.

Lord Ordinary's Interlocutor.

The pursuer *reclaimed*, when the *Dean of Faculty* argued, that the present differed from any previous case ; that although it might be held, in the absence of counter proof, that there was presumptive evidence of the letter of intimation having been put into the Post-office, yet here there was sufficient proof that the letter had never passed through the Post-office. Only one letter had been sent through the Post-office between the 11th and 16th January, and that letter had been delivered to the witness, Kirkton.

Pursuer's Argument.

12 Dec. 1835.

Robertson v.
Gammack.

This witness had proved that that was a letter from the charger's office, intimating that a bill was about to become due. Now, it had been admitted by the charger, that his uniform practice was to send such letters by a private opportunity. From this the inference was irresistible, that the person who had the charge of dispatching the letters, intending to put the letter to the suspender into the Post-office, and to send that to Kirkton by a private opportunity, had by mistake sent Kirkton's letter by post, and that to the suspender by a private opportunity, and so it had miscarried.

Defender's
Argument.

Rutherford answered—We have adduced the best possible proof that this letter to the suspender was put into the Post-office at Peterhead. We are not bound to prove its delivery. The entry in the Peterhead Post-office book corresponds with the fact. The inference on the other side is entirely matter of conjecture. Kirkton's letter, the best evidence how it was transmitted, has not been produced; neither have they produced the books of the Ellon post-master. Here, then, is a manifest attempt to set presumption in opposition to positive proof.

Opinion of
Court.

Lord Balgray.—This is entirely a jury question, and resolves into this, whether the presumption is for delivery, yea or nay. It is impossible, in the nature of the thing, to prove absolutely that the letter was put into the Post-office. There must necessarily be but a talis qualis proof in all such cases.

Lord President.—The charger is not bound to prove that the suspender received the letter: he may concede that he did not, and yet give all the evidence of intimation which can be required. It is enough, in the general case, to prove a regular practice in transmitting such letters. The clerk might speak positively to some very remarkable case; but it is impossible he can do so in regard to the ordinary run of letters.

Lord Mackenzie.—If I thought it had been distinctly proved that the letter to the suspender had not passed through the Post-office, on the alleged date of transmission, I should think the matter open to some question, because there is no positive proof of its being put into the Post-office. We cannot say that there is an absolute certainty that the clerk did put the letter into the Post-office. Evidence to that extent cannot be looked for, and so the evidence we have is good if uncontradicted. Yet there might be a complete contradiction. It is proved that only one letter was sent from Peterhead on the day when this letter should have been transmitted; and there might be certain proof that that letter was not a letter to the suspender. Or, again, there might

be positive evidence that no letter to the suspender arrived on that day. If the postmaster could have sworn positively, in a recent case, that no such letter arrived, or we had the evidence to this effect of a person who was actually at the Post-office when the post arrived, and saw the bag opened, there might then be room for hesitation. But there is nothing of the kind here; there is proof that one letter entered the Post-office on the day, and it has not been proved that that was not the letter to the suspender. There is no positive proof that it was a different letter. We cannot say that the strong probability, arising from the evidence of the clerk, is contradicted by or opposed to fact.

Lord Gillies.—Here it is proved that the letter was put into the Post-office, I do not say by complete evidence, but by all the evidence the case will admit of; and there is no positive proof to the contrary. There may have been some mistake in delivering the letter; but that is mere presumption, which must always yield to proof. If the bank were not to be exonerated in such a case as this, there could be no safety in their transactions. As to the attempt to prove irregularity, I observe the charger, who was examined here as a haver, states positively that this is the first instance he knows of in which any of his notices had not arrived at their destination.

The Court therefore adhered.

Judgment.

Lord Ordinary, Fullerton.

Act. Dean of Fac. (*Hope*,) Neaves.

Alt. Ruther-

furd, Thomson.

H. Inglis & Donald, Suspender's Agents.

James Shep-

herd, W. S. Charger's Agent.

B. Clerk.

C.

SECOND DIVISION.

No. XXXIV.

12th December 1835.

TOD'S TRUSTEES

against

BURNS.

PROCESS.—SUMMONS.—*Found incompetent to enroll in the Reduction Roll a summons containing, in the first place, certain conclusions declaratory of the import of a particular decree, and alternatively, conclusions reductive of the decree.*

12 Dec. 1835. **LORD COCKBURN** reported the following point for the opinion of the Court: The pursuers had raised a summons, setting forth, that a certain decree had been pronounced by this Court, which decree they subsumed to be of a particular import and effect, and concluding that it ought to be so found and declared, or otherwise, that if the contrary should be found, the decree ought to be reduced. The summons had been enrolled in the Reduction Roll. The question was, whether it had been competently enrolled.

Tod's Trustees
v. Burns.

Their Lordships were unanimously of opinion that the summons ought to have been enrolled in the Ordinary Action Roll, and that it must necessarily be struck out of the Reduction Roll.

Lord Ordinary, Cockburn. For Pursuers, G. Meir. For Defenders, Sol.-Gen.
(Cuninghame,) and J. S. More. James Ross, S.S.C. and J. & W. Douglas,
W. S. Agents.

R.

SECOND DIVISION.

No. XXXV.

12th December 1835.

NEIL CAMPBELL M'LAREN

against

ROBERT FINLAY.

STATUTE 10. GEO. IV. c. 55, (SMALL DEBT ACT.)—JURISDICTION.

—*Found, in conformity to the decision in Wallace v. Hume, 3d July 1835, F. C., that it formed a good ground of suspension under the statute, that the copy citation left with the defender, in an action under the small debt act, did not bear in gremio that a copy of the account had been left with him.*

THE Lord Ordinary had refused the bill, on the ground that the messenger's execution bore that a copy of the account had been left. But the Court altered, and passed the bill.

Opinion of
Court.

Lord Medwyn, though he differed from the other Judges in *Wallace v. Hume*, was of opinion that this bill ought to be passed, as this case was different from the other, in as much as it was nowhere averred in the answers that a copy of the account had actually been served on the defender. In *Wallace's* case, the copy of the account served was produced in process.

The *Court* passed the bill without caution, *Lord Meadowbank* observing, that the defender (suspender) had been improperly brought into Court, and therefore no caution ought to be found.

12 Dec. 1835.

M'Laren v. Finlay.

Lord Ordinary, *Cockburn.* For Suspenders, *A. M'Neill.* For Respondent, *Jo. Russell.* *C. F. Davidson,* W.S. and *C. Fisher,* S.S.C. Agents. Bill-Chamber. Judgment.
R.

SECOND DIVISION.

No. XXXVI.

12th December 1835.

JAMES A. STEWART MACKENZIE

against

LORD DUNDAS.

TENOR.—In this action of proving the tenor of a bond, (see vol. x. *F. C.*, p. 635,) the adminicles were found sufficient, and the case remitted for proof. *See Papers.*

Act. *Keay, Sandford.* Alt. *Rutherford* and *H. Bruce.* Ro. *Rutherford,* W.S.
and *Ker & Dickson,* W.S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. XXXVII.

12th December 1835.

HERCULES INSURANCE COMPANY

against

JOHN HUNTER.

PROCESS,—(AMENDMENT OF LIBEL AND ISSUES).—INSURANCE.—
ARBITRATION.—*A party insured machinery, which was afterwards destroyed by fire : the claim against the insurers was submitted to arbitration, in terms of the policy, and decree-arbitral pronounced :— Found, in a reduction by the insurers of the decreet-arbitral, (1.) That it was competent to amend the summons, to the effect of stating, as a ground of reduction, that the pursuers had since ascertained that the insurance was effected with an intention, on the part of the*

12 Dec. 1835.


Hercules In-
surance Co. v.
Hunter.

defenders, of setting fire to the machinery. (2.) That an additional issue—whether the insurance was effected by the defender upon a fraudulent overvaluation of the machinery, with the intention of destroying the same by fire? might be sent to trial.

Narrative.

CERTAIN machinery, the property of Hunter, the defender, was insured by Mr Salmond, agent at Glasgow for the Hercules Insurance Company, against damage by fire, for the period from 8th October 1831 to Martinmas 1832. The machinery was, on 22d October 1831, destroyed by fire. The parties submitted to two arbiters the claims arising from the damage done by the fire, and a decree was pronounced, finding the insurance company liable in a certain sum.

The insurance company afterwards brought a reduction of the decree of the arbiters, on various legal grounds, (unnecessary to be here enumerated.) After certain procedure in the reduction, the Lord Ordinary, (Moncreiff,) allowed an amendment of the summons, to the effect, that the defender had insured the machinery with the intention of setting fire to it. This ground of reduction is thus set forth in the amended summons: ‘*Quinto*, The said submission was entered into in the belief that the said insurance had been effected for the bona fide purpose of protecting the defender’s property from fire, and that the fire which had occurred was an accidental or innocent one, so far as he was concerned; but the pursuers have recently discovered that they were deceived in this respect; and, from facts which have come to light, they are enabled to aver, that the insurance of the mill machinery in question was the result of a deliberate fraud on the part of the defender, Hunter, with the view of having the machinery consumed by fire, and obtaining an exorbitant and excessive sum for the same from the insurance office,—the true value of the said machinery, though insured at L.1450, not having exceeded L.350.” It was also averred, that the machinery had been fraudulently set fire to by the defender, or by some other person in concert with him. The defender maintained that the submission or decreet-arbital could not be reduced, ‘on the ground, that pleas which might have been effectually urged under the submission by the party now pursuing the reduction were not so urged.’

Lord Ordinary’s Inter-
locutor.

The Lord Ordinary, (Cockburn,) found that it was ‘competent to inquire, under this record, into the fact of the fire having been wilfully raised by the defender; and that it is proper that this fact, which, if established, goes to destroy the whole submission, should be determined before deciding whether the decree under that submission be effectual;’ and remitted the case to the Jury-Roll.

Note.—‘ The Lord Ordinary purposely couples the remit with a finding, because, in the circumstances of the case, he thinks the defender has a fair claim to have the opinion of the Court on the remit, if he wishes it. ’

12 Dec. 1835.
Hercules Insurance Co. v. Hunter.

Note.

‘ After the submission was gone into and disposed of by a decree, the pursuers brought the decree under reduction, on certain legal grounds; and then, after the case had gone a certain length, they got leave, by interlocutor of Lord Moncreiff, to give in an amendment, which charges the defender with the fire-raising. It is maintained by the pursuers, the Lord Ordinary thinks justly, that if this charge be supported, it goes altogether to destroy the agreement to refer, and that therefore this fact must be first disposed of. ’

‘ But the defender urges, that the pursuers have no right to be let into any proof on the subject, because it was open to them before the arbiter, and they did not avail themselves of it, and that they only try to get into it now by averring *res noviter*, &c. but without either condescending on it or proving it. The Lord Ordinary is not satisfied that the plea of competent and omitted before the arbiter is applicable here. But, at any rate, *res noviter*, &c. is sufficiently condescended on to admit of its being proved, if this shall be necessary; and in adjusting the issues, one may be given on that point, subject always to approval. ’

The following issue, prefaced by the admitted facts of insurance, fire, and decree-arbitral, was approved of by the Lord Ordinary, viz. ‘ Whether the defender destroyed the said machinery, or caused the same to be destroyed, as aforesaid, for the purpose of defrauding the pursuers of the said sum, insured as aforesaid? ’

The pursuers thereafter gave notice that the Court would be moved to add to the issue approved of by the Lord Ordinary, to the effect of allowing another issue in these terms: Whether the said insurance ‘ was effected by the defender upon a fraudulent overvaluation of the said machinery, with the intention of destroying the same by fire, or for the purpose of defrauding the pursuer of the sum insured, in the event of the said machinery being so destroyed. ’

At the moving of the cause, the Lord Justice-Clerk, a partner of the company, and Lord Medwyn, as trustee for a partner, declined judging. Lord Moncreiff having been called in, Lord Glenlee took the chair, and counsel were heard.

Lord Moncreiff suggested that the latter part of the proposed issue, after ‘ fire, ’ might be left out; which, with the acquiescence of the pursuers, was agreed to. The cause having stood over for consideration, the Court this day resumed consideration of the motion.

Opinion of Court.

12 Dec. 1835.


Hercules In-
surance Co. v.
Hunter.—
Opinion of
Court.

Lord Meadowbank.—The facts in issue afford relevant ground for setting aside the decree-arbitral, if proved. Observe what it is the pursuers in truth allege. By the submission it appears that the amount of the value of the machinery in the work was proved to be L.1450 odds;—competently proved, for the arbiters took evidence on that point. What remains?—that there was a fraudulent intention on the part of Hunter, though in point of fact he did not insure his property for more than the value. Put aside the allegation of fire-raising, then the question is, whether there is a sufficient allegation to reduce the submission and decree-arbitral? Now, is it a relevant ground, though it is admitted,—for that is the result in the way I take it,—that the defender did not in point of fact insure above the value, yet that he entertained the intention to insure above value? It was certainly competent for the arbiters to take into view the amount of value, and their decree would have been conclusive on that point. But then, say the pursuers, we will set aside the decree, because though the defender did not insure above value, yet he had a fraudulent intention in so insuring.

Lord Moncreiff.—The material averment is contained in the fifth reason of reduction. The plea by which that ground of reduction is attempted to be met proceeds upon a misstatement. The important facts contained in the pursuers' averment have been discovered since the submission was entered into, and decree pronounced. The statement now is, that the insurance was effected by the defender with the intention of having the machinery to be insured destroyed by fire. There might be many motives for an intention to destroy subjects insured. Goods might have been obtained under a smuggling or other illegal agreement, or from other motives. Now, if this insurance was made with an intention to burn the machinery, from whatever motive, the insurance is bad, no matter though in point of fact it should actually have been destroyed by an accidental fire. Nothing can be more material than this. It is of the very essence of a policy of insurance that there shall be no concealment. Every concealment vitiates the agreement. This averment, therefore, strikes at the very root of the policy. The ground of reduction, founded upon the insuring with intent to set fire, then, is clearly relevant. It is even more relevant that the other ground,—the actual setting on fire. The arbiters might have considered the last point, the setting on fire; but the intention to burn the machinery insured extinguishes the clause in the contract binding the parties to refer their respective claims to arbitration. The submission could not therefore be valid, or come under the contract, because, upon the assumption of the facts stated in the fifth ground of reduction, there could never have been a proper legal contract.

Lord Glenlee.—I am entirely of the same opinion.

The *Court*, therefore, approved of the proposed issue, omitting the latter part of it after the word fire.

15 Dec. 1835.

Town-Council
of Brechin v.
Guthrie, Mar-
tin & Co.

Lord Ordinary, *Cockburn*.

Act. *M'Neill*.

Alt. *Dean of Fac. (Hope,)* and

Neaves.

G. & W. Napier, W. S. and *James Wright*, W. S. Agents.

Mr Russell, Clerk.

R.

FIRST DIVISION.

No. XXXVIII.

15th December 1835.

TOWN-COUNCIL OF BRECHIN

against

GUTHRIE, MARTIN AND COMPANY.

TENOR.—The state of the proof in this cause, noticed ante, vol. x. p. 364, was this day advised, when their Lordships *decerned*.

Act. *Dean of Fac. (Hope,)* *Graham Bell*.

Alt. *Rutherford, Currie*.

Graham

Binay, W. S. Pursuer's Agent.

James Imrie, Defenders' Agent.

D.

Clerk.

C.

SECOND DIVISION.

No. XXXIX.

15th December 1835.

JAMES INGLIS

against

ALEXANDER GLEN AND SPOUSE.

PROCESS.—JURY TRIAL.—A. S. 29TH NOV. 1825, § 47.—*Issues having been finally prepared, upon 19th November 1834, and the parties having entertained a proposal of extrajudicial settlement, which was broken off in February 1835, and the pursuer having given no notice of trial within twelve months after the preparation of the issues, the Court, upon the motion of the defenders, dismissed the action, with expenses.*

15 Dec. 1835.

*Ingis v. Glen
and Spouse.*

By Act of Sederunt, 29th November 1825, § 47, it is declared, that if the pursuer, 'or party appointed to stand as pursuer, before the Jury Court, shall not proceed to trial within twelve months after the issues have been finally prepared; or if, after having given or received notice of trial, the pursuer does not appear at the trial, and proceed with his evidence, unless reasonable cause for such delay, or for his failing to appear, is shewn to the satisfaction of the Jury Court, it shall be competent to apply to the Jury Court to remit the case back to the court from whence it came, and that such court shall hold the party as confessed, and proceed therein as in other cases in which parties are held as confessed.' By 1st Gul. IV. cap. 69, the jurisdiction for trial by jury in civil causes is united with, and forms part of the ordinary administration of justice in the Court of Session.

In this case, the issues were finally prepared and signed by the Lord Ordinary upon the 19th November 1834, and twelve months had elapsed without notice of trial, or any step having been taken by the pursuer. The defenders presented a note, moving the Court to dismiss the action, with expenses.

The pursuer, in answer, stated, as a 'reasonable cause' for delay, that the parties had been engaged in an extrajudicial adjustment of the case, by submission; and this was only broken off in February last: that the provision of the Act of Sederunt is not imperative; for although the application for dismissing the action be competent, yet if there be a bona fide purpose of proceeding to trial, (and the pursuer had now given notice of trial for the sittings after the present session,) the Court could exercise its discretion; more especially as the defenders had the power of fixing a day for trial, if one was not fixed by the pursuer within ten days of the issues being engrossed.

Opinion of
Court.

A majority of their Lordships held that reasonable cause for delay had not been assigned. If the extrajudicial settlement broke off in February, the pursuer was bound to have proceeded, and given notice of trial, and that within the twelve months from the adjustment of the issues. Were the rule, under circumstances like the present, not given effect to, extrajudicial attempts at settlements, not seriously gone into, and finally abandoned, might be made a pretext for defeating the application of the Act of Sederunt.

Judgment.

The Court granted the prayer of the note, and dismissed the action, with expenses.

Act. Ja. Anderson.

Alt. Sol-Gen. (Cunninghame.)

John Livingstone, W. S.

and Greig & Morton, W. S. Agents.

Mr Russell, Clerk.

R.

SECOND DIVISION.

No. XL.

15th December 1835.

ALEXANDER, DUKE OF HAMILTON,

against

JOHN MATHER AND JOHN URQUHART, (COMPEAREER.)

SUPERIOR AND VASSAL.—FEU-DUTIES.—TEINDS.—ALLOCATION.

(1.) *Found in an action for bygone feu-duties, that certain kain being stipulated by charter as payable by the vassal, and there being no conversion, the superior is entitled, either to delivery of the kain in kind, or to the market value thereof, in the several years. (2.) That carriages stipulated in the charter not having been required to be performed in each year, in the manner specified, the superior is not entitled to demand any estimated value thereof retrospectively. (3.) That a feu-duty, stipulated to be payable annually to the titular, as superior, or the minister, as the consideration for the sale of the teinds of his lands to the party liable in payment of said feu-duty, was to be localled on for stipend primo loco; that the vassal was entitled to have this duty exhausted before any allocation for stipend on his lands; that the allocation of the teinds of the vassal's lands, as stipend to the minister, was to be held as an allocation of the said duties, such duties being by law primarily liable to such allocation; and that payments of stipend made by the vassal, under decrees of locality, must be considered as payments of the stipulated feu-duties by consent of the superior.*

JAMES STRANG of Meikle Earnock, grandfather of the defender, *Narrative.*

Mr Mather, was heritable proprietor of, and held in feu of the Duke of Hamilton, the following lands with the teinds: 1st, a 6s. 8d. land of the 40s. land of Meikle Earnock, held under the burden, (1.) of the yearly payment to the Duke, his heirs, &c. of L.3:6:8 Scots, in name of silver feu-farm duty, for the lands; (2.) of payment to the Duke and his foresaids, or, in their option, to the ministers of Hamilton and their successors, one boll one firiot one peck three-fourths of a peck oatmeal of teind, with the ordinary met and measure of Hamilton, in name of feu-farm duty, yearly, for the teinds; (3.) of payment to the Duke of six hens one capon yearly; and, (4.) of leading to the Palace of Hamilton yearly, in summer, from the nearest and most convenient coalheugh, one dozen loads

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of coal, the Duke paying for the coals at the heugh. 2*d*, The 13*s*. 4*d*. land, and the 10*s*. land of the 40*s*. land of Meikle Earnock, with the teinds of the same, held under the burden, (1.) of payment to the Duke of L.11 : 13 : 4 Scots yearly, in name of feu-farm, for the lands ; (2.) of payment to his Grace, or, in his option, to the minister of Hamilton, of 4 bolls 2 firloths 2½ pecks of teind oatmeal, with the ordinary met and measure of Hamilton, in the name of feu-farm duty yearly, for the teinds ; (3.) of payment to his Grace of 21 hens 3½ capons yearly ; (4.) of leading 3½ dozen loads of coals. 3*d*, The half of the 3*s*. 4*d*. land of the 40*s*. land of Meikle Earnock, with the teinds, were held under the burden, (1.) of payment to the Duke of 16*s*. 8*d*. Scots, in name of feu-farm duty, for the lands ; (2.) for payment to the Duke, or, at his option, to the ministers of Hamilton, of 9 pecks of teind oatmeal, for the teinds ; (3.) of payment to the Duke of the equal half of the number of three hens and a half capon yearly ; 4. of leading to the Duke's Palace three carts of coals.

In 1763 James Strang conveyed to George Coventry the ' 40*s*. ' lands of Meikle Earnock, called Fairhill Park, with the parsonage ' teinds and teind sheaves thereof, the disponee being burdened with ' the payment of L.4, 10*s*. Scots of feu-duty, 3 bolls 2 pecks of ' teind-meal, 8 kain hens, one capon, and the leading loads of coals, ' and cess in proportion to L.67, 10*s*. Scots, valued rent, with 9 ' sheaves of sargent corn.' This portion of the lands was afterwards acquired by Robert Lamb, who obtained a confirmation from the Duke in 1787, by which he became liable for the whole feu-duties ' payable by James Strang and his successors, reserving relief to him ' from them of their proportion of the feu-duties of the lands still per- ' taining to them.' This portion of the lands was afterwards acquired by John Urquhart, who was entered by charter from the Duke in 1817, and is bound to pay the whole feu-duties and services payable by James Strang, reserving relief to him against Strang's successors, as proprietors of the other parts of the lands of Meikle Earnock, of the proportions of the feu-duties and services effeiring to their several lands.

James Strang was succeeded by four daughters, who possessed pro indiviso, till the subjects were divided in four parts, by decree of the Sheriff, in 1781. The lands were taken together and parcelled out, and allotted according to their extent and value. One of the daughters, the defender, -Mather's mother, besides her own share, succeeded to two-fourth parts, as heir of two of the other sisters, and continued proprietrix of these three-fourths till her death. The remaining fourth was sold.

The present Duke's father succeeded to the dukedom in 1799. Payment of kain and carriages did not take place yearly, the vas-

als settling when convenient. Since 1799, the defender's mother 15 Dec. 1835.
settled the feu-duties and prestations due to the superior on three 
occasions; 1st, In 1813, for the feu-duties and kain, from Whit- Duke of
sunday 1799 to Martinmas 1812, L.19 : 8 : 1, being paid 'as Hamilton v.
'the proportion of the feu-duty for the lands,' without reference to Mather and
the teind-duties. The kain were charged at the rate of 2s. for Urquhart.
each capon, and 1s. 6d. for each hen. No charge was stated in Narrative.
lieu of carriages. 2dly, In January 1816, for the feu-duties and
kain, from Martinmas 1812 to Martinmas 1818. 3dly, In March
1821, for the same, from Martinmas 1815 to Martinmas 1820, the
conversion being at the same rate, and the discharge not compre-
hending teind-duties. The defender having applied for a charter,
a demand was made upon him by the pursuer's factor for the said
feu and teind duties, kain and other prestations, due from the said
lands to the superior from Martinmas 1820. But he refused to pay
the teind-duties, as having been already allocated and paid to the
minister of Hamilton, or to pay for kain at the rate demanded;
but he offered to pay at such rate as should be equivalent to their
fair market value. Soon after the payment of 1821, the pursuer's
factor wrote to the defender as follows: 'I find, upon looking over
'the feu-duties of Meikle Earnock, lately paid by you to me, I have,
'by mistake, drawn L.5 : 7 : 6, being the amount of the feu-duties
'payable by Mr Urquhart of Fairhill, for his part of the lands of
'Meikle Earnock; and this sum accordingly I am ready to pay to
'you.' This sum had not been paid; but the pursuer admitted that
the defender was entitled to credit for it.

The pursuer raised the present summons against Mr Mather,
concluding for payment of L.34 : 8 : 3 $\frac{5}{2}$, as the amount of feu-
duties, kains and carriages, from Martinmas 1820 to Martinmas
1831, and also for L.179 : 6 : 9, being the amount of teind-duties,
due for the teinds of the lands for the last half of crop and year
1799, to Martinmas 1831, inclusive, with interest. After the sum-
mons was raised, the defender agreed, upon receiving a charter,
to pay the different feu-duties and kain since Martinmas 1820, but
he refused to pay the teind-duties; and the charter was delivered,
upon payment of the feu-duties, kain and carriages, the defender
granting an obligation to pay whatever teind-duty might be found
due by him to the pursuer.

It was stated in support of the pursuer's claim, that the amount Pursuer's
of the feu-farm duties, payable by the defender to the pursuer for Statement.
the teinds from 1799 to 1831, on a computation of the price of
the victual according to the fiar prices for the respective years, was
L.179 : 6 : 9; and the pursuer never required the defender or his

15 Dec. 1835. predecessor to pay, nor did they pay any part of the said feu-farm duty for the teinds of the above lands to the minister of Hamilton; which statement was denied. And farther, that in the locality of the stipend of Hamilton, the defender's lands are localled along with those of the heritors who have heritable rights to their teinds, without regard to the feu-farm duties payable to the pursuer for the heritable right to the teinds of the lands; and the stipend allocated upon the defender's lands is no more than the proportion of the teind for which the said lands are liable, without including the feu-farm duties. This statement also was denied, with the exception that the defender is localled upon as having an heritable right to his teinds.

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Pursuer's
Statement.

Defender's
Statement.

The defender, on the other hand, in resisting the claim, stated, that the whole teind-duties claimed by the pursuer have, since the dates of the original feu-rights, been paid at the option, and with the acquiescence of the pursuer and his predecessors, to the minister of Hamilton. An allocation of them to the full amount was made in different successive localities, in which the pursuer and his father had appeared as titulars and patrons. The yearly stipend payable to the ministers of Hamilton, which now exceeds the whole teind-duties in the feu-rights, is of old meal stipend, 5 bolls 1 firloft $2\frac{1}{2}$ lip-pies, and of augmented stipend and barley, 3 bolls 2 firlofts $1\frac{1}{2}$ lip-pies. The stipend was paid by the defender's mother, and is now payable by himself. No demand was ever before made for payment of the teind-duties, except to the ministers of Hamilton, by the pursuer and his predecessors.

Pursuer's
Counter State-
ment.

The pursuer admitted the stipend paid to the ministers to be as stated, but alleged that this stipend was localled upon the teinds of the defender's lands rateably and proportionably with those parties having heritable rights, and with the titular himself. The teind-duties were not in the first place exhausted as free teinds, and then a proportional allocation besides made upon the defender's lands; but in framing the localities the teind-duties were left out of view altogether.

Pursuer's
Pleas as to
Kain.

The pursuer *pleaded*, in regard to the kain, &c.—When the reddendo of a charter stipulates the payment of kain, and contains no clause converting these into money, the superior is entitled to demand either the ipsa corpora, or the value of the article at the time in the market, or their converted value, according to the use of payment, which also applies to carriages. In regard to teind-duties: When an obligation to pay certain teind-duties to a titular is contained in a charter, by which an heritable right to the teinds

As to Teind-
duties.

is granted, the circumstance of the teinds of the vassal's lands being allocated for payment of the stipend *pari passu* with those of other heritors having heritable rights, does not exempt the vassal from payment of the said teind-duty, and the titular is not barred from demanding bygoness.

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The defender *pleaded*, in regard to kain and carriage, 1. The kain are payable in kind, and the pursuer is not entitled to a conversion as a matter of right. Even if a conversion for bygoness be allowed, or consented to, the defender will at most be liable only for the real value or average market worth. 2. No requisition having been made to lead coals debito tempore, and in the respective years, there is no service exigible for past years, nor penalty in lieu of service exigible. In regard to teind-duties: The teind-duty payable to the superior and titular for the lands in question is free teind, and as such is liable to be localled on for stipend *primo loco*, and before any allocation can be made on the defender's teinds, which he holds by heritable right flowing from the titular; Dundas v. Baikie, 13th Feb. 1793; Graham v. His Feuars, same date; Lord Dundas v. Balfour and others, 17th Nov. 1802, *F. C.*; and Locality of Bothwell, 8th July 1828, (*Shaw, Teind Cases*,) as decided on the specialty. 2. The defender's right to have the teind-duty exhausted before any allocation for stipend on his own lands is also clear, from the nature of the reddendo, stipulating that the teind-duty should be payable to the superior or the minister; and from the course of payment and possession all along, the teind-duty, which was equal to or less than the minister's stipend, having been so allocated upon to their full extent in the localities of Hamilton, with the acquiescence of the pursuer and predecessors, no part of them is due to the pursuer*.

Defender's
Pleas as to
Kain, &c.

As to Teind-
duties.

In the course of the process, Mr Urquhart of Fairhill lodged a minute, craving to sist himself and give in defences, on the ground, (1.) That he was liable, though proprietor only of a part of the lands of Meikle Earnock, in the reddendo of the whole lands. (2.) That the decree to be pronounced in this action would be a decree affecting his interest, not merely because whatever might be the reddendo, he, as in a question with the superior, may be liable for the whole, but because the lands libelled do include his portion of the lands. (3.) That he was in a certain degree liable in relief to Mather. Lord Mackenzie, by interlocutor, dated 5th March 1833, found ' Mr Urquhart entitled to appear, and give in defences against

* The claim to feu-duty was admitted by Mr Mather.

15 Dec. 1833. 'the conclusions of the libel as they stand.' *Note.*—'Though the
 Duke of Hamilton v. Mather and Urquhart. 'Lord Ordinary thinks that Mr Urquhart is entitled to appear, he
 'cannot see any use for double pleadings, as every thing material
 'may be put into one set.' Mr Urquhart nevertheless made up a
 record with the pursuer.

Lord Ordinary's Interlocutor.

The cause having come to depend before Lord Moncreiff, as Ordinary, his Lordship pronounced this interlocutor and note:

'The Lord Ordinary having considered the closed record, and
 'heard parties' procurators thereon, and made avisandum, finds,
 'That the pursuer is entitled to decree against the defender, Mather,
 'for the sums of feu-duty concluded for in the summons, amounting,
 'for all the years libelled, to the sum of , and decerns
 'for the same accordingly, under deduction of the sum of L.5 : 7 : 6,
 'admitted by the pursuer to have been overpaid in 1821 : finds,
 'That the pursuer is entitled either to delivery of the kain stipu-
 'lated by the charters in kind, or to the market value thereof in
 'the several years : finds, That the carriages not having been re-
 'quired to be performed in each year in the manner specified in the
 'charters, the pursuer is not entitled to demand any estimated value
 'thereof retrospectively : finds, That the allocation of the teinds of
 'the defender's lands, as stipend to the minister, must be consider-
 'ed as an allocation, made by the pursuer and his predecessor as
 'titulars, of the teind-duties payable forth of the said lands to them-
 'selves, as titulars and superiors, in the first instance, such teind-
 'duties being by law primarily liable to such allocation : finds, there-
 'fore, That the payments of stipend made by the defender, under
 'the decree of locality, must be considered as payments of the said
 'teind-duties, by consent of the pursuer, in terms of the charters ;
 'sustains the defences as to these teind-duties ; assoilzies the defend-
 'er, and decerns. finds the defender, John Mather, entitled to
 'expenses, subject to some small modification, and remits the ac-
 'count, when lodged, to the Auditor to be taxed : finds, That John
 'Urquhart, Esq. having been found entitled, by final interlocutor
 'of Lord Mackenzie, of 5th March 1833, to appear for his inter-
 'est in this process, the present Lord Ordinary must so far consi-
 'der him as a party in the cause ; but finds, that, under the summons
 'in this process, no judgment, either of decerniture or absolvitor,
 'can be pronounced directly affecting his interest : finds, in con-
 'formity to the note of Lord Mackenzie in pronouncing the fore-
 'said interlocutor of 5th March 1833, that it was altogether unne-
 'cessary for the said John Urquhart to give in separate pleadings
 'in addition to those of the said John Mather, or to insist on a se-
 'parate record being made up for his case, in which, under the sum-

‘mons, no judgment could possibly be pronounced : Therefore finds 15 Dec. 1835.
 ‘the said John Urquhart entitled to the expense of entering ap-
 ‘pearance by his minute, and of maintaining his interest at the bar, 
 ‘as permitted by the said final interlocutor of Lord Mackenzie; but Duke of
 ‘finds the said John Urquhart liable to the pursuer in the expense Hamilton v.
 ‘of making up the separate record on his own account, in opposition Mather and
 ‘to the express intimation of opinion to the contrary by Lord Mac- Urquhart.
 ‘kenzie, and for no useful purpose: Allows accounts of expenses Lord Ord-
 ‘in conformity to these findings to be lodged, and appoints nary’s Inter-
 ‘cause to be thereafter enrolled, in order that this interlocutor may locutor.
 ‘be carried into full effect, and the cause finally disposed of.’

Note.—‘There is really no difficulty in this case, when the prin- *Note.*
 ‘ciples of law, and the decided cases in the only material point, are
 ‘attended to. The feu-duties are admitted. The *capons* and *hens*
 ‘must either be delivered in *kind*, or paid for by a fair estimated
 ‘market value, which the parties may easily settle. There is no
 ‘conversion to bind either party.

‘The plea of the pursuer, as to the teind-duties, is just an at-
 ‘tempt to revive a question long ago settled. The reasoning is
 ‘plausible, that the teinds having been sold, not for a *price* in *one*
 ‘*sum*, but for a *feu-duty* payable annually, to take that as the first
 ‘subject of allocation is to take back the price of the purchase.
 ‘But this is the very argument used in the case of Sir T. Dundas
 ‘v. Baikie, &c. Feb. 13. 1793, and which appears to have been
 ‘answered on very sound principles. The fallacy is in not obser-
 ‘ving that the *teind-duty stipulated* was taken as the *full value* of the
 ‘teinds at the time. If there had been no feu, the titular, when
 ‘the locality came, must have paid *all that*, as being the *drawn teind*,
 ‘to the minister. The feu gives a right to the teinds to the heritor,
 ‘valeat quantum; and the implication is, that the feu-duty is the
 ‘full value of that right. Therefore, on the strictest principles, the
 ‘titular must exhaust that teind-duty as the proper teind drawn by
 ‘himself, before he can require his feuar to pay any thing more
 ‘from the land as teind to the minister. It is true that the result
 ‘is not the same in the case of a proper *sale* of teinds under the
 ‘statute. The titular is not required to allocate the interest or
 ‘value of the *price*. This is explained by the authorities to proceed
 ‘on the difference between a forced sale, at an undervalue, by the
 ‘statutes, and a voluntary sale or feu, where the full value is pre-
 ‘sumed to be taken. But, at any rate, the anomaly, if any, is in
 ‘the latter case. The correct principle is in the decisions in the
 ‘other case,—that of a feu of the teinds at what is presumed to be
 ‘the full annual value.

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Note.

‘ The decisions, however, are quite conclusive of the point, and it is unnecessary to assign farther reasons for the judgment.

‘ Perhaps the present Lord Ordinary does not fully understand the grounds on which Lord Mackenzie found Mr Urquhart entitled to appear in the process. Mr Urquhart’s titles certainly make him liable to the superior for the entire feu and teind duties stipulated with Strang, with a right of relief only against Strang’s heirs. But the *summons* has no relation to Urquhart, being certainly confined to the proper proportions due by *Strang’s heirs* for the lands *retained by them* after the constitution of Coventry’s right; and though the judgment to be pronounced under it might affect Mr Urquhart *in principle*, yet *as a judgment* it could never touch his rights. However, it is *res judicata* that he had a right to appear. But though it be so, most clear it is, that the making up of a separate record was a most unnecessary and oppressive proceeding. It is too clear, from Lord Mackenzie’s note, that in admitting Mr Urquhart as a party, he deprecated the idea of separate pleadings, and never thought of any thing more than Mr Urquhart appearing to attend to his interest, by concurring in Mr Mather’s pleadings, where he thought it necessary. The Lord Ordinary thinks it his indispensable duty to discourage such multiplication of unnecessary pleadings.’

The Duke *reclaimed* against the interlocutor, in so far as unfavourable to him, maintaining, in reference to the claim for teind-duties, that the question was not to be viewed as if parties were in the process of locality. It was more of the nature of an action for payment of feu-duties strictly exigible.

Mr Urquhart *reclaimed* against having been found liable in any expense, and craved his own expenses.

Judgment.

The Court refused both reclaiming notes, and *adhered* to the Lord Ordinary’s interlocutor, and found Mr Mather entitled to additional expenses.

Lord Justice-Clerk.—The case of Lord Dundas clearly applies.

Lord Ordinary, *Moncreiff*. Act. Sol.-Gen. (*Cunninghame*,) *Jardine*. For Mather, *Dean of Fac. (Hope)*, and *Ja. Paterson*. For Urquhart, *Rutherford* and *Cowan*. Ro. *Rutherford*, W.S. *Jardine*, *Stoddart & Fraser*, W.S. and *Donaldson & Campbell*, W.S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. XLI.

15th December 1835.

JOHN DRYSDALE
against
CHARLES KENNEDY.

LANDLORD AND TENANT.—COMPETITION.—PHYSICIAN'S FEES.—

Found, in regard to a sequestration by a landlord of his tenant's effects, who had died before warrant for sale, or payment was granted, 1. That the tenant's medical attendant had a legal claim for deathbed charges, preferable to the landlord. 2. That this preferable claim includes a fair and reasonable charge for attendance and furnishings during the illness terminating in death, and is not confined to the sixty days before death.

JOHN DRYSDALE obtained sequestration of the effects of his tenant, Clark, on 14th August, and a warrant for sale on the 7th September 1832. Clark having died on the 4th September, the original petition was served on his nearest of kin, who made no appearance, when warrant of sale was granted of new, after which part of the effects was sold on two different occasions, and on 3d October the Sheriff granted warrant for payment of the free proceeds to the landlord. On the 10th October warrant was granted for a sale of as much of the sequestrated effects as would pay the current year's rent and the expenses. On 17th October the Sheriff pronounced an interlocutor, finding a certain sum to be the balance on the proceeds of the third sale, and granted warrant for payment of that sum to Drysdale, in extinction of the rent for the current year, for which warrant to sell had been granted. Narrative.

A claim had been lodged, upon the 10th October 1832, for Charles Kennedy, surgeon, for L.32:16:4, being for attendance furnished to Clark, from January, at the time the disease of which he died commenced, down to September, the period of his death. A claim was some time after lodged for Robert Hendrie, for funeral expenses. No petition was presented either by Kennedy or Hendrie for recall of the interlocutor of 17th October, ordering payment. The Sheriff, upon 28th December 1832, pronounced an interlocutor, finding that the 'claimant, (Kennedy,) (along 'with Robert Hendrie, the functor, in so far as his account

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Narrative.

'shall be sustained,) is preferable to the respondent, (Drysedale,) in so far as the amount of his claim is proper; the respondent however being allowed to receive, *primo loco*, the expense of his process of sequestration and sale, which converted the fund into money, divisible among those concerned; and upon the principle of the decision of the case of Flint, 17th June 1795, finds, that the claim is not limited to sixty days before the death, but extends to the whole period of the illness which terminated in death; and before ascertaining the amount due,' remits to Mr Watson, surgeon, to report what is the proper amount to be allowed to the claimant in the whole circumstances. On 27th February 1833, the Sheriff found that the free proceeds of the three roup-rolls amounted to L.42:9:1; sustained the claim of Kennedy for L.16:19:1, dismissing it *quoad ultra*; sustained the claim of Hendrie to L.12:14:11, and granted warrant to the clerk to pay them these sums, and to pay the residue to Drysdale. Thereafter a joint minute was lodged for Hendrie, the funerator, and Drysdale, withdrawing the claim of the former, and consenting to the payment of the L.12:14:11½ to Drysdale. Accordingly, the Sheriff, 13th September 1833, granted warrant for payment to Drysdale of the sum found due to Hendrie, and decerned.

The case, as betwixt the landlord and Kennedy, as creditor *medicus*, was advocated.

Advocator's
Plea.

Drysedale *pleaded*—1. The furniture and effects of the tenant having been attached for payment of the year's rent, by sequestration before the death of Clark, there is no room for the respondent's plea, that he is entitled to a preference over the advocator, on the price of the furniture and effects, on the ground of his debt being a privileged debt. 2. Under the circumstances, the respondent has no right to be ranked even *pari passu* with the advocator on the price of the furniture and goods. 3. Even had the sequestration not been executed previous to the death of the tenant, the year's rent due to the landlord would have been as much a privileged debt as the year's rent due to the respondent. 4. *Privilegiatus contra privilegium non utitur privilegio*. 5. Even assuming that the respondent had right of preference over the advocator, in regard to the expense of his attendance while Clark was on deathbed, it would be insufficient to support his claim for the expense of attendance during a period while Clark was not on deathbed. 6. The claim of the respondent not having been lodged until after decree of payment to the advocator had been pronounced, it was incompetent for the Sheriff to pronounce the interlocutor complained of.

The respondent *pleaded*—1. Expense of a surgeon's attendance and medicines during the mortal sickness of a party is a privileged debt upon his estate, and preferable to landlord's hypothec; *Rowan v. Barr*, 29th June 1742, *M.* 11,852; *Peter v. Monro*, 26th July 1749, *M.* 11,852; *Elch. Fun. Charg.* 3; *Lawson v. Maxwell*, 12th Feb. 1784, *M.* 4473. 2. The execution by the landlord of a warrant to sequestrate his tenant's effects for rent, although it secures and prolongs his hypothec, does not transfer the property from the tenant, nor even confer on the landlord a higher grade of preference, and cannot defeat the superior privilege of deathbed expenses, which neither requires nor admits of the adoption of judicial measures for farther security; *Robertson v. Jardine*, 6th July 1802, *M.* 7891. 3. There are no circumstances in this case to impede the application of the legal privilege to the respondent's claim; particularly, the proceedings adopted by the advocator, after the death of the common debtor, could have no legal effect in giving the advocator any preference beyond what he previously possessed; *Rowan*, *supra*. 4. The duration of the mortal sickness covered by the privilege is not limited to any precise period; and considering the lingering character of the disease in the present case, pulmonary consumption, the period of betwixt seven and eight months is not too long, and fairly falls in with the considerations of humanity which form the reason of this law; *Lawson*, *supra*.

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Respondent's Pleas.

The Lord Ordinary pronounced the following interlocutor and note:

'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, repels the reasons of advocacy, remits the cause simpliciter to the Sheriff, and decerns: Finds expenses due.'

Lord Ordinary's Interlocutor.

Note.—'This case is not free from difficulty; but the Lord Ordinary, after carefully considering all the points, and examining the adjudged cases, thinks that the claim of the respondents, as modified by the Sheriff's interlocutor, is a just claim of preference, and that there is not any incompetency in the form of the proceeding.'

Note.

'1. There is some appearance of difficulty in the form of the procedure, in so far as the interlocutor of the Sheriff of 17th October 1832 was not reclaimed against, and was never recalled. It was a mistake to pronounce that interlocutor without first disposing of the respondent's claim, which had been lodged on the 10th October. But, (1.) no objection to the form of the subsequent proceedings was taken in the inferior court; and, (2.) the Lord Ordinary is inclined to think that, from the peculiar nature of the

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—
Note.

‘ process, it was not essential that that interlocutor should be recalled.
‘ The fund was still in manibus curiæ, and the respondent’s claim,
‘ if just, was properly a burden on the advocator’s right, as the land-
‘ lord, sequestrating. It rather appears, indeed, from the report of
‘ the case, *Rowan v. Barr*, June 29. 1742, *Kilherran*, p. 138,
‘ *Mor.* 11,852, that the creditor funerarius was found entitled to
‘ reclaim the money from the landlord sequestrating, even after it
‘ had been actually paid to him. At the same time the Lordordi-
‘ nary doubts whether it would be of any avail to the respondent,
‘ though his objection was sustained. Some more extensive form
‘ of doing justice must be found; and, as the respondent did not
‘ state the point in the inferior court, he could not be relieved of
‘ expenses. Indeed the point is not even stated in this record, the
‘ 6th plea for the advocator being directed to a different question,
‘ in which he has mistaken the facts.

‘ 1. The Lord Ordinary thinks, that according to the decisions,
‘ though none of them are exactly the same with this, the medical
‘ attendant has a preference for the deathbed charges. By *Peter*
‘ *v. Monro*, July 26. 1749, the surgeon was preferred *pari passu*
‘ with the creditor funerarius; and by *Rowan v. Barr*, June 29.
‘ 1742, the creditor funerarius was preferred to the landlord.

‘ 3. Some doubt was founded on the fact, that the sequestration
‘ was raised in the lifetime of the deceased. But it was merely
‘ raised; no warrant of sequestration ever had been given; and before
‘ the order for payment was pronounced, the respondent’s claim was
‘ lodged. The advocator has mistaken this fact in his 6th plea in
‘ law. The claim was lodged on the 10th October, and the inter-
‘ locutor ordering payment was not till the 17th October. But in
‘ the case of *Robertson v. Jardine*, July 6. 1802, it was substan-
‘ tially found, in a question with the Crown, that the debtor was
‘ not divested, or judgment for execution given by the proceedings
‘ in a sequestration, till an order for payment was made. And the
‘ case of *Rowan* seems to go even farther than this in regard to
‘ other privileged creditors.

‘ 4. As to the extent of the preferable claim, the Lord Ordinary
‘ thinks, that it is for the fair attendance and furnishings during the
‘ illness terminating in death; that it is not confined to the sixty days
‘ before death; but it is impossible to define, by any rigid rule, the
‘ utmost period to which it may be extended, and that in this case,
‘ the claim, as restricted by the Sheriff to about one-half of the
‘ charge, is, in the circumstances, fair and reasonable.’

Drysdale having *reclaimed*, *Monteith* argued, That the Lordordi-
nary’s note, Art. 3, proceeded upon mistake in point of fact. Ken-

nedy's claim was not lodged till the 10th of October, while the order for payment to Drysdale was granted on the 3d October. The case was therefore to be adjudged on a different state of the fact from that assumed by the Lord Ordinary. In the case of Robertson, the party was held to be divested by the order for payment. On the merits: the case of Rowan was not the case of a creditor medicus, but of a creditor funerarius. There had been no case as betwixt landlord and doctor. Erskine, iii. 9. 43, places all these creditors in the same category, and refers to the case of Dunipace. Here the respondent can found only on the case of Rowan, for there was no competition in Peter's case, which occurred with general creditors. Here sequestration was followed out before claimant appeared. Could money be taken from the pocket of the landlord after payment? He referred to the case of Lawson, to shew, from the opinions of the Judges, that the medical expenses were confined to deathbed charges.

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Rutherford, in answer, argued, That as the creditor funerarius and the creditor medicus were admitted to be on the same footing,—it having been so decided;—and it having been also found that the creditor funerarius was preferable to the landlord, it necessarily followed that the creditor medicus, by being held entitled to rank *pari passu* with the creditor funerarius, was also preferable to the landlord.

The Court was of opinion that the interlocutor was well founded, that the Sheriff had taken the proper course to fix the proper amount of the surgeon's charge, which had been reduced to a half: And farther, that the opinions in the case of Lawson shewed that the claim for attendance, by a medical practitioner, was not to be restricted to sixty days, but depended on circumstances, and left the question entirely discretionary.

Opinion of
Court.

The Court adhered, and found additional expenses.

Judgment.

Lord Ordinary, *Moncreiff*.
Rutherford and *Monro*.
Burness, S.S.C. Agents.

Act. *Dean of Fac. (Hope)* and *Monteith*. Alt.
J. Mowbray & A. Howden, W. S. and James
R. Clerk.

R.

SECOND DIVISION.

No. XLII.

16th December 1835.

JAMES, MARQUIS OF ABERCORN, AND
 COMMISSIONER,
against
 JOHN GRIEVE, SCOTT'S TRUSTEE.

SUPERIOR AND VASSAL.—TRUST.—Circumstances in which the voluntary trustee of a vassal was held to have adopted certain feu-rights, and was found liable, qua trustee, for subsequent feu-duties, and other prestations of a feu-contract entered into by the superior with the trustee's author.

Narrative.

THE question betwixt these parties was, whether there were sufficient grounds for holding that Mr Grieve, as trustee for the creditors of Mr James Scott, late merchant in Leith, had adopted certain feus belonging to his author, Mr Scott, which were held of the Marquis of Abercorn as superior. The alleged acts of adoption of the feus are fully stated in the interlocutor of the Lord Ordinary, adhered to by the Court; and the principles and authorities upon which the trustee was held to have adopted the feus are stated in the relative note issued by his Lordship.

The summons concluded, that 'the said John Grieve, defender, 'is liable in payment to the pursuer of the whole arrears of feu-duty payable out of the eleven lots of ground above described,' with interest from the date of citation; and also is bound and obliged to build a house or houses upon each of the said five lots of the town-park, of sufficient value to be a full and ample security for the feu-duty payable thereupon; 2dly, That the defenders should be ordained to pay the feu-duty past due; and, 3dly, That he ought to be ordained to build, within such reasonable and short period as our said Lords may think proper, a house or houses upon each of the said five lots of the town-park, of sufficient value to be a full and ample security for the feu-duty payable thereupon.

The interlocutor of the Lord Ordinary was in these terms:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and made avisandum, Finds it 'admitted that James Scott, the defender's author and constituent, 'stood infest on the eleven feu-charters recited in the summons: 'Finds it admitted, under the 11th article of the condescendence, 'that the said James Scott was in full possession of all the lots of

‘ground comprehended in the said charters, and that the additional ground acquired under the five latest charters was possessed as an addition to the villa previously formed by the name of *Haothornbrae*, and, ‘along with the ground previously feued, ‘was thenceforth known by that name.’ Finds that the disposition executed by the said James Scott, in favour of the present defender, did clearly comprehend the whole grounds so possessed, as well those conveyed by the last five charters, as those conveyed by the six first charters, with reference to the descriptions therein contained: Finds it admitted that the defender accepted of the said disposition, took infeftment on the precept therein expressed, and entered into possession of all the subjects comprehended therein: finds, that by such acceptance, infeftment and possession, the said defender, for himself and the creditors for whom he acts, must be held to have fully adopted, as the assignee of the said James Scott, the feu-contracts established by the said charters in the person of the said James Scott, with all their benefits and burdens: and finds that it is irrelevant, in this question with the superior, to inquire how far the infeftment so taken was in all respects feudally effectual or complete, or not: finds, that the said defender, having so adopted the contracts of feu under which the said James Scott possessed the property in question, is bound to give implement of the conditions and obligations thereof, so far as concluded for in this action, and is not entitled now to refute or reject any part of the subjects of feu included therein against the will of the superior: Therefore repels the defences, and decerns in terms of the libel; reserving to the defender his relief, not only against all the funds of the trust that may be in his possession, but also against all the creditors acceding to the trust, and the said James Scott; and to them their defences as accords; but finds no expenses due.’

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Marquis of
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Lord Ordinary's
Interlocutor.

Note.—‘The Lord Ordinary must now assume it to be fixed law, that a party who holds a subject in feu by feu-charter cannot refute the feu, invito domino; Dec. 16. 1834, *Hunter v. Boog*. Scott, therefore, could not throw back any part of the feus in question on the superior.

‘The Lord Ordinary farther holds it to be a well-settled general rule of law, that where a bankrupt ‘has an interest in *any prospective contract*, the creditors may be called upon, either to undertake his part, or to abandon the contract, leaving his estate exposed to a claim of damages;’ *Bell*, ii. 413. If therefore the defender had merely accepted of a *general* disposition from Scott, the pursuer might have called on him either to undertake the burdens and obligations in the feu-charters, or to abandon the subjects of them; and if he had declared his resolution to adopt the con-

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‘ tracts involved in these charters, and had taken and held for a
‘ length of time possession of the subjects of them, it seems inevi-
‘ tably to follow, that he could not afterwards have refused to im-
‘ plement the obligations imposed by them.

‘ But where, instead of a *general* disposition, the defender has ac-
‘ cepted of a *special* disposition, which, by the description of the
‘ subjects, with reference to the two plans by *Paterson* as to the *first*
‘ *six* feus, and by *Leslie* as to the subsequent *five* feus, and, as ad-
‘ mitted on the record, did certainly comprehend all the eleven par-
‘ cels, and has taken infestment on that disposition, and during a
‘ long period exercised all acts of possession, the Lord Ordinary
‘ must be of opinion, that he effectually made his choice, and can-
‘ not now throw any part of the feus back on the superior. The
‘ cases decided in regard to leases settle the general principle as to
‘ the effect of a trustee for creditors taking up the real property of
‘ the bankrupt, involving onerous obligations to third parties; *Cuthil*
‘ *v. Jeffrey*, Nov. 21. 1818; &c. But the case of *Kirkland* and
‘ *Sharpe v. Gibson*, May 17. 1831, is directly in point as to feu-
‘ rights; and the Lord Ordinary must consider the case of *Mitchell’s*
‘ *Trustees v. Pearson*, &c. Jan. 23. 1834, as having been decided
‘ on its special circumstances, and not at all as intended to alter or
‘ depart from the principle held in the case of *Kirkland*.

‘ It farther appears very clear to the Lord Ordinary, that it is
‘ nothing at all to the purpose in such a question to say, that in
‘ strict feudal correctness the defender’s sasine might be liable to
‘ objections in the form of it. The question is, whether he intend-
‘ ed to take up the whole rights in the bankrupt, and did take full
‘ possession on the title by infestment, which he deemed sufficient?
‘ For any other purpose, if the title was defective, he could have got
‘ it perfected at any time.

‘ If the defences are not good, the Lord Ordinary sees no other
‘ course but to give decree in terms of the libel, with a full reser-
‘ vation of the defender’s relief. If he has funds of the trust, no
‘ matter whether derived from this property or not, they must be
‘ answerable. If he has not funds, or has parted with what he had,
‘ every creditor acceding must, according to the Lord Ordinary’s
‘ present opinion, be liable in relief; and, in general, he can see
‘ no cause for doubting that he will make his relief effectual. But,
‘ at any rate, he thinks that the right of the superior cannot be pre-
‘ judiced by any question of that kind.

‘ There is no question of interest involved, the summons only
‘ concluding for interest from the date of citation.’

The defender *reclaimed* on the merits, as did also the pursuers
against the finding of no expenses.

Dean of Fac. for the pursuers, stated, that they had no intention to force the defender to build at any period inconveniently early. 16 Dec. 1835.

Marquis of
Abercorn, &c.
v. Grieve.

Opinion of
Court.

Lord Justice-Clerk.—I can have no doubt as to the soundness of the interlocutor in its general result, more especially as it has now been stated from the bar, that the pursuers have no intention of forcing this party to build at any period inconveniently early, nor in any manner otherwise than may be sufficient to secure the Marquis in payment of the feu-duties. Here the trustee accepts, and had in his person a right to these feus, drew the rents, attempted to sell; indeed, does every thing indicative of possession and adoption of the feu-rights. The cases referred to are conclusive, and were decided upon the principle, *quo animo* did the party interfere. In the case of Pearson especially, we held that Mr Kincaid Mackenzie, the trustee, had done nothing to shew his acceptance, nor declared his intention to possess the feu-right for the creditors. We were satisfied that he never formally accepted. But here there are distinct acts of taking possession, and adoption of the feu-rights.

Lord Glenlee concurred. Grieve is liable in all that could have been demanded of Scott himself. The superior has a right by a personal action to recover the feu-duties, and the defender is liable personally, *qua* trustee. I thought in Pearson's case that there was not the least evidence or pretence for saying that Kincaid Mackenzie ever did any thing to adopt the feu, or to make himself liable to be forced to fulfil the contract. Here, however, the *species facti* to be gathered from the record lead me to a precisely opposite conclusion in this case, and I incline to hold that the interlocutor is upon the whole correct. There is no harm in agreeing to it as it stands.

Lord Medwyn.—I entirely concur. In looking to the conclusions of the summons, we must take into view the declared intention of the superior, not to force the defender to proceed to erect buildings at any inconvenient period; and if the time could be now fixed, at the expiry of which the defender should be obliged to build, there can be no objection to this part of the interlocutor.

Upon the merits: the case may no doubt be important to the parties, but not so to the law, considering that the cases referred to clearly settle the principle applicable to circumstances such as occurred in the present case. There was possession,—drawing rents,—an attempt to sell,—and infestment taken, which, though it might not have been good with a third party, affords at least sufficient indication of the pursuer's intention to get possession, and that he did get possession. In Kirkland's case there was infestment, and something indicative of intention to come into the right of the

16 Dec. 1835. *vassal.* In short, if Grieve intended to put himself in Scott's place, he necessarily incurred the same responsibilities. The circumstance of there not having been a sequestration of Scott's estate makes the case stronger against Grieve; for by voluntarily undertaking and acting under Scott's mandate, and taking possession, he gave the clearest indication of his intention to adopt the feu-rights.

Marquis of
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Opinion of
Court.

Lord Meadowbank concurred.

Judgment.

The *Court* pronounced this interlocutor: 'The Lords having considered this note, with the other proceedings, and heard counsel thereon, and having also considered the reclaiming note for the pursuers, on the question of expenses, adhere to the interlocutor on the merits, and refuse the note for the defenders; but find the pursuers entitled to expenses; and remit to the Lord Ordinary to proceed accordingly, and also to receive a minute for the pursuer, stating within what period he craves decree for building a house or houses on the premises in question *.'

Lord Ordinary, *Moncreiff*. Act. *Dean of Fac. (Hope,)* and *Marshall*. Alt. *Forsyth* and *Pyper*. J. & C. *Nairne*, W.S. and *Andrew Grieve*, W.S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. XLIII.

16th December 1835.

DONALD SMITH, MANAGER OF THE WESTERN BANK OF
SCOTLAND,
against
WILLIAM MITCHELL.

JURISDICTION.—NOBILE OFFICIUM.—*The pursuer in an action for damages having, during the dependence of the action, printed, and not having taken due means to prevent the distribution of a statement alleged by the defender to be false and injurious, and likely to create a prejudice against him in the depending action, and some of the copies of the statement having got into circulation, the Court, on a petition and complaint by the defender, ordained, 1st, That the copies of the statement should be sealed up, and their fur-*

* The cause was enrolled before the Lord Ordinary, who pronounced this farther interlocutor: 'Having considered the foregoing minute for the pursuers, and heard counsel for the parties, finds, That the defender is bound to implement the conclusions of the summons as to building within five years, and decerns accordingly; and, in terms of the interlocutor of the Inner-House, finds the pursuers entitled to expenses,' &c.

their circulation interdicted ; and, 2d, The record having been completed, the whole copies were ordered to be destroyed, and the defender found liable in expenses.

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Smith v. Mitchell.

SEQUEL of the case, John Miller, petitioner and complainer, reported vol. x, p. 416, 7th March 1835. A record was made up, in which the circulation of some copies of the statement was admitted to have been done unintentionally.

The Court ‘sustain the complaint ; ordain all the copies of the Judgment. ‘ memorial in question now remaining under seal to be destroyed, at ‘ the sight of the agents for the parties, and decern ; find, in the ‘ circumstances, that it is unnecessary any censure, further than to ‘ subject the respondent in the payment of the expenses of process.’

Lord Ordinary, Cockburn.
Respondents, Penney.
Agents. T. Clerk.

For Complainer. P. Robertson and Wm. Bell. For
Graham & Anderson, W. S. and James J. Smith, S.S.C.

R.

FIRST DIVISION.

No. XLIV.

17th December 1835.

ALEXANDER FRASER AND MANDATARY

against

JOHN FRASER'S TRUSTEES.

MARRIAGE-CONTRACT.—CONSTRUCTION.—*Words in a marriage-contract held not to import a general conveyance by the husband to the children, but to limit the conveyance to a specific sum therein mentioned.*

By contract of marriage (1771) between John Fraser and Margaret Bowie, he bound and obliged ‘ him, his heirs and successors, ‘ to ware out and bestow, employ and secure upon land, annualrent, ‘ or other sufficient security, the sum of L.500 sterling money of ‘ his own proper means and effects, with the sum of L.500 money ‘ foresaid, being the tocher under written, extending in hail to the ‘ sum of L.1000 sterling, to and in favours of himself and the said ‘ Margaret Bowie, his future spouse, and longest liver of them two, ‘ in conjunct fee and liferent, for the said Margaret Bowie, her life-

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Fraser and
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Fraser's Trus-
tees.

Narrative.

rent use alienably, and to the children to be procreated betwixt him and her in fee; and how oft the said sum of L.1000, money foresaid, or any part thereof, shall happen to be uplifted, the said John Fraser binds and obliges himself to employ and secure the same of new again, in the terms above specified.' There was then an obligation to pay to Margaret Bowie, in case of survivance, L.50 sterling, as the yearly annualrent effeiring and corresponding to the said principal sum of L.1000, or such an yearly annualrent as by the law for the time shall effeir and correspond thereto.' This obligation was followed by a clause in these terms: 'And sicklike, the said John Fraser hereby disposes and assigns to the said Margaret Bowie, his future spouse, under the conditions and provisions after mentioned, in case she survive him, all goods, gear, debts, sums of money, both heritable and moveable, household plenishing, heirship moveables included, and others whatsoever pertaining or belonging to him, or that shall happen to be resting to him at the time of his death, or that shall fall under his executry. And in case his said future spouse shall survive him, he hereby nominates her his sole executrix and universal legatrix.' There was then a provision that Margaret Bowie should maintain and educate the children, after which the clauses following: 'And it is hereby provided and declared, that the aforesaid sum of L.1000 sterling, or whatever the said John Fraser shall die possessed of, shall be divided among the said children, in such proportions, and at whatever time the said Margaret Bowie shall think proper. And it is further provided and declared, that in case the said John Fraser shall happen to survive his said spouse, and that there be a child or children existing of the marriage at the time, and that he marry a second wife, the foresaid sum of L.1000 shall not be affectable with the debts or deeds of the said John Fraser, but shall wholly belong to the children of this marriage; and he hereby binds and obliges himself to lay out the interest of the aforesaid sum upon their maintenance and education. In like manner it is also provided, that in case the said Margaret Bowie shall happen to survive her future husband, and shall marry again, in that case her jointure of L.50 sterling, provided by this contract, is hereby restricted to the sum of L.25 sterling yearly, and that only in full of all she can ask or claim in virtue of this contract, unless there be no children existing of this marriage at the time of her marrying a second husband, then and in that case she shall be entitled to the whole household furniture. And it is hereby declared, that in case the said Margaret Bowie shall marry a second husband, she shall forfeit all right or title to the management or division of the means and effects of the said John

'Fraser, her husband : Excepting only, that in case there be no children existing of this marriage at the dissolution thereof, then and in that event the said Margaret Bowie shall have full power and liberty to convey and dispoise to Robert Bowie, her brother-german, or his heirs, or to Jean Fraser, sister to the said John Fraser, or to the heirs whatsoever of the said John Fraser, the one or other of them, as shall appear to her most deserving, all the means and effects, both heritable and moveable, that shall happen to appertain and belong to the said John Fraser at the time of his death.' These clauses were followed by a conveyance by the wife of the tocher of L.500 to the husband, and also a conveyance to him of all debts, goods, gear, heritable and moveable, resting and belonging to her at the time of her decease. Margaret Bowie died in 1801, leaving three children, Alexander, (the pursuer,) John, (who died in 1811,) and Jean, now Mrs Hogg. John Fraser, the father, died in 1827, having executed a trust-settlement of his whole means and estate, heritable and moveable, (which were considerable,) in favour of the defenders, for the benefit of the children of Mrs Hogg.

17 Dec. 1835.

Fraser and
Mandatory v.
Fraser's
Trustees.

—
Narrative.

The pursuer raised an action of declarator and reduction, containing various conclusions, to which it is unnecessary to advert. According to the respective pleas and admissions of the parties, the only question under consideration was simply, whether the contract of marriage imported (as contended for by the pursuer) a general conveyance of the whole means and estate acquired and to be acquired by John Fraser during his life to the children of the marriage, or whether (as contended for by the defenders) there was no farther right whatever conferred by that contract, in the case of John Fraser surviving his wife, upon the children, beyond a mere spes successionis in a sum of L.1000 at John Fraser's death, except in the event of his entering into a second marriage.

The contract made no provision as to legitim, and the defender did not dispute the pursuer's claim to it.

The Lord Ordinary ordered cases, and made avisandum therewith to the Court.

Lord Balgray.—I never saw a clearer case. Here was an antenuptial contract of marriage, and the parties were entitled to enter into any conditions and provisions they chose. I can make no more of the matter than that. The original obligation was to stock out this L.1000, in the same way as is done in all contracts. I never saw a contract between parties similarly situated drawn in any other terms. Then, on the death of either, the survivor is to enjoy the whole the other shall die possessed of, excepting this L.1000, which

Opinion of
Court.

17 Dec. 1835. is to be liferented by the wife if she survives; and if the husband survives, the L.1000 is to become vested in the children in case he shall marry a second wife. It is all fair and correct out and out.

Fraser and
Mandatory v.
Fraser's Trustees.

Lord President.—I am of the same opinion.

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Court.

Lord Mackenzie.—I am of the same opinion. All has been made of the matter by the pursuer that can be made of it; but his argument just comes to this, that there is an attempt to construe the deed to serve his purpose, without any expression to warrant such a construction. It is contended that the children are to have a right to the whole fortune of their father, not merely what he was possessed of at the time of the contract, but all his acquisitions till his death; and yet there is not one syllable to this effect from beginning to end of the contract. Something is said about the wife's fortune creating reciprocity: there is not even the appearance of reciprocity. There is not the least shadow of authority for such a construction as that which is contended for.

Lord Gillies.—There is not one word in the contract to warrant the pursuer's construction; but more than that, even the L.1000 is only absolutely secured to the children if he married a second time. Any thing further is left entirely to his natural affection. It might naturally have been supposed he would leave the whole of his fortune among his children; but there was a mistake as to that: he has not done so; and if he has disappointed one of them unreasonably, there is no help for that.

Judgment.

The Court then pronounced this interlocutor: 'The Lords having considered the cases for the parties, and heard their counsel, find, that under the contract of marriage betwixt the deceased John Fraser and his wife, the pursuer is only entitled to a share of the special provision of L.1000 therein mentioned, and find that he is also entitled to his legitim; and with these findings, remit to the Lord Ordinary to apply the same, and to dispose of what remains of the cause, and of all question and claims of expenses, as shall appear to him to be just.'

Lord Ordinary, Cockburn. Act. Shaw. Alt. Christison, John Cullen, W.S.
Pursuer's Agent. E. & A. M'Millan, W.S. Defenders' Agents. D. Clerk.
C.

SECOND DIVISION.

No. XLV.

19th December 1835.

PETER GAVIN AND SON
against
JOHN STALKER.

PROCESS.—JURISDICTION.—STAT. 11. GEO. IV. & 1. WILL. IV. c. 69, § 40.—*A party having raised an action before the Court of Session against the owner, ship's-husband and agent of a vessel, for repairs, furnishings and painting, and the summons having been signed, passed the signet, paid fee-fund dues, and been called as an ordinary action,—found, that it was a maritime cause, and that the action must be dismissed, in respect the regulations of 11. Geo. IV. and 1. Will. IV. c. 69, § 40, had not been observed.*

GAVIN AND SON raised a summons, setting forth, that in 1835, *Narrative.* 'they were employed by Turner, master of the Maid of Islay steam-boat, then lying at Leith and Newhaven, and now on the passage between Newhaven and Dundee, and by Sword, ship-agent at Leith, then acting as agent or ship's-husband for the said steam-boat, to make repairs and furnishings to and painting upon the said vessel: That these repairs and furnishings and painting so made, upon the orders and authority of Turner and Sword, amounted to L.43:11:2: That John Stalker was, at the time when the repairs, furnishings and painting were so ordered and made, the owner or joint-owner of the vessel, or was otherwise the constituent of Turner and Sword, and as such liable;' and concluding against Stalker, Turner and Sword for the amount.

The summons was signed, passed the signet, was executed, and called as an ordinary (mercantile) cause in the Court of Session.

The defenders pleaded, as a preliminary defence, that this being a maritime cause, the action ought to be dismissed, in respect it had not been brought into Court conform to the regulations of 11. Geo. IV. and 1. Will. IV. c. 69, § 40, the summons not having been subscribed by a Clerk of Session, having passed the signet and paid fee fund-dues, and more especially as, by the mode adopted, the defenders had been excluded from the privilege of caution provided by § 23. of the 1. Will. IV.

The Lord Ordinary having heard parties, appointed them to lodge

19 Dec. 1835. a note of authorities relied on by them, and thereafter reported the cause to the Court.

Gavin and
Son v. Stalker.

— The pursuer cited—

Pursuer's
Note of
Authorities. 1st, ACTS OF PARLIAMENT.—1681, c. 16; 1. and 2. Geo. IV.
c. 39, § 1.

2d, INSTITUTIONAL WRITERS.—Bank. 4. 12. § 4; Erskine,
(Ivory,) 1. 3. § 33, 34, and note; 1. Bell, 497.

3d, MISCELLANEOUS WRITERS.—Smith's Maritime Practice,
cap. 4. p. 19; Kames's Law Tracts, p. 233.

4th, DECISIONS.—See Ivory's note, ut supra.

5th, DICTA OF JUDGES.—See Campbell, 8th July 1765, M. 7360;
Stephen, 10th Feb. 1761, M. 7515; Kennedy, 28th June 1705,
M. 7508; Graham, 28th March 1807, M. 7510; Ritchie, 5th July
1780, M. 7529.

6th, CASES SHEWING PRACTICE OF COURT OF SESSION.—Men-
zies and Goalen v. Kerr, 22d Feb. 1805, 1. Bell, 521; Ogilvy v.
Brown, 1. Jan. 1805; Stewart v. Hall, 10th Nov. 1813, 2. Dow, 29.

The defenders cited—

Defenders'
Note of
Authorities.

Stat. 1681, c. 16; 1. and 2. Geo. IV. c. 39, § 1; 1. Ersk. 3. 38;
1. Bell, 496, 622; Bell's Principles, p. 107; Balfour's Practices,
p. 680; Boyd's Judicial Proceedings, p. 8, &c.; 2. Hume on Crimes,
85; Cases of Campbell, Stephen, Kennedy; Clark v. Robertson,
8th Aug. 1783, M. 7532; Balderston v. Galloway, 14th Feb. 1798,
M. 7535; Menzies and Goalen, and M'Kinnon v. M'Leod, 9th July
1828, (6. Shaw, 1108); see Judges' Speeches in that case.

Lord Jeffrey reported the case.

Judgment.

After hearing counsel, the Court, unanimously considering that
the cause was of a maritime nature, held that the Lord Ordinary
must dismiss the action, as improperly brought, and that they could
not now sanction the signing of this summons by a Clerk of Session,
with the view of remedying the non-compliance with the requisites
of the statute.

Their Lordships considered that the case of M'Kinnon v. M'Leod
applied.

Lord Ordinary, *Jeffrey*.
(*Hope*,) and *More*.
T. Clerk.

Act. Sol-Gen. (*Cunninghame*.)
L. M. Macara, W.S. and *S. Beveridge*, Solicitor, Agents.

Alt. Deon of Fac.

R.

SECOND DIVISION.

No. XLVI.

19th December 1835.

GEORGE TULLOCH

against

LADY WILLOUGHBY D'ERESBY AND HUSBAND.

COMPETITION.—POINDING.—LANDLORD AND TENANT.—Sequel of the case reported in *F. C.*, 19th June 1834, vol. ix. The cause having been remitted to Lord Moncreiff, in terms of the interlocutor of the Court of the above date, his Lordship pronounced the following interlocutor, adding a note :

‘ The Lord Ordinary, to whom this case has been specially remitted, having again considered the closed record, with the interlocutor of the Court, and heard parties’ procurators thereon, and made avisandum, finds, that the defenders had a right of preference for the current rent, and so far sustains the defences, and assoilzies the defenders, and decerns : finds of new, in terms of the interlocutor of the Court, that the defenders have no preference for arrears of rent, and reduces the decree under challenge, in so far as it sustains any such claim of preference for arrears, and decerns accordingly ; and, further, in respect of the said interlocutor of the Court, finds that the defenders are entirely excluded from any claim whatever for the arrears of rent in competition with the pursuer as a poinding creditor ; reduces, decerns and declares to this effect ; finds expenses due to the pursuer, and remits the account, when lodged, to the Auditor to be taxed.’

Note.—‘ The Lord Ordinary fears he does not fully understand the principles of the judgment of the Court in this case. He cannot see his way clearly through the judgments in this case, and in those of *Tullis v. White*, June 18. 1817 ; *Samson v. M’Govan*, May 15. 1822 ; *Campbell’s Trustees v. Paul*, Jan. 13. 1835.—(See especially Lord Balgray’s opinion.) But it appears to him, that if the landlady, in this case, has no preference by her proceedings, she is entirely excluded in regard to the arrears, by the pursuer’s poinding, because he cannot see any case in the record for raising the *pari passu* preference of the bankrupt statutes. Objections to the validity of the defender’s poinding are out of the question, on the judgment of the Court. But he can discover no case of bankruptcy under the statutes to admit the *pari passu* preference.

19 Dec. 1835. ‘As the pursuer substantially prevails by this judgment and that
 Tulloch v. of the Court, he is entitled to expenses, if the case ends on this
 D'Eresby and ‘interlocutor.’
 Husband.

Lady Willoughby and husband *reclaimed* against the interlocutor, chiefly on the ground of expenses having been found due.

Judgment. The Court adhered, in so far as to find expenses due to the pursuer, subject to modification.

Lord Ordinary, Moncreiff. Act. Dean of Fac. (Hope.) Alt. Rutherford and
 G. Dundas. Brown & Miller, W. S. and Dundas & Wilson, C. S. Agents.
 R.

SECOND DIVISION.

No. XLVII.

19th December 1835.

WILLIAM DEMPSTER *against* WILLIAM POTTS.

MANDATARY.—PROCESS.—*Special circumstances in which it was found that the pursuer of an action, a Scotchman, and proprietor of a landed estate in Scotland, who had gone abroad, was bound to sist a mandatory.*

Narrative. WILLIAM DEMPSTER, proprietor of the lands of Mossend Green, the annual rental of which was L.105, raised a reduction of certain bonds and bills granted during minority to the defender, William Potts, as having been granted to his lesion, and obtained through fraud and misrepresentation. Potts having also raised against Dempster an action of maills and duties, and an ordinary action upon one of the bills, executed inhibition against the pursuer.

Procedure was sisted in the maills and duties, and consignment of the rents ordered. Issues were prepared in the reduction, and the cause put down for trial during the ensuing Christmas recess.

Defender's Statement. The defender moved the Court, in November, to ordain the pursuer to sist a mandatory, in respect that he had gone to America, after having deserted, in April 1834, from the Second Regiment of Life Guards, in which he had enlisted in April 1833; that besides the obligations to the defender, the property of the pursuer

had been conveyed, by a disposition *ex facie* absolute, to Mr Graham, in security of other debts; and that, in these circumstances, the heritable property of the pursuer afforded an inadequate security to the defender for payment of the expenses; and that, in terms of the decided cases, a mandatory ought to be sisted.

19 Dec. 1835.
Dempster v.
Potts.

The pursuer, in *answer*, denied the fact of desertion and absence in America *animo remanendi*, and stated that the rents consigned were more than double the interest of the heritable debt—and payment to the defender was further secured by his inhibition; that it had been already found by the Lord Ordinary, that the disposition to Mr Graham was in fact merely a security for debts contracted, or to be contracted, and quoad ultra a trust for the grantee, and that Mr Graham had granted a back-bond declaratory of the limited nature of his title; and he relied on the general rule of law, that a pursuer, an heritable proprietor, when abroad without any *animus remanendi*, is not bound to sist a mandatory.

Pursuer's
Statement.

The Court ordered mutual minutes, containing the authorities relied on by the parties respectively.

It was argued for the pursuer, that while the fact of desertion could not now be disputed, yet that he had remained in this country a considerable time after the alleged act of desertion, and had gone to visit relations in America; that the security was perfectly adequate; and that a Scotchman, proprietor of lands in Scotland, does not require a mandatory while abroad; 1. *Darling*, p. 98, and cases there cited, particularly *Earl of Marchmont*, 7th June 1716, (358); *Smith v. Norval*, 24th May 1828, (6. *Sh.* 852); *Kid v. Ferguson and Walker*, 11th March 1826, (4. *Sh.* 549); *Johnstone v. Jendwine*, 23d Jan. 1813, *F. C.*; *Ewing v. Hare and Glasgow*, 28th Nov. 1823, (2. *Sh.* new ed., 467); *Lockhart v. Ferrier and M'Neil*, 22d Dec. 1832, (11. *Sh.* 236).

Pursuer's
Pleas.

The defender founded on the special circumstances as sufficient in this case to render a mandatory for the pursuer necessary. As to the general rule, he founded on *Ersk.* iii. 3. 33; *Bank.* iv. 3. 25, 26; *Stuart*, 3d Feb. 1681, (353); *Hope v. Mutter*, 10th June 1797, (4646); *Dundas v. Ferguson*, 20th July 1780, (8837); *Davidson v. Elphinstone*, 6th July 1802, (8842); *M'Innes v. M'Call*, 3d June 1813, (*F. C.*); *M'Call v. Campbell*, 17th Jan. 1822, (1. *Sh.* 249); *Shaw, Digest, v. Mandatory*; *Smith v. Countess of Strathmore*, 31st May 1828, (6. *Shaw*, 903); *Stalker v. Railton*, 12th Feb. 1831, (9. *Sh.* 434); *M'Neil v. Lockhart*, 10th July 1832, (10. *Sh.* 806); that the pursuer was in the same situation as a party absent *animo re-*

Defender's
Pleas.

19 Dec. 1835. *Dempster v. Potts.* manendi. Being a deserter from his Majesty's service, he is liable, under the Mutiny Act, (5. Gul. IV. cap. 5, § 11, 22,) to such punishment as a court-martial may inflict, and to be branded on his side with the letter D.

Judgment. The *Court*, in respect of the special circumstances of this case, found that it was necessary that the pursuer should sist a responsible mandatory.

Lord Ordinary, *Moncreiff.* Act. *H. J. Robertson.* Alt. *Sandford.* *H. Graham,*
W. S. and *A. M. Anderson,* Solicitor, Agents. *Mr Russell,* Clerk.

R.

FIRST DIVISION.

No. XLIX.

14th January 1836.

WILLIAM THOM
against
 THOMAS GRAHAME.

PROCESS—(JURY TRIAL.)—EXPENSES.—IN this case, see ante, Narrative. vol. x. App. J. S. p. 50, an objection was made to the Auditor's report, to the effect that the expenses of six of the witnesses for the pursuer, as admitted by the Auditor, should be disallowed. The pursuer had nine witnesses in readiness to prove the expressions used; and when the third witness was examined, the defender intimated that he did not intend to lead evidence, which stopped the farther examination of the pursuer. The ground of objection was, that if the pursuer could prove his case, so as regarded evidence, by three witnesses, he should not have brought nine. To this it was answered, that the nine might have been necessary if the defender had led evidence. The Court repelled the objection.

Judgment.

Rutherford, for the Objector.
 former report.

Dean of Fac. (Hope,) contra.

Agents as in former report.

R.

SECOND DIVISION.

No. L.

14th January 1836.

JAMES MASON
against
 REV. E. CRAIG AND OTHERS, (SCOTT'S TRUSTEES.)

SCHOOLMASTER.—TRUST.—IMPLIED CONTRACT.—HOMOLOGATION.—*Circumstances in which it was found, (1.) That the managers of an Episcopal school, instituted by private trust, were entitled to dismiss the teacher without any cause shewn. (2.) That an appointment 'at £.60 per annum permanent,' did not import permanency in reference to endurance of the appointment, but merely as to*

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the amount of salary. (3.) That a departure from the terms of a schoolmaster's engagement was acquiesced in, and homologated by him.

COLONEL SCOTT, by codicil to his trust-disposition, bequeathed to trustees L.2000 sterling, 'for the maintenance of an Episcopal school or schools in inseparable connection with the Episcopal chapel, commonly called or to be called St James's Chapel, Broughton Place, Edinburgh, under such regulations as to the number of boys and girls, and as to all the general arrangement of the school or schools, as to the said trustees, or a majority of them, shall seem best.' A school was erected in fulfilment of the trust, and was regularly advertised, until recently, in the Edinburgh Almanack as an 'Episcopal Free School, in connection with St James's Chapel, Broughton Place, founded and endowed for ever by the late Colonel F. J. Scott.'

The situation of master having become vacant, the trustees, at a meeting, held 13th March 1824, authorised the Rev. Edward Craig, one of their number, to make the requisite inquiries as to the qualification of candidates. The minute bears, that 'the emotion for the present may be stated at L.40 yearly of fixed salary, and such very small school fees as shall afterwards be fixed upon, with the farther prospect of the salary being increased as the trust-funds improve, and if the master give satisfaction.'

Under this authority Mr Craig entered into correspondence with the pursuer, who then held the situation, said to be a permanent one, of schoolmaster under the 'National School Society' of England. The pursuer objected (16th July 1824) to the smallness of the salary, but said, that 'could it be made up to L.70, or, at least, L.60 permanent, I think I should be inclined to go to Edinburgh,—with this understanding, that I should be entitled to have 2d. per week from each child, and the necessary expenses occasioned by our removal to Edinburgh allowed.' Mr Craig wrote him, in answer, on the 24th July, 'Since I last wrote you, the trustees of the school held a meeting, and authorised me, as the ultimatum, to offer to any man whom I approved L.60 per annum and the house. There are no other allowances. The 2d. per week may or may not be joined; and the number of children will depend on the activity of the master; so that we do not wish to lay stress upon such a casualty, but to specify the salary at L.60, with a free house.' The pursuer afterwards had a personal conference with Mr Craig, who, on his return, stated the result of his negotiation to a meeting of the trustees, held 26th August. The minutes bear, that 'the salary mentioned to Mr Mason was L.60 per annum in full; but if any small exaction was ever made from

'the scholars, Mr Mason expected he would be allowed to collect 14 Jan. 1836.
'it, as on another occasion he had made it answer well.' The
meeting resolved 'that Mr Mason shall be engaged on the above
'terms; and they requested Mr Craig to write to him to that ef- Mason v.
'fect, and to make a distinct arrangement with him accordingly.' Scott's Trus-
tees.
Mr Craig, in consequence, wrote the pursuer on the 26th August Narrative.
and 10th September, informing him of the resolution of the meet-
ing, and stating the terms 'to be a free house and L.60 per an-
'num, according to our former conversation.' The pursuer ac-
cepted the situation, 'at the salary stated in your letter of the 26th
'ultimo, in the hope and expectation of an increase, as circum-
'stances will permit.'

The pursuer accordingly resigned his English situation, and com-
menced his duties at Edinburgh on the 1st November 1824. A
meeting of trustees was held on the 13th of the same month, at which
it was resolved, inter alia, 'That each scholar should, for his educa-
'tion, and with the view of securing attendance, pay 1d. per week and
'½d. for necessary school articles, making in whole 6d. per month,
'which should be collected by the master, and accounted for to the
'trustees, as in the present limited state of the funds of the charity
'the said fees cannot be allowed to the master, but must be applied
'to the other necessary purposes of the establishment.' The pur-
suer complained of this arrangement, in a letter to the secretary of
the school committee, dated 26th May 1825, which was laid before
a meeting of committee on the 27th, and the minutes bear, that
'the meeting, while they expressed themselves perfectly satisfied
'with the manner in which Mr Mason had hitherto conducted the
'school, were of opinion that both the committee and Mr Mason
'were bound to the trustees of the school for one year, from No-
'vember last, in terms of the agreement that had been entered
'into, and consequently declined to interfere in the matter till that
'period should have expired.' The minute bears that this resolu-
tion was communicated to the pursuer, and at the commencement
of the next year his salary was raised to L.80. He continued to
account to the trustees for the pence levied from the children.

The house allotted to the pursuer having fallen into disrepair,
he left it on the 3d December 1829, after complaining of its con-
dition to the trustees; and the school committee, by a minute, dated
2d February 1831, agreed to pay the rent of the house the pursuer
had removed to, until the school-house should have undergone a
thorough repair. The repairs, according to the pursuer's averment,
were not completed before his dismissal.

The trustees having become dissatisfied with the manner in
which the school was conducted, announced to the pursuer, at a

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meeting on the 16th December 1831, that they had resolved to shut up the school at Whitsunday 1832, and to dismiss him from his situation at that date. No specific reason for this resolution was stated.

Against this proceeding the pursuer presented a bill of suspension and interdict, which, after answers, was refused on the 6th March 1832. The school was accordingly shut up at Whitsunday following, in terms of the previous resolution.

In these circumstances the pursuer raised this action against Colonel Scott's trustees, founding on the correspondence as proving a permanent appointment, and concluding for the arrears of pence collected from the children, for his house-rent already due, and for a continuation of his salary and house-rent, or for corresponding damages.

The Lord Ordinary reported the case to the Court upon cases, accompanied by the following note :

Lord Ord-
inary's Note.

Note.—‘ The material question is, whether, from the nature and terms of the appointment, and the circumstances under which the pursuer was removed from the situation, a claim of damages is competent to the pursuer, simply *on account of that removal*. The summons, and substantially the pleas in law, also assume, that this was an appointment *for life*, and that the pursuer could not be removed unless the defenders should state and prove such a cause of removal as the Court should hold to be sufficient; and the damages concluded for are qualified accordingly as for the *loss of a life office*. The Lord Ordinary has already had occasion, on advising a bill of suspension and answers, to express the opinion which he deliberately formed on this question, so far as it relates to the *power* of the defenders to remove the pursuer; and as his interlocutor was not brought under the review of the Court, he thinks it expedient that the cause should now be reported for the opinion of the Court, without any judgment which might embarrass it on a point so fundamentally involved in it.

‘ He is sensible that the question in this action of damages may be materially different from that which occurred in the application for an interdict. There might be *power* to remove, and yet the power might be so exercised as to raise a claim for damages. But still the Lord Ordinary is decidedly of opinion, 1st, That this was not an office for life; and, 2d, That the managers of a trust like this cannot be called upon to state, or to prove in a court of law, the grounds or reasons on which they acted in the exercise of the discretionary power which he thinks was vested in them. The Court, however, may possibly take a different view, even of these

'points; and as, apparently at least, the pursuer may be thought
'to have been harshly treated, (though there may have been very
'good reasons which cannot be stated,) the Lord Ordinary wishes
'to leave the case to the consideration of the Court, without enter-
'ing farther into the details of the argument.

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—
Note.

'He thinks it right, however, to say, that at present he has an
'impression, that the pursuer has a relevant and probable claim to
'the small sums, or a part of them, which were levied from the
'scholars. It is true that he may seem to have acquiesced in the
'different arrangement made, when it was resolved that these fees
'should be exacted: But the Lord Ordinary doubts much whe-
'ther this is a satisfactory answer, because, by that time, he had
'abandoned his situation in England, and was then in the power of
'the defenders. He says that he had done so, partly in considera-
'tion of the promise conditionally made to him in regard to these
'fees; and the question will be, Whether undue advantage was not
'taken of him to break through the understanding on which he had
'in good faith acted.'

Pleaded for pursuer—I. The appointment was a permanent one, Pursuer's
Pleas.
defeasible only on reasonable grounds. Setting aside parochial
schools as under statutory regulations, there is a wide class of cases
in which the principle of permanency in similar appointments is re-
cognised; Magistrates of *Montrose v. Strachan*, 18th Jan. 1710,
(*Morr.* 13,118); *Hastie v. Campbell*, 29th June 1769, (*Morr.*
13,132); *Kemp v. Magistrates of Irvine*, (*Morr.* 13,136); School-
master of *Dunsyre*, 1777, (*Morr.* 13,137); *Adams*, 1815, (unre-
ported); *Directors of Ayr Academy*, 3d June 1825, (4. *Shaw*, 63).

There are also analogous cases ruled by the same principle;
Foulis v. Vestry of Blackfriars' Wynd Chapel, 10th Nov. 1747,
(*Morr.* 6588); *Harvie v. Bogle and Kirk-Session of Glasgow*,
27th July 1756, (*Morr.* 13,126 and 8017); as contrasted with the
case of *Anderson*, 13th Jan. 1779, (*Morr.* 8017).

According to the principle established by these cases, the pre-
sent, although not a life appointment, was defeasible only on cause
shewn. The rule is founded in expediency and recommended by
experience. The school in question was in its nature more a pub-
lic one than many unequivocally recognised as public. This is not
the ordinary case of a private trust. It was granted for public pur-
poses, and is irrevocable. The trustees are responsible to the pub-
lic for the application of the funds to the purposes of the trust.
Magistrates and Town-Councils have much more ample powers
than the present trustees, in reference to the erection, management
or abolition of public schools; but they have not such a power of

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dismissing the teacher without assigning a reason, as is claimed here. Unless the trustees' power is limited by general principles, they are wholly irresponsible. Usage, or the general understanding of the public, ought to be binding upon them as it is in other cases.

By the terms of his contract also, the pursuer was entitled to believe the appointment permanent. There is no evidence to shew that he was engaged only for a year. But if the fact had been so, and he had been continued by tacit understanding from year to year, the trustees were bound to give him notice, and not to dismiss him, as they did, between terms and without warning.

II. The pursuer was entitled by his original bargain to the small fees levied from the scholars. His apparent acquiescence in the appropriation of these sums by the trustees cannot affect his right. He was in no situation to dispute with them such a deviation from the terms of his bargain, when they had it in their power to injure him to a much greater extent. The increase of salary was what he was led to expect from the terms of his engagement, and he did not accept of it, as in lieu of his right to collect the pence.

III. The pursuer is entitled to his house-rent at least down to Whitsunday 1832. The trustees are expressly bound, by their minute of 2d February 1831, to relieve him of this charge. That the school-house required repairs is proved by the architect's report, 29th January 1831; and it is not denied that it has not since then undergone any repairs.

Defenders'
Pleas.

Pleaded for defenders—I. There is no reason for holding this school, because it was established in connection with the chapel, to be on the footing of a parochial or public school.

II. There is nothing in the original correspondence with the pursuer, or in the circumstances connected with his engagement, which imports a permanent appointment. The trustees are entitled, by the terms of the trust, to manage the school in whatever manner they may think proper. It is a private trust, and is not under the rules applicable to parochial schools, still less under those applicable to the appointments of town-clerks, &c. These are protected, because they are public officers; *Simpson v. Todd*, 17th June 1824. The present case comes under the principle which ruled the case of *Fowlis*, quoted by pursuer. The pursuers intimated their disapproval of the manner in which the school was conducted, and gave ample notice of the consequences which would ensue, if the pursuer should continue to displease them.

III. The claim of house-rent is founded upon the terms of a mi-

nute of the school committee; but the conditions on which they made that offer were not complied with by the pursuer. He left his house without notice, and while it was in a sufficient state of repair, and cannot therefore rest his claim upon any other grounds than the voluntary offer of the committee referred to.

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IV. The small fees were not insured to him by his original contract. He acquiesced, as the minutes bear, in their appropriation to the purposes of the trust; and in consideration of this arrangement, his salary was raised from L.60 to L.80, which he continued to draw until the period of his dismissal.

Lord Justice-Clerk.—I have no difficulty upon two points, viz. Whether this school is to be regarded in the same light as a parochial or public school; or, 2d, Whether the trustees were bound to assign reasons for the dismissal of the teacher. As to the first point I have no difficulty whatever. The school was erected by a private individual, and committed to the management of private trustees. It is in no respect a public school, or such as the Inverness and Ayr Academies. No doubt it is established in connection with St James's Chapel, but there is nothing in the nature of the institution to render it what is called a public school. It is essentially a private institution, and wholly under the management of trustees. The case of the Inverness Academy, which is not reported, was decided upon grounds of great public expediency. The present case is altogether different.

Opinion of
Court.

The next point is equally clear. The question is, was there any covenant of permanency in the appointment? There is no evidence of any such covenant; on the contrary, it appears that Mason, the very first year of his appointment, made application for an increase of salary, and it was then distinctly intimated to him that the appointment was only for a year. Then was the time to assert his claim to a permanent appointment, had he been entitled to do so; but instead of that, he plainly acquiesced in this interpretation of the terms of his engagement. Here was a clear manifestation of the feeling of the trustees at least, as to the nature of the appointment, and it was met by no opposition upon the part of the pursuer. It would have been a very extraordinary appointment indeed, had the trustees bound themselves to continue the services of the pursuer and his wife as long as they lived, whether they gave satisfaction or not. I have no doubt whatever as to the trustees' power to dismiss them. I wish to avoid the question, whether the pursuer's conduct was such as to call for the exercise of that power.

But I have considerable doubts as to his right to the pence levied from the scholars. At one time it was clearly intended that this

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tees.

Opinion of
Court.

was to form a portion of his income. But my doubt is, whether, after continuing so long to collect these fees, and to account for them to the trustees, he ought not to be held to have abandoned that right.

Lord Glenlee.—I am of the same opinion as to the nature of the institution and the powers of the trustees. It is a private school, and the trustees were entitled to dismiss the teacher when they became dissatisfied with him. I don't think they were bound to assign any reason. They might have sufficient reasons, although they could not easily state them. Although they may be unable to point out any absolutely vicious conduct on the part of the teacher, yet he might have become troublesome, and it might have been a proper step to dismiss him.

As to the small fees, I am inclined to think that the sudden raising of the salary at once was intended to make up for the want of pence collected, and that the pursuer is not entitled to claim both.

Lord Meadowbank.—As to the first point I have no difficulty. The institution in question is clearly not a public school, and the rules applicable to the one do not affect the other.

With regard to the second point I have some doubts. There is nothing express in the agreement regulating the endurance of the appointment. It is a question of implied contract, and the whole circumstances must be considered in connection. There is no precise period of engagement expressly stated. But my difficulty is this, whether, considering the permanent character of the pursuer's situation in England, and various expressions in the correspondence, there is not reason to conclude that the parties contemplated a permanent engagement in Edinburgh. The word 'permanent,' in the letter 16th July 1824, clearly refers merely to the amount of the salary, and not to the endurance of the appointment. And it is also true that the school committee, by their minute 27th May 1825, stated the engagement as one for a year. But, 1st, Let it be remembered that the situation the pursuer left in England was a permanent one; and, 2d, That he denies that the import of this minute was communicated to him, so that we cannot rest much upon it. Besides, he might be misled by the terms of the defenders' advertisement. It stated the school to be in perpetual connection with the chapel. The pursuer was therefore entitled to inquire what was the constitution of the chapel. I should have wished much to know the conditions under which Mr Craig holds his appointment. If he is removable only upon cause shewn, it would be no great stretch upon the part of the pursuer to infer that he, the only other officer connected with the chapel, should hold his situation upon the same footing. Altogether, I have con-

siderable doubts on this point. I think it a very hard case, and I should like to see the charter of the chapel. 14 Jan. 1836.

As to the small fees, I am inclined to think that the arrears of the increased salary should be considered equivalent to them, and that the pursuer is not entitled to both. Mason v. Scott's Trustees.

Lord Medwyn.—I fully concur with the Court as to the first point. This is clearly the case of a private trust, and the decision of it cannot be regulated by the principles peculiarly applicable to public schools. Besides, the trust confers the most ample power upon the trustees. I cannot see how the connection of the school with the chapel should affect the question. I cannot see the sequence in the proposition, that if the school is in permanent connection with the chapel, the situation of the teacher must be held a permanent one, even if the situation of the clergyman were permanent. I don't know even if the clergyman is ex officio always one of the trustees. If the pursuer drew this inference, I am sorry for him; but he was bound to inquire and satisfy himself. He says that he left a permanent situation in England. I have doubts as to the accuracy of this statement. I should like to see some evidence that the managers of the 'National School Society' cannot dismiss their teachers when they cease to give satisfaction. Opinion of Court.

As to the small fees, it appears that, in the letters which truly constitute the contract between the parties, they are not mentioned; and almost immediately after entering upon the situation, the pursuer was required to pay them over to the trustees. He afterwards objects to this arrangement. Then his salary is raised from L.60 to L.80, and he thereafter continues to enjoy this increased salary, and to pay over the small fees without a word of complaint. He was originally told, in Mr Craig's letter, that the terms were a house and L.60 per annum, 'and no other allowances.' A more definite arrangement was entered into upon his arrival in Edinburgh. He homologated that arrangement, by acting in terms of it for four or five years, drawing at the same time an increased salary. I have no doubt whatever that his claim for the arrears of school fees ought to be refused.

Milne, for pursuer, drew the attention of the Court to the claim for house-rent and half year's wages.

Lord Justice-Clerk.—It is evident that the house stood in need of repairs. I would strongly recommend the defenders to allow the actual rent.

Whigham, for defenders, said, that though the grounds of the action did not warrant these claims, if they had been all the pursuer demanded he would have advised, and would still, rather than litigate the matter, advise his clients to give up that point.

14 Jan. 1836.

Mason v.
Scott's Trus-
tees.

Judgment.

Milne, for pursuer, claimed the salary for the whole year in the course of which the pursuer was dismissed.

The *Court* recommended the defenders to yield this also; and the case was continued for a week, in order that these minor points might be adjusted.

The cause having stood over, the parties agreed that the *Court*, of consent, should assoilzie the defenders.

Lord Ordinary, *Moncreiff*. Act. *Brodie, Milns.* Alt. *Dean of Fac. (Hope),*
and *Whigham.* Robert *Hatton, W. S. and Tod & Romanes, W. S. Agents.*
T. Clerk.

R.

FIRST DIVISION.

No. LI.

15th January 1836.

JAMES LITTLE

against

JOHN RITCHIE.

PRESCRIPTION, (TRIENNIAL.)—*Three years not having run at the death of the ancestor from the date of the longest due sum pursued for by a creditor, the representatives acknowledging constitution of the debt, and not alleging payment since the ancestor's death, cannot plead the triennial limitation.*

Narrative.

In September 1831, John Ritchie raised a summons, in the Sheriff-court of Dumfriesshire, against the general representatives of his deceased employer, the late Mr Rea, concluding against them, as liable to him in L.106, the alleged arrears of wages due him at the period of Mr Rea's death. Rea died before Martinmas 1826, and the wages claimed were those due at Martinmas 1823, and those for the three succeeding years. The defenders called were the widow and heir as well as the younger children.

It was pleaded in defence, 1. That the executors should be discussed before the heir or widow could be called on as responsible for a moveable debt of the deceased; and, 2. That the claim was out off by the running of the triennial prescription.

To this the pursuer replied, that he, as a creditor of the deceased, had a right to call on any or all of the lucrati representatives of his debtor, leaving them to arrange their claims of relief inter se, with

which he had no concern ; and, 2. That as at the period of Mr Rea's death, three years had not run from the date at which the longest owing year's wages were due and exigible, and as the representatives allowed the constitution of the claim, they not denying his services, and had made no allegation of payment since Mr Rea's death, the presumption of payment established by the act, after the running of three years, could have no place in the present case, and the plea of prescription was unavailable accordingly.

15 Jan. 1836.

Little v.
Ritchie.

The Sheriff pronounced interlocutors, sisting procedure against the widow and heir till the executors should be discussed, and sustaining the defender's plea of the triennial prescription.

Ritchie advocated ; and the case having come before Lord Corehouse, his Lordship pronounced the following interlocutor : ' The Lord Ordinary remits to the Sheriff, with instructions to recall the interlocutors complained of ; to find that prescription does not apply to any of the wages pursued for, and falling due within three years of the late Mr Rea's death ; to allow parties a proof of their respective averments as to the wages claimed, and thereafter to proceed in the case as shall appear to him to be just : finds the advocator entitled to expenses.'

Lord Ordinary's Interlocutor.

The defenders reclaimed—

The Court considered the point of prescription as similar to that raised and decided in the cases of *Lesly v. Mollison*, Nov. 15. 1808 ; *Broughton v. Weston*, Feb. 24. 1826, and *Elder v. Craig's Trustees*, May 15. 1833.

Opinion of Court.

The Court adhered.

Judgment.

Lord Ordinary, Corehouse. Act. C. F. Shand. Alt. W. Bell. W. & J. B.
Douglas, W. S. and Thos. Johnstone, S. S. C. Agents. B. Clerk.

R.

SECOND DIVISION.

No. LII.

16th January 1836.

ALEXANDER ALEXANDER, USING THE NAME AND TITLE
OF EARL OF STIRLING,
against
SMITH AND CHAPMAN.

PEER.—PRIVILEGE.—PROCESS.—*A party having suspended a charge for payment of a bill accepted by him, in respect of his privilege of exemption from the personal diligence of arrestment, as being a Peer of Scotland, but before his title to be ranked among the Peers of Scotland had been duly established, bill of suspension passed on caution.*

Narrative.

By the act 1707, c. 7, ratifying the treaty of Union, all Peers of Scotland, ‘and their successors to their honours and dignities, shall, ‘from and after the Union, be Peers of Great Britain, and shall ‘be tried as Peers of Great Britain, and shall enjoy all privileges ‘of Peers, as fully as Peers of England do now, or as they or any ‘other Peers of Great Britain may hereafter enjoy the same, except the right and privilege of sitting in the House of Lords, ‘and the privileges depending thereon, and particularly the privilege of sitting upon the trials of Peers.’ Among the privileges so conferred was that of exemption from arrest, for a Peer of England ‘cannot be arrested even when no Parliament is sitting;’ (*Blackstone*, b. 1. c. 5.)

Alexander Alexander, with a view to qualify himself to vote as Earl of Stirling, at the election of representative peers, by signed list, in pursuance of 6. Anne, c. 23, § 4, took the oaths before the Lord Chancellor of England, in the Court of Chancery, and was received and qualified, and got the usual certificate, and his vote was received by the clerks at the general election, on 2d September 1830. His vote was received at another election, on 3d June 1831, and at the election on 10th February 1835, but under protest. The complainers farther stated, that this Court had, in an action of proving of the tenor of a charter, raised by him against the Lord Advocate, (9th February 1831,) sustained ‘instance in ‘the name of Alexander, Earl of Stirling.’

The complainer brought a suspension of a charge of horning on a bill for L.150, dated 30th March 1832, drawn by James Co-

chance upon and accepted by the complainer, (who signed 'Stirling' on the document,) and indorsed by Smith and Chapman, and prayed that the charge might be suspended without caution or consignment, to the effect of finding him entitled to plead exemption from personal diligence. He also referred to proceedings in the Court of King's Bench in England, where the circumstance of his voting at the election of Scotch Peers was held sufficient to justify, *prima facie*, his freedom from arrest.

16 Jan. 1836.

Alexander v.
Smith and
Chapman.

Smith and Chapman answered—The justice of the debt was not disputed, and there could be no exemption from the personal diligence of arrest, by this party calling himself an Earl. Any person who might choose to assume a dormant or extinct title might go and vote at an election of Peers in Holyrood, by tendering his vote, and thereupon claim exemption from personal diligence. But, besides, 1. The peerage of Stirling was extinct. 2. The Court of King's Bench had found, in reference to a claim to the privileges of a Scotch Peer by the complainer, that it could not be sustained, and referred, at the debate at the advising, to several cases in name of the complainer, in 8. and 9. Bingham's Rep. and 3. Tyrwhitt's Rep. The Court had not recognised his title as Earl of Stirling, but had merely allowed him to state his claim, as the party claiming that name and title; (see 8. *Sh.* 404-434; 9. *Sh.* 413; 11. *Sh.* 506-625.)

The Lord Ordinary reported the bill and answers to the Lords of the Second Division.

The Court was of opinion, that as the complainer had not yet established his claim to the name and title of Earl of Stirling, and his right to be ranked in the peerage being denied, the bill could only be passed on caution. Lord Glenlee added, that this was like a suspension of a charge by a party calling herself a married woman, the charger denying she was married.

Opinion of
Court.

Lord Medwyn observed, that if the Court of King's Bench had been aware of our forms of procedure in the election of Scotch Peers, by which the Peers assembled have no power to refuse the vote of any claimant to a peerage, however groundless or improbable the claim may be, he was satisfied they would not have sanctioned the complainer's plea of exemption from the personal diligence of arrest, on the mere ground that he had voted at the election as stated: That we, at least, could not.

Bill passed on caution.

Judgment.

Lord Ordinary, Cockburn.

Act. Rutherford, A. Anderson.

Alt. P. Robertson.

Eph. Lockhart, W. S. and T. Darling, S. S. C. Agents.

T. Clerk.

R.

SECOND DIVISION.

No. LIII.

16th January 1836.

JOHN THOMSON
against
ANDREW BOUSIE.

CAUTIONER.—ARRESTMENT, LOOSING OF.—PROCESS.—*An arrestment having been laid on a vessel, in virtue of a depending maritime action in the Court of Session, 'aye and until sufficient caution be found that the same shall be made furthcoming as accords of law ;' and a party having become bound as cautioner in the Bill-Chamber, in a bill for letters of loosing the arrestment, and the arrestment having been withdrawn by extrajudicial arrangement, and the letters of loosing never expedite,—found, that the cautioner still continued bound in terms of the bond of caution.*

Narrative.

LAWRENCE SKEEN was part-owner and ship's-husband of the brig Skeen of Leith, of which the charger, Bousie, held shares. In 1832 Skeen chartered the vessel for a voyage out and home. While the brig was getting ready for the voyage, the charger raised in this Court an action of count and reckoning as for a maritime debt, under the provisions of the 1. Will. IV. c. 69, against Skeen, for his intromissions and management as ship's-husband. The charger then laid arrestments on the dependence in the hands of parties by whom freights were due. He also arrested the brig at Port-Glasgow. The will of the summons contained the warrant on which the arrestment proceeded, and which was to this effect, being the same as that formerly in use in the Admiralty Court, that 'ye lawfully fence and arrest all ships,' &c. 'to remain under sure fence and arrestment, at the instance of the complainer, aye and until sufficient caution be found acted in the books of our said Lords of Council and Session, that the same shall be made forthcoming to him as accords of law ;' and the words are repeated in the execution.

Skeen intimated to the charger that he looked to him for relief of the damages caused by the arrestment. Skeen also presented to this Court a bill in common form, praying for letters of loosing arrestment, accompanied by a judicial bond of caution, subscribed by the suspender, John Thomson, to make the vessel forthcoming as accords of law. A deliverance was pronounced in the Bill-Chamber, passing the bill ; but nothing farther took place upon it.

In consequence of a communication betwixt the agents for the parties, as to the terms of which the statements on record do not concur, a letter was written by the charger's agent, and delivered to the captain of the vessel, discharging the arrestment, in consequence of which the vessel sailed. The letters of loosing the arrestment were never expedite.

16 Jan. 1836.

Thomson v.
Bousie.

Narrative.

The charger, in his action against Skeen, obtained decree by default for a certain sum; and having got an extract from the Bill-Chamber of the bond lodged in the application for obtaining letters of loosing, a charge was given upon it, in general terms, to make furthcoming the vessel as accords of law. The bill for the horning set forth the depending action, the bond of caution, and the decree.

Thomson suspended the charge, and among other pleas stated this prejudicial objection, that the charge was not warranted in the circumstances of the case, inasmuch as the letters of loosing arrestment were never expedite, for the special purpose of obtaining which the bond was granted and lodged.

The Lord Ordinary pronounced the following interlocutor and note:

'The Lord Ordinary having resumed consideration of the debate, with the closed record, and whole process, In respect that the arrestment was not regularly or judicially loosed upon expedite letters, and that no consent was obtained from the suspender to extend his cautionary to the case of the arrestment being discharged by private agreement between the principal parties, suspends the letters and charge simpliciter, and decerns; finds expenses due.'

Lord Ordinary's
Interlocutor.

Note.—'The suspender was a *judicial* cautioner in a loosing of an arrestment laid on on a dependency; and the charger proposes to deal with the bond so granted as if it had been an ordinary, independent, and extrajudicial obligation, to be enforced according to its letter. He founds upon the fact, that the vessel was arrested only 'aye and until caution is found,' and contends, that as soon as caution was found the arrestment was virtually at an end; and that the execution of the expedite letters being merely an *official intimation* of that fact, was a matter with which the cautioner had nothing to do, and might therefore be competently dispensed with by the principal parties, without discharging his obligation.

'In all this, however, the Lord Ordinary apprehends there is a radical mistake. The suspender, in express terms, '*judicially* enacts and binds himself, in the books of Council and Session,' in reference to a bill of loosing arrestment, that the vessel arrested shall be furthcoming 'as accords of law;' and his bond being granted, as *relative* to that bill, and lodged along with it, is but

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Note.

‘ one step of a public judicial proceeding, upon the regular completion of which its validity is accordingly dependent. If it were an absolute, independent, private obligation, there would be no need of a bill of loosing, or any judicial procedure at all. But if the arrester was satisfied with the security offered, the arrestment would be privately discharged, and the cautioner would be liable, as at common law. But a *judicial bond* of this kind is quite in a different situation. There, it is not the arrester, but *the clerk of the bills*, who must be satisfied that the caution is sufficient; and unquestionably, if the bill to which it is incident is *refused*, there is an end of the cautioner’s obligation, whether the vessel is allowed to *sail* by private consent, or still remains under detention. It is quite in vain, therefore, to refer to the terms of the arrestment. Though the words are, ‘aye and until sufficient caution be found *acted in the books of Council and Session*, that the vessel shall be furthcoming as *accords of law*,’ the meaning plainly is, *till the arrestment is regularly loosed upon caution*; and as it cannot be regularly loosed except upon expedite letters, the arrestment must subsist till these are executed, and consequently the caution cannot come sooner into operation. The charger cannot have, at one and the same time, *both* the security of his subsisting arrestment, and of the caution offered in the loosing; and, consequently, till the arrestment is judicially loosed, the judicial cautioner cannot begin to be bound. The case is the same in all other judicial bonds of caution. They only become operative when the matter comes to a *judicial* termination. If a charger, for instance, settles matters by a compromise or private arrangement, after a suspension is passed upon caution, the cautioner is unquestionably free—and the case is the same here. It is admitted that the suspender would not be liable, if the vessel had been allowed to sail without presenting any bill of clearing, but merely on getting the arrester’s consent, upon shewing him the judicial bond of caution without any concurrence on the part of the granter. Yet that consent to dispense with a bill of loosing would be quite as effectual between the parties as the consent which was actually given in this case to dispense with the expedite letters. An extrajudicial consent was equally necessary in both cases, if the judicial proceeding was not completed; for, notwithstanding the passed bill, the arrester might have refused to liberate the vessel till the expedite letters were intimated. But such an extrajudicial agreement can only affect those who were parties to it; and as the judicial cautioner had nothing to do with this agreement, so he cannot be charged, *in consequence of it*, upon a bond which formed part of a judicial proceeding, and was truly conditioned on its completion.

‘As to the statement that the cautioner has no *interest* to take this objection, since the charger might expedite the letters at his pleasure, when he could have had no defence, it is answer enough that a CAUTIONER charged on a gratuitous obligation has always interest enough to found upon any irregularity. But the suspender might here have had a much more direct interest; since arrestments, when regularly loosed, are still preferable *in competition*, according to their priority, and a cautioner paying on his bond is entitled to an *assignment* of the diligence. But when discharged by a private agreement, the diligence falls altogether, and can no longer be assigned to any one.’

16 Jan. 1836.

Thomson v.
Bousia.—
Note.

The charger having *reclaimed*, and the Court differing in opinion, minutes of debate were ordered, which were afterwards laid before the other Judges for their opinions.

The charger, in his minute, referred to the practice in the Admiralty Court, before its junction with the Court of Session. The finding of caution, acted in the books of the Admiralty, took place at the sight of the clerk, and his certificate that caution had been judicially found, justified, on the one hand, the instant departure to sea of the arrested vessel, as it fixed, on the other, the responsibility of the cautioner, under his judicial bond, to make her forthcoming. This arrestment was not laid on in virtue of letters under the signet. The depending action on which the diligence was used was one of a proper maritime nature, which, till the 1. Will. IV. c. 69, could only have been brought in the Admiralty Court, but which, under the sanction of that statute, was brought into this Court, and arrestment used on its dependence, according to the rules formerly in observance before the Admiralty. By that act, § 21, it is provided, that ‘the Court of Session shall hold and exercise jurisdiction in all maritime and civil causes, and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty, before the passing of this act, and all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills.’ By § 28, the finding of caution and using of arrestment, heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in the foresaid courts respectively. Again, by § 40, it is declared that summonses in maritime causes instituted in the Court of Session shall be signed by one of the principal or depute clerks of Session, and it shall not be necessary that such summonses pass the signet. The question therefore was, whether caution had not been judicially found acted in the books of Council and Session, as coming in place of the

Jan. 1836. books of the Admiralty? This being the fact, the arrestment must be held to have been thereby judicially removed or loosed, so that the owner might legally send the brig to sea freed from the temporary attachment.

Thomson v. Bousie.

The opinions of the Consulted Judges went so much on this statement of the practice, that it is only necessary to refer to the Session papers for the farther argument in the cause.

The Consulted Judges returned the following opinions:

Opinions of Consulted Judges.

Opinions of the Lords President, Balgray, Gillies, Mackenzie, Corehouse, Fullerton, Moncreiff and Cockburn.—This question relates to an arrestment used on the dependence of an action in the Admiralty Court, at the instance of Bousie, the charger in this process, against Skeen. Its object was to attach a vessel, of which the defender was part-owner and ship's-husband, and which was then lying at Greenock, about to proceed on a voyage to the West Indies. The will of the summons, agreeably to the forms of that Court, contained an express warrant for the diligence authorising all ship's goods, &c. to be arrested 'aye and 'until sufficient caution be found acted in the books of our said 'Lords of Council and Session, that the same shall be made furth-coming to him as accords of the law;' and these words are repeated in the execution. Skeen presented a bill for loosing this arrestment, setting forth that he was willing to find caution that the vessel should be made furthcoming to the charger, and the bill was passed on caution being so found. Thomson, the suspender, became cautioner, and by his bond, which is absolute in terms, he judicially enacted himself to make the vessel furthcoming. Having obtained this security, Bousie the charger's interest in the matter ceased. It was not his duty to expedite letters of loosing on the passed bill; nor could he have been heard in the Bill-Chamber, or any where else, either objecting to these letters passing the signet, or praying that they should pass. They must have passed, of course, on the demand of Skeen, the arrestee, without reference either to Bousie, the arrester, or to his own cautioner, Thomson. They would have been necessary if the vessel had been arrested in the hands of a third party, not the defender in the original action, and not cognisant of the proceedings in the Bill-Chamber, and who, on that account, might have required the production or intimation of such letters, before he was in safety to allow the vessel to depart. But as Skeen was not only the defender, who had found caution, but the arrestee in whose hands the vessel was, it was unnecessary, and perhaps would have been absurd, that he should have expedite letters of loosing for no purpose, except to intimate them to himself. The suspender says that he was entitled to rely

that the vessel could not proceed on her voyage till the letters were expedite; but it is thought there is no foundation for that plea. He was himself a party to the proceedings in the Bill-Chamber, and knew that, in consequence of his own bond, Skeen had a warrant put into his hand, by which he might have expedite the letters at any time without further communication with him, the cautioner; and, in point of form, it is in no case necessary that expedite letters should be intimated to the cautioner, on the faith of whose bond the bill was passed. It is a postulate equally inadmissible, that, until the arrestment is loosed, the cautionary obligation cannot take effect. The cautioner's obligation takes effect from the moment the bond is received; and the letters are expedite, not for his benefit, or even of the arrester, but for the safety of the arrestee. As soon as the bond is received, the arrester is entitled to require the cautioner to make the vessel forthcoming, in whose hands soever it may then be.

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Thomson v.
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Judges.

When a bill of suspension and liberation is passed on caution, the Lord Ordinary's interlocutor passing the bill is not a warrant for the magistrates of the burgh where the debtor is incarcerated to set him at liberty. In the general case they are not entitled to do so until letters of liberation are signeted, and either a charge given upon them, or regular intimation made. But that form is dispensed with if the incarcerating creditor consents to the liberation, which he may do, without any communication with the cautioner; and in practice not only is this consent frequently given, but it is thought a harsh proceeding to refuse it. It never was supposed in that case that the liberation of the debtor before the letters were expedite released the cautioner, or that his obligation did not commence until they were expedite. It appears to us that this is not only a similar, but an a fortiori case.

Lord Jeffrey.—I have considerable difficulty in concurring in the opinion of the other Consulted Judges; though I can no longer look with any confidence to the views on which my interlocutor proceeded. The difficulty of the case is this: If the mere words of the arrestment, or the bond of caution, are looked at, the cautioner's obligation should be complete from the moment the bond was signed and delivered; and might consequently be enforced, though the ship had been allowed to sail the hour after, and without any bill of loosing being passed. Nay, in this view, it might even be enforced, although the cautioner had been rejected by the clerk of the bills as insufficient, and the bill ultimately passed, upon lodging another bond by a different person. If that last person had become bankrupt, and the first bond had come into the hands of the arrester, it is not easy to see why it might not be enforced against the granter,

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Judges.

if its own terms and plain tenor only could be looked at, without reference to the judicial procedure with a view to which it was granted. But it is supposed that this will not be pretended; and in the foregoing opinion it seems accordingly to be assumed that the cautioner's obligation only begins from the passing of the bill. But it is really difficult to see how, if this was necessary, the expediting of the letters should not be necessary also. There is no reference to the passing of the bill, more than to the expediting of the letters, in the arrestment or in the bond. Yet the former seems to be held necessary to make the cautioner's obligation operative, because he bound himself only *judicially*, and with reference to a technical course of procedure. The passing of the bill, however, is but the first step of that procedure. It does not itself loose the arrestment; but is merely a *warrant* for the *letters*, by which alone it can be judicially loosed. If the judicial bond of caution, therefore, will not be effectual, if the arrestment is discharged *altogether extrajudicially*,—that is, without passing a bill,—the natural conclusion seems to be, that it cannot be effectual unless it be *judicially loosed*; that is, by expediting letters of loosing, and not merely suing out a *warrant* for such letters. The opinion of the other Consulted Judges seems to adopt the principle on which my judgment proceeded, but only to follow it half way to the conclusion.

In matters of form it is dangerous to reason from equity, or the reason of the thing: But the equity which entitles a *cautioner* to the most rigorous construction of his engagement is now a settled part of the law; and I have suggested in the close of my note that he may have a *substantial interest* to require what the law seems here to entitle him to.

On these grounds I should certainly incline, though with great diffidence, to adhere to the interlocutor. I am most moved to doubt it, by what is stated in the minute for the charger, as to the settled practice in the Admiralty Court, before its jurisdiction was merged in the Court of Session, and the provisions of the statute by which the benefits of that practice are held to be still preserved to suitors in proper maritime causes. My impression is, that this ground of pleading was not touched upon at the debate before me; and I am so much impressed with it now, that I can scarcely be held to dissent from the practical conclusion of the other Consulted Judges.

Judgment.

At the final advising, the *Court*, in accordance with these opinions, recalled the interlocutor of the Lord Ordinary, repelled the objection to the charge in so far as founded upon the letters of arrestment not having been judicially loosed, found the charger en-

titled to the expenses of this discussion, and quoad ultra remitted 16 Jan, 1836.
to the Lord Ordinary.

Thomson v.
Bousie.

Lord Ordinary, Jeffrey. For Suspender, Neaves. For Charger, Cowan. John
Wotherspoon, W. S. and D. M. Adamson, Agents. T. Clerk.

R.

FIRST DIVISION.

No. LIV.

20th January 1836.

M. LIPPMANN AND MANDATARY

against

SIR WILLIAM H. DON AND TUTORS.

FOREIGN.—(LEX LOCI CONTRACTUS, AC SOLUTIONIS).—BILL OF EXCHANGE.—SEXENNIAL PRESCRIPTION.—RES JUDICATA.—*Circumstances in which it was found, in respect to the acceptance of a bill of exchange signed at Paris, by a party who had been resident in Scotland since the bill fell due, (adhering to the interlocutor of the Lord Ordinary, pronounced after taking the opinion of foreign lawyers,) (1.) That the defence of the sexennial prescription was inapplicable; (2.) That the plea of res judicata, founded on a decree of the Tribunal of Commerce in Paris, against a party in absence, was untenable, and that the party's representative ought to be repounded, notwithstanding the opinion of French lawyers to the contrary.*

The late Sir Alexander Don, when in Paris, in 1809, (having *Narrative.* been detained by Buonaparte, with other British subjects who were in France when hostilities commenced in 1803,) subscribed two bills of exchange, conceived in the following terms, in favour of the pursuer as payee:

Versail, le 13. 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain payé, par cette premiere de change, à l'ordre de M. Lippmann, le somme de vingt mille francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.
(Signed) CHAS. FAGAN.

A Monsieur Mon. Don.

Hotel Richelieu, Rue Neuve, St Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810.

(Signed) ALEXANDER DON.

20 Jan. 1836.

Lippmann and
Mandatory v.
Don and
Tutors.

—
Narrative.

Versail, le 13. 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain payé, par cette premiere de change,
à l'ordre de M. Lippmann, le somme de vingt mille francs, valeur
reçu, sans autre avis.

Bon pour vingt mille francs.

(Signed) CHAS. FAGAN.

A Monsieur Mon. Don.

Hotel Richelieu, Rue Neuve, St Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier
Mars 1810.

(Signed) ALEXANDER DON.

Early in February 1810, and before the bills became due, Sir
Alexander Don returned to Scotland.

These bills, when they became due, were protested in Paris,
for non-payment, against the acceptor, and the dishonour was in-
timated to Charles Fagan the drawer.

An action was afterwards raised by the pursuer, M. Lippmann,
the payee of the bills, before the Tribunal of Commerce, of the
Department of the Seine of Paris, against both the drawer and
acceptor of these bills, as defenders. A citation, however, was left
for Sir Alexander at the Hotel de Richelieu, in which he was de-
signed as a merchant; but the officer was there informed that he
had left it four months before; in consequence of which answer, by
which it appeared that Sir Alexander Don had no residence known
in France, he posted up a copy of the summons against the princi-
pal door of the Tribunal of Commerce at Paris, and took another
to the Imperial Attorney of the Tribunal of First Instance of the
Department of the Seine.

On the 25th of July 1810 the pursuer obtained a judgment
against both the defenders, viz. against the drawer, who appeared
by his attorney, and admitted the validity of the debt, and against
Sir Alexander Don, in absence, after, as is alleged, the forms ac-
cording to the law of France had been gone through, where the
defender does not appear. The judgment was for the principal
sum in the bills, with interest and expenses.

This judgment was intimated, on the 2d October 1810, at the
Hotel de Richelieu, where the bill was addressed; but no intima-
tion was made to Sir Alexander in Scotland, where he then resided.

The pursuer, then, in default of the acceptor, put the judgment
in execution against Charles Fagan, the drawer; but his person
could not be found, and his effects were sold under order of the
French courts, and the proceeds received by the pursuer, to the
extent of 434 francs, after deducting judicial expenses.

No judicial demand was made upon Sir Alexander, or action raised in this country, before his death, which occurred on the 11th April 1826. 20 Jan. 1836.

The present action was brought against Sir William Henry Don, as son and heir of Sir Alexander, founded on the above-mentioned judgment as a valid ground of debt.

Lippmann and
Mandatory v.
Don and
Tutors.
—
Narrative.

After completing a record, the Lord Ordinary appointed a case to be prepared for opinion of French counsel, which was accordingly obtained *, after which his Lordship ordered cases. The pleas and authorities for the parties were as follows :

Pleaded for pursuer—1. A party entering into a contract in a foreign state is bound by the laws of that state, although he should, when sued, be beyond the jurisdiction of that state. 2. Where a bill is granted in a foreign country, payable there, and the law of that country declares that the course of prescription is stopped by decree being taken for the amount of the bill in one of its courts of law, and decree is so taken, prescription must be stopped, although the law of the debtor's subsequent domicile should proceed upon a different rule. 3. In mercantile contracts, or ordinary contracts of debt, the *lex loci contractus* must be the governing rule. Pursuer's
Pleas.

Authorities.—Opinion taken ; 7. *East*. 681 ; 4. *Wils. & Sh.* 37 ; cases of Goddard and others, in *Mor. Dic. v. Forum*, 4533, 5, 43, 44 ; *Bro. Syn.* 707. As to *lex contractus*, 1. *Black.* 256 ; *Chitty, Bills*, 172 ; 2. *Pardessus*, 384 ; *Dig.* 447, 21 ; *Thomson, Bills*, 708 ; *Armour*, 21st Jan. 1792, *M.* 4476 ; *Watson*, 21st Jan. 1792 ; *M.* 4582 ; *Glyn*, 8th June 1830 ; 2. *Russ. Rep.* 251 ; 4. *Bing.* 686 ; *Cod.* iii. 13 ; *Brunneman*, 278 ; *Stephan Pomcran*, i. 29. 1 ; *Voet.* i. 1. 66 ; *Thomson*, 678 ; *Gordon*, 23d June 1784, *M.* 11,127 ; *Camp.* 63 ; 1. *Phillip's Evidence*, 353 ; 1. *Stark. N. P. C.* 255 ; *Chitty*, 16.

Pleaded for defenders—1. A Scotsman, sued in a Scotch court for payment of a bill of exchange, is entitled to plead the sexennial prescription, provided he shall have been domiciled in Scotland for six years after the bill became due, and before the commencement of the action. Defenders'
Pleas.

Authorities—*Voet.* i. 42, § 58 ; *Huber de Confli. Leg.* ; *Dirleton*,

* See Session papers for case as prepared by Mr Alison, and opinion of counsel. The substance and import of the opinion will appear in the interlocutor and note of the Lord Ordinary, after quoted. Reference is also made to the Session papers for the arguments of the parties in support of their respective pleas, which will be found to be very ably and elaborately stated.

20 Jan. 1836. *8vo* edit. 96; *Ersk.* iii. 7. 48; Delvalle, 9th March 1786; Randal, 13th July 1768, and other cases in *Mor.* 4520-4-2; *Hailes*, 408; 6. *Dow*, 134; *Ersk.* (*Ivory*,) 788, note 408; Cheswell, 14th Feb. 1792; Richardson, 14th June 1824, *Sh. App.*; Kinloch, 12th July 1789, *M.* 4456; Gibson, 2d March 1831, *S. D. B.*; *Chitty*, 613; 4. *Pardessus*, 223, 193; 1. *Barn.* and *Adol.* 284; Glyn, *ut sup.*; Gibson, 2d March 1831.

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Mandatory v.
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Defenders'
Pleas.*

2. Proceedings against the alleged debtor in a bill of exchange in a foreign country, where such debtor has no domicile, cannot have the effect of interrupting the course of prescription.

Goddard, *ut sup.*; Edwards, 29th June 1720, *M.* 4535; Sinclair, 14th July 1768, *M.* 4542; Hamilton, *M.* 4548; *Ersk.* i. 2. 16; 3. *Camp.* 463; *Story*, 457; 2. *Russ.* 351; *Voet*, v. 1. 73; *Ersk.* i. 2. 20; 1. *Camp.* 63; *Story*, 484.

3. Proceedings against the drawer or indorser of a bill of exchange cannot have the effect of interrupting prescription, in a question with the acceptor, unless such acceptor shall have been duly made a party to such proceedings; *Story*, 482.

The Lord Ordinary pronounced the following interlocutor, adding a note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the revised cases for the parties, the case prepared for the opinion of French counsel, and their opinion thereon, together with the productions and whole process, repels the plea of the sexennial prescription stated for the defender; finds that the defender is entitled to be reponed against the judgment of the Tribunal of Commerce in France; and appoints parties to be farther heard on the merits of the cause.'

Note.

Note.—'This action is laid on two grounds: 1st, On the bills of exchange accepted at Paris by the late Sir Alexander Don; and, 2dly, On the decree of the Tribunal of Commerce in that city against Fagan, the drawer, and Sir Alexander, the acceptor, jointly and severally, proceeding on those bills. This decree may be considered either as an interruption of the prescription of the bills, or as a separate title of pursuit.

'To decide the question of prescription, as applicable to the bills, it is necessary to inquire whether the debt sued for is a French or a Scotch debt, and that depends, in this case, on the point whether Scotland or France was the place where the bills were payable. If they constituted a Scotch debt, it is plain they are subject not to the French quinquennial, but to the Scotch sexennial prescription; and as Sir Alexander Don had resided more than six years after the time of payment in Scotland, they are not actionable unless resting owing be proved by writ or oath, or the prescription interrupted by action or diligence. Action was raised against Sir Alexander Don,

‘ and decree obtained against him in France; but whether those proceedings amount to an interruption of the Scotch sexennial prescription may well be questioned, whatever may be their effect as a separate title. He was not in France when the action was raised: he was not personally cited there, nor had he any property, either heritable or moveable, within the jurisdiction. Farther, and what is still more material, he was then an alien enemy in France, and could not appear in safety in a French court either to sue or to defend. Considered, therefore, purely as a question of Scotch law, it would seem that the sexennial prescription of the bills was not interrupted.

20 Jan. 1836.

Lippmann and
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Note.

‘ On the other hand, if France was the place of payment, and if the bills in consequence constituted a French debt, the case must be viewed in a different light. Our decisions have not been uniform on this point; but it seems the better opinion, that if a debt be payable in a foreign country, the law of that country must apply, in so far as its extinction is concerned, although the debtor resides and must be sued in Scotland. On that principle, the bills were subject, not to the Scotch sexennial, but to the French quinquennial prescription; and every interruption of that prescription by the law of France is pleadable against the defender here. The bills do not specify the place of payment; and the defender argues, on that ground, that the debtor’s domicile is to be held the place of payment. This point is not decided in the law of Scotland; but it seems well established in the law of England, that where there is no such specification, the place of acceptance is the place of payment; and that is also the law of France, as is stated in the opinion obtained. As the bills in question were drawn and accepted in France by parties resident there, it must be held as *pars contractus* that Paris was the place of payment.

‘ It would follow from this, that if the proceedings in the French court were held in that country as an interruption of the quinquennial prescription, they must be so held in Scotland also, however anomalous they may appear, either in respect that the debtor was not within the jurisdiction, and had no property there, or in any other view; or if it be the law there that a decree against the drawer is also a decree against the acceptor to the effect of interrupting prescription, the same interruption must be admitted in Scotland.

‘ But the difficulty which occurs to the Lord Ordinary, and which is not met in the opinion of the French counsel, rests upon this ground: They state, that in consequence of the lapse of five years, the bill of exchange is annulled, and the bearer acquires his redress on a new title, namely, the judgment which remains.’ This

20 Jan. 1836. ' doctrine lays prescription out of the question altogether. The only
 Lippmann and ' title of pursuit is the French judgment, which this Court is called
 Mandatary v. ' upon to enforce; and the question arises, whether it be such a
 Don and ' judgment as should be held as a *res judicata*, without further in-
 Tutors. ' quiry, or whether it may competently, and should in equity, be re-
 Note. ' viewed on the merits.

' It appears that by the law of France a judgment in absence
 ' prescribes in six months, unless execution has followed upon it;
 ' but this prescription was interrupted as to Sir Alexander Don, in
 ' consequence of execution against the drawer Fagan, who was liable
 ' with him in *solidum* in the bills, and against whom the judgment
 ' also proceeded in so far as the constitution of the debt is concern-
 ' ed. In so far as the question of personal execution is concerned,
 ' it was competent for Sir Alexander, and it is still competent for
 ' his heir, to be reponed, and to obtain a new hearing, in the Tri-
 ' bunal of Commerce, but in no other court; but that proceeding,
 ' it is said, would now be inept, as the representative of the deceas-
 ' ed is not subject to personal execution.

' But, whatever may be the provisions of the French law as to
 ' decrees in absence, the important question arises, whether, when
 ' a foreign court is called upon to enforce that decree, it ought not,
 ' in material justice, to repon the party to the effect of his being
 ' heard on the merits. A decree *sine causa cognita* can never be
 ' considered in any other light, except either as a compulsi^r to en-
 ' force the attendance of the party against whom it is pronounced,
 ' or a penalty on his contumacy for not attending. In Scotland, at
 ' least for forty years, it is held merely as a compulsi^r, and the
 ' party is entitled *de jure* to be reponed on payment of expenses.
 ' And, therefore, in the case of *Douglas v. Forrest*, in the Court of
 ' Common Pleas, cited by the pursuer, where a Scotch decree in ab-
 ' sence was held equivalent to a decree *causa cognita*, it is probable
 ' that the law of Scotland had not been fully explained to the Court,
 ' because they gave much greater effect to it than it would have re-
 ' ceived in the forum where it was pronounced.

' On the other hand, although the judgment in the Tribunal of
 ' Commerce were to be held in France as a penalty on the acceptor,
 ' for his contumacy for not appearing to answer the citation, it can-
 ' not be viewed in that light in this country, because he could not
 ' have appeared in safety, being an alien enemy. Admitting that,
 ' as a private individual, he had a *persona standi*, and might have
 ' been heard by his attorney or procurator, which may be inferred
 ' from the opinion obtained, yet, on the principles of international
 ' law, no man is bound to answer in a court where he cannot be

‘personally present without endangering his liberty, and that from 20 Jan. 1836.
‘no fault of his own.

‘The French counsel hold, that, as Sir Alexander Don was
‘bound jointly and severally with Fagan, a decree against Fagan
‘in foro contentioso is equivalent to a decree in foro contentioso
‘against Sir Alexander Don also. That might be granted if the
‘decree were to be used solely for the purpose of interrupting the
‘French prescription; but, as the Court is called upon to enforce
‘it as a judgment upon the merits, it is thought no party can have
‘a cause conclusively decided against him, until he has been heard
‘by the judge, or unless it be his own fault that he has not been
‘heard.

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Note.

‘It is on these grounds that the Lord Ordinary has arrived at
‘the conclusion, that while the sexennial or Scotch prescription is
‘repelled, as inapplicable to the circumstances of the case, the de-
‘fender ought to be reponed against the French decree, and parties
‘be allowed to go into the merits.’

The defenders *reclaimed* against the interlocutor, in so far as it
repelled the plea of prescription; and at the advising, they cited
a case lately decided in England, *Huber v. Steyner*, 1 *Bingham’s*
Rep. new series, vol. ii. part 1. p. 202.

The *Court*, however, without hearing the respondents’ counsel, Judgment.
unanimously *adhered*.

Lord Ordinary, *Corehouse*.
Keay and Mailland.

Act. *Advocatus* (J. A. Murray) and *Sandford*. Alt.
B. Clerk.

R.

FIRST DIVISION.

No. LV.

20th January 1836.

WILSON’S TRUSTEES against EWING, MAY AND COMPANY.

CAUTIONER.—PROCESS.—*Found, that the obligation of a cautioner in
an advocatium subsisted after the death of the original advocator, to
the effect of making him responsible for such part of the expenses as
were incurred after the advocator’s death, the process having been
carried on by his eldest son, who had been sisted.*

20 Jan. 1836.

Wilson's Trustees
v. Ewing,
May & Co.

Narrative.

THIS question arose in the shape of suspension of a charge, proceeding on a decree of the Lords of Council and Session in the charger's favour, for expenses in advocacy by one Mann of a certain decree of the Sheriff of Lanark. Pending the process of advocacy Mann died; and of this date, (18th June 1833,) his eldest son, John, was sisted in his room and place. Wilson, the suspender, was cautioner under the statute in the advocacy.

The Lord Ordinary pronounced this interlocutor and note:

Lord Ordinary's Interlocutor.

'Having heard counsel for the parties, repels the reasons of suspension; finds the letters and charge orderly proceeded, and decerns; finds the chargers entitled to expenses.'

Note.

Note.—'Previous to the year 1650 a cautioner in a suspension was liberated, if either the charger or suspender died before the letters were discussed. This rule was founded on a very rigid construction of the terms of the bond of caution, contrary, it is thought, both to principle and to the object of the transaction. It was corrected by the Act of Sederunt, 29th January of that year, which declared that the cautioner should continue bound notwithstanding the decease of either charger or suspender; and it was directed that the bond of caution should in future contain a clause binding the cautioners as validly, and in the same manner as the suspender, his heirs and executors are bound. It does not appear, however, that that clause was ever inserted in the bond of caution, at least it had fallen into disuse as early as 1688, when Dallas's Styles were written; and in the case of Dickie, December 1743, it was found that the omission of the clause was immaterial. As this Act of Sederunt did not extend expressly to cautioners in the Admiralty Court, it was found, (28th January 1680, Hodge,) that their obligation came to an end by the death of the party for whom they were bound. But that judgment was afterwards held to have been erroneous, in the case of Dundas, 13th December 1743, when the point was very carefully considered. There appears, with great deference, to be a mistake in the note of the Lord Ordinary in the Bill-Chamber, where it is stated that the judgment in the case of Dundas was pronounced solely 'in respect of the Act of Sederunt 1756, and, of course, in cases to which it directly applied, viz. cases of caution in suspensions.' The case of Dundas was not that of a cautioner in a suspension, or in any way one to which the Act of Sederunt could directly apply, but in the case of caution *judicio sisti* and *judicatum solvi* in the Admiralty Court. It appears also from the reports, particularly from the report of Lord Kames, that the judgment did not rest exclusively on the peculiar nature of maritime causes, but also on the

‘ broad principle of the construction of cautionary obligations, as 20 Jan. 1836.
 ‘ in reference to the nature of the transactions to which they are
 ‘ interposed. Not to mention the rule of the Roman law, adopted
 ‘ also into our own, that *hæres est eadem persona cum defuncto*,
 ‘ which of itself justifies the enlarged construction, it is plain that
 ‘ if caution fell by the death of the suspender, it might in many
 ‘ cases be altogether nugatory. Before the Act of Sederunt 1709,
 ‘ it was decided (Nov. 30. 1709, Dunbar,) that the cautioner in a
 ‘ suspension was not liberated by the decree being turned into a
 ‘ libel—a much greater stretch than either the Act of Sederunt
 ‘ 1650, or the decision in the case of Dundas authorises.

Wilson's Trustees
 v. Ewing,
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 Note.

‘ If it had been the practice in 1650 that caution should be found
 ‘ in advocations as well as suspensions, and if the Act of Sederunt in
 ‘ that year had applied to the latter exclusively, it might have been
 ‘ plausibly argued that the former were intentionally omitted, and
 ‘ that the act therefore could not be applied to them. But caution
 ‘ was never required in advocations till more than a century after-
 ‘ wards, when it was first introduced by the Act of Sederunt 1756
 ‘ in advocations of decrees of removing. The bond of caution in
 ‘ that case has always been in this respect identical with the bond
 ‘ in suspensions; and the same style has been followed in bonds of
 ‘ caution in advocations, under the late statutes 50. Geo. III. c. 112,
 ‘ and 6. Geo. IV. c. 120.

‘ There has been a practice, therefore, for about eighty years,
 ‘ in which cautioners in advocations, from the tenor of their bonds,
 ‘ seem to be placed in the same situation as cautioners in suspen-
 ‘ sions; and in the statute 50. Geo. III. it is declared that bills of
 ‘ advocation should be passed, upon caution being found in the same
 ‘ manner as in bills of suspension at present. It is true that the
 ‘ 6th of Geo. IV. restricted that caution in the case of advocations
 ‘ of final interlocutors to expenses of process only; but that restric-
 ‘ tion, it is thought, cannot operate in favour of the cautioner in so
 ‘ far as the point now in question is concerned. With regard to
 ‘ advocations on the ground of incompetency or contingency, the
 ‘ act of 50. Geo. III. is still in force, and it rests with the Lord
 ‘ Ordinary in the Bill-Chamber whether caution for the sum at
 ‘ issue, as well as expenses, shall be found.

‘ Looking to the principle recognised in the Act of Sederunt 1650,
 ‘ which applies with equal force to suspensions and advocations, the
 ‘ principle of seventy-nine years as to the style of the bonds, the
 ‘ decision in the case of Dundas, which is an a fortiori case, and
 ‘ the terms of the act 50. Geo. III. c. 112, it is thought that Mr
 ‘ Bell has accurately stated the clause in his Commentaries, (edit.
 ‘ 1819, ii. 247,) that ‘ the cautioner is not freed by the death of

20 Jan. 1836. “ the suspender or *advocator*, nor even by the decree being turned
 Wilson’s Trustees v. Ewing, May & Co. “ into a libel.’ This was in 1819, previous to the act 6. Geo. IV.;
 “ and he has repeated the same words in his last edition in 1826,
 “ subsequent to that statute.

Note.

‘ In bonds of caution *judicio sisti*, the rule is, and always has
 ‘ been different, the obligation being of a totally different nature.
 ‘ It may be enforced at any time during the dependence of the
 ‘ cause; and if the suspender is kept amenable to the Court while
 ‘ he lives, there is no reason why the pursuer of the action should
 ‘ not require a new bond of caution from his representative, if there
 ‘ be any occasion for that security. But the obligation of a cau-
 ‘ tioner *judicatum solvi* is not purified, nor can it be enforced in
 ‘ any way, nor to any effect, till the termination of the cause; and
 ‘ if the cautioner got free by the death of his principal, it would in
 ‘ many instances be entirely defeated.’

Suspenders’
Pleas.

The suspenders *reclaimed*, and *pleaded*—The suspenders are not bound in terminis of the bond, more especially as cautionary bonds are *strictissimi juris*. The party who had been sisted in the advocacy was not executor—the suit being in matters of executry—but heir-at-law to the advocator, and one of several sons, while one Thomson in Dundee had served executor *qua creditor* to the deceased.

Respondents’
Pleas.

Answered—The original advocator died, leaving a family, of whom the eldest, John, only was of age, and who had taken out an inventory, and been decerned executor-dative *qua next* of kin to the deceased.

Opinion of
Court.

Lord President.—The heir-at-law is liable in first instance, and has his relief against the executors.

Lord Balgray.—The interlocutor is right. Cautioners are liable after death of the party.

Lord Mackenzie.—John was executor, and submitted as such to the decree in the action concerning the expenses in which the present question is raised.

Lord Gillies observed, with reference to statute 6. Geo. IV, that it does not alter rules in this respect previously existing.

Judgment.

The Court adhered, with additional expenses.

Lord Ordinary, *Corehouse*. Act. P. *Robertson*. Alt. *Neaves*. Thos. *Darling*,
 S. S. C. Rob. *Welsh*, S. S. C. S. Clerk.

R.

SECOND DIVISION.

No. LVI.

20th January 1836.

WILLIAM EWING
against
 CHALMERS AND COLLINS.

PROCESS.—EXPENSES.—IN this case, see antea, p. 54, the Court repelled an objection by the pursuer to the Auditor's report, and allowed the defenders to charge, in their account of expenses, the sums paid by them to the jury.

Act. Maitland. Alt. Monteith. Wotherspoon & Mack, W. S. and Mowbray &
 Howden, W. S. Mr Russell, Clerk.

R.

SECOND DIVISION.

No. LVII.

20th January 1836.

SIR WINDHAM CARMICHAEL ANSTRUTHER, BART.
against
 MRS MARIAN ANSTRUTHER AND HUSBAND.

COLLATION.—TAILZIE.—HEIR AND EXECUTOR.—*An heir of entail, who is also the heir aliqui successurus, and one of the nearest of kin of his predecessor, is not entitled to share in the moveable succession without collating his liferent interest in the entailed estate.*

IN this case the Court, upon 29th November 1833, (see F. C. Narrative. vol. ix. p. 112,) found, that ' Sir Windham Carmichael Anstruther, ' heir of entail and provision to the late Sir John Carmichael Anstruther, his nephew, in the entailed estates of Carmichael and ' Anstruther, being also heir of line to his nephew, cannot claim ' any share in the moveables along with his sister, without previously collating the heritage to which, as heir of Sir John, he

20 Jan. 1836. ' has succeeded : Find Mrs Marian Anstruther and husband entitled
 ' to expenses, and remit to the Lord Ordinary.'

Anstruther v.
 Anstruther and
 Husband.

Sir Windham took that judgment to appeal, and the House of Lords declared, ' that this House (by consent of parties) forbears ' hoc statu to pronounce any decision upon the matter of the said ' appeal ; but it is ordered and adjudged, that the cause be remitted ' back to the said Second Division of the Court of Session, with an ' instruction to the Judges of that Division to order the matter of ' law in question in this cause to be heard before the whole Judges, ' including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole Judges *.'

A hearing accordingly took place before the whole Court.

* *Lord Brougham's Speech, House of Lords, 15th April 1835.*

My Lords, I stated, when this case was argued this morning, that as the Little Gilmour case had been decided in 1809, by one branch of the Court without the concurrence of the other, and as the present decision had been pronounced only by one of the Divisions, without consulting the other Judges, it would be highly expedient to have so highly important a doctrine as is involved in the question finally established, after it should have been submitted to the whole Court. This was at once acceded to by the learned counsel for the respondents. The consequence was, that your Lordships did not continue to hear the argument. So many doubts had suggested themselves to my mind, that I stated at two o'clock my wish for an opportunity of entering at some length into a statement of those difficulties, in order that a clearer view might be taken below, and a more satisfactory result might be obtained from remitting the cause. I added, that it was very desirable that any statement I might make should be put in an authentic form, and that I should therefore prefer adjourning for two hours, in order to have an opportunity of reducing my observations to writing. I have now endeavoured to do so, as well as the shortness of the time would enable me. I shall read to your Lordships the grounds on which I propose this case shall be remitted, stating, at the same time, that as I have not had an opportunity of looking into the case before this morning, and as my noble and learned friend, the Lord Chief-Justice, who heard but a small portion of the case yesterday, had no opportunity of referring to cases cited, it is very possible that I may have overlooked some material points.

My Lords, the present question, confessedly one of great importance, and of which I regard the difficulty as not inconsiderable, arises out of that provision of the Scotch law, which enables the heir, who but for his inheriting the real estate of his ancestor, would have taken a share in the personal property among the next of kin, to take that share as one of the children, or other heirs in mobilibus at his election, but only upon paying the price, by bringing in his inheritance as part of the whole fund or succession, and letting it be divided with the heirs in mobilibus.

The law regards the succession in all cases as twofold—heritable, which goes to the heir, excluding the other next of kin,—and moveable, which goes to the other next of kin, excluding the heir. But as the latter is the person peculiarly favoured by the law, and as this preference might operate to his detriment rather

Anderson, for heir of entail.—The heir of entail in the two estates of Carmichael and Anstruther claims to hold these as heir of entail, 20 Jan. 1836.

Anstruther v.
Anstruther and
Husband.

than his advantage were he confined in all cases to the real estate; an option or election is given him, by which he may be no worse off than the other next of kin, though he shall not be better off than they if he elects to interfere with their fund; and so he must let them share his land if he is to share their gear. Nothing can therefore be more just or fair than this fundamental principle upon which the doctrine of collation rests, always assuming it to be right that the heir should have the preference as regards real estate—a preference which excludes the other next of kin from any election as against him—while it gives him his option as against them. That preference rests upon feudal principles, and may be unjust in itself, but upon the injustice an undeniable equity is grafted.

The equitable view of the subject which gave rise to this doctrine has been carried so far as to require an heir claiming his share of personalty to collate even real estate to which he succeeds in another country. This point was first considered in 1817, in the case of *Robertson v. Macvane*, (in the Faculty Collection, where the Court, after two opposite judgments by two Lords Ordinary, (Lord Balgray and Lord Alloway,) held it clear that a party claiming legitim in Scotland must collate the Jamaica estate to which he had succeeded from the same intestate who left the moveables. This seems to be a considerable stretch of the principle, and it was admitted to be then first decided. Would it not follow from the rule there recognised, that if a youngest child in Scotland succeeded to lands of the tenure of 'Borough English,' in Middlesex, he must bring those lands into the common fund before he could take his legitim or legal provision? For though quoad personalty he is a younger child, yet in England, where the land lies, he is quasi eldest. He is heir here as much as *Robertson* was in Jamaica; for heir is nomen juris, and does not denote one child more than another. Does not this shew the difficulty of holding that land situated in a foreign country, and dealt with, and descending according to a foreign law, is to be regarded as if it were under the control of the Scotch law?

Notwithstanding this rigour, however, in applying the principle, and making the heir pay the price, it never was contended that equality is to be worked out between the next of kin at all hazards, and that whatever the heir has, and however it may have come to him, he must bring it into the common stock. The real estate coming to him from the father, or other ancestor whose personal property is in question, is all that he can be required to collate; and I presume, upon a principle of presumed intention, that the father, who might otherwise have disposed of his personal estate, died intestate, and left the law to dispose of his substance, believing the heir would take the land, and the rest the gear, but that, had he supposed the heir would claim upon the gear, he would have made another arrangement of his property. This, too, accounts for the collation being confined to intestate succession, and for the rule, admitted to be settled, that if the heir takes nothing by inheritance, he needs not collate what comes to him from a remoter ancestor, even, it is said, where the immediate ancestor, who left the personalty behind him, was liferenter of the land, so that his death opened the succession to the heir.

This principle it is that raises my *first* difficulty as to the provision supposed by the judgment to exist in the law, as regulating the present question; for if the heir, taking nothing in land from the last ancestor, owner of the personalty, needs not collate merely because he takes nothing in land from that ancestor, why should he collate in a case where confessedly he takes just as little, namely, where

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he succeeds, but succeeds not as heir of line but as heir of tailzie, has no privity with the last heir of tailzie, could in no way be either helped or hurt by any thing that predecessor could do, and takes, as regards him, by a title altogether as singular as if he had received the estate from a stranger, in which case it must be admitted no question at all could have arisen upon collation, whether the estate were entailed or not? It may, indeed, be said, that the ancestor's presumed will as to the personalty is here the ground of requiring collation to be made by the heir of tailzie. But why is there more presumed intention in this case than in the last one put, namely, that of a tailzied estate coming to the heir through the last ancestor, owner of the personalty, and coming by the fact of his decease? Surely he may be supposed to have had this advancement in fortune also in his eye; and it may be said, that had he thought the heir would claim on the gear, he would have willed it away to the younger branches, because he knew full well, that the same event which left the goods and chattels to them left the land to the eldest branch. And, indeed, the same argument from presumed intention would apply to the case of real estate coming from a mere stranger, but which the immediate ancestor, owner of the gear, knew would so descend upon, and provide for his heir.

The next difficulty which I have felt is akin to the former. The law has undoubtedly laid down, that an estate coming to one, though by conveyance, must be collated, provided it be such, as but for the conveyance or destination would at all events have come to the heir, the estate to which he was *alioqui successurus*. Now, granting that this is settled in the case of one taking the fee by destination, to which he would have succeeded at any rate by descent; and granting even the more general proposition, that whatever interest, whether fee-simple or fee-tail, or any other more restricted interest a person takes by singular title, he must collate; provided he would have taken it by inheritance, in the event of no such destination having ever been made in his favour, still I do not see that this proposition, and it is a pretty large one, can cover the case of a person taking, under a tailzie, or as heir of tailzie, an estate, which, but for there having been a tailzie, he would have taken as heir-at-law. We seem here to be confounding two very different things. We suppose the capacity of heir of tailzie to be lost and merged in that heir of line, because the same individual happens to be clothed with both characters; and we also suppose, that because the estate which is tailzied is also an estate, which, but for the entail, would have descended upon the heir of tailzie, as heir of line, therefore the same tailzied estate is in the same person in both his different capacities; in other words, that he takes in one way only what he would have taken in another, had there been no entail to interfere with the succession. If this were true, no doubt the principle of collation would apply, and all the grounds which can be urged for it would exist here; but it is neither true, nor any thing like the truth. The heir of tailzie, as such, may be the same person with the heir of line; but as regards the estate tailzie, he stands in a perfectly different position, and the estate tailzie, and which he enjoys under the entail, is not at all that which he would have taken by succession. By succession he would have taken a fee-simple with all its incidents, the absolute liberty of enjoyment and dealing with it during his life, and leaving it after his death. By the tailzie, he only takes the estate tied up in every way, both as to enjoyment and as to succession. He takes the fee from one who might have given it as he chose. He takes the entailed estate from one who was himself tied up, suppos-

line, is not bound to collate, while we admit, that the heir of line is bound to collate what he takes in that character, the question lies,

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ing him to be only heir of entail. He takes the fee from the immediate ancestor: He takes the tailzied estate from some one else; admitting that he must collate whether he takes that to which he was *alioqui successurus*. He was not *alioqui successurus* to the same thing which he took under the entail, but to another and to a very different thing. He takes a tailzied fee by entail, and he would have taken a fee-simple by succession; so that the doctrine upon the ground of *alioqui successurus*, when accurately examined, does not appear at all to decide the question.

If he is bound to collate exactly what he would have taken by descent, then let him collate the fee which he would have taken had there been no entail; but the fee he cannot collate, for he has it not. Does not this shew the difficulty of applying the rule of *alioqui successurus*, as the governing principle or decisive test in this case?

But a subtle kind of argument appears to be raised in order to meet this difficulty. It is said, that the heir of tailzie takes a portion of the fee which he would at any rate have succeeded to; and that this portion being common to both his capacity of heir of tailzie and heir of line, he must collate to that extent, as *alioqui successurus*. Thus, it is considered, that he was *alioqui successurus* to a thing composed of two parts, the liferent and the fee; that by the tailzie he takes one of those two parts, the liferent, and that therefore he must, as *alioqui successurus*, collate this. Now, though I will not deny the force of this observation, I must observe its repugnancy to the doctrine of a Scotch entail, for it rather resembles and very closely, our English doctrine of remainders and particular estates. A Scotch entail is a succession of fees to be successively enjoyed, not a carving out of one estate or interest into a number of portions to be vested immediately, but to be successively enjoyed; and therefore, consistently with that Scotch law doctrine, you can hardly hold that the heir was *alioqui successurus*, unless the kind of fee which he took under the tailzie was exactly the same with that which he would have taken by inheritance. Perhaps, indeed, the best support of the present decision, and of the case of *Little Gilmour*, is to be found in the principle of the heir of tailzie taking a fee, only restricted in so far as it is tied up. But, again, he takes not a fee-simple to which he is *alioqui successurus*, but a fee-tail, to which he never could have by inheritance succeeded at all.

Let us now consider shortly the case of an heir of tailzie under a simple destination, one holding by a tailzie without the fencing clauses. He takes no fee, that is, no fee-simple, nor any thing like it; but a *feodum talliatum*, as both the old laws of England and of Scotland term it, a fee-tail. He is not validly prohibited, it is true, from converting it into a fee-simple, as in England, by fine and recovery, and the conveyances substituted of late for that proceeding. So in Scotland, by conveyance he may convert his right into a fee; or in Scotland he may, without any such process, validly deal with it as a fee in most particulars; but until he does so—until he suffers a recovery here, or otherwise affects it in Scotland, that is, so long as he does nothing but enjoy it, he has only a fee-tail. Now, shall he be called upon, (and this I beg to press particularly,) shall he be called upon to collate the whole *corpus* of this estate, or only the portion which he takes by force of the entail, that is, the fee-tail? So, were there collation in the English law, would the tenant in tail with us be obliged to suffer a recovery for the purpose of vesting the fee in the common fund, and dividing it with the

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as it were, between these two positions, and arises out of the circumstance of Sir Windham Carmichael having in him both these characters.

personalty? This is my first difficulty on the present point. But another is akin to it. Suppose him to have done something to bar the remainders over in England or in Scotland, to burden the estate, and cause it to be evicted, or otherwise injured the succeeding heirs of tailzie, I ask, what is he to collate? That is a question I wish very specially to have resolved. Supposing him actually to have done something which he can do in Scotland, there being no fencing clauses, something which in England he might do by suffering a recovery if he is tenant in tail, but which I have already shewn he could not be compelled to do. But supposing him actually to have done this, and vested in himself thereby a larger estate or interest, I ask, what it is he is to collate? And I think the answer to that question will bear very materially upon the principle of these cases; I ask, what is he to collate? The estate tail, such as he has made it, or the estate tail, such as he received it from his ancestor, or through his ancestor, the owner of the fund? This is a question of some nicety, and I do not see how it is to be dealt with upon the principles which have governed the decision in these cases. For surely it would be going a great way to hold, that he must collate not only what he got under the entail, but what he made of that since he came to it, and which no power on earth would have compelled him to make of it, namely, a fee simple.

Again, what shall be said of one who takes an estate by purchase for a valuable consideration? Suppose the heir buys the estate to which he was *alioqui successurus*—it is agreed on all hands that he is not to collate that; and yet how can an heir of tailzie, in contemplation of law, be said to be other than a purchaser? But the value given is said to make the difference. Value, however, in law, is not merely money had, or land changed. Marriage is just as binding a consideration, and a consideration just as valid to exclude the claims of subsequent heirs or onerous creditors, as money price. Then, suppose the heirs of tailzie and provision to take, under a marriage-contract, estates to which they were *alioqui successuri*, why are they to collate more than heirs who gave value in money? They may not have given the consideration themselves, but their parents, or other ancestors, who contracted the marriage, upon the faith of this settlement, gave value, executed the highest and most binding consideration known to the law. We may put a case of every day's occurrence, a settlement by which the father on his son's marriage makes him heir of tailzie and provision, failing himself. Then the son must collate this, though he has given just as high if not a higher consideration than if he had paid a sum of money, in respect of which his father had executed an entail, making him the donee and institute. It is admitted on all hands that he is not to collate if the father sells him an estate, though, as eldest son and heir-at-law, he was *alioqui successurus*. Then, how is he bound to collate that which he takes by marriage-contract, being made the donee in consideration of his intended marriage?

My Lords, I have stated these difficulties without pretending to say that they weigh against the decision under review, so as to make me think it erroneous. But they make me anxiously desire further light upon its principles, than I can find in the reasons of the learned Judges by whom it was pronounced. Their Lordships rely entirely upon the *Little Gilmour* case, which is entitled to very great deference no doubt, both as having been most ably supported in argument,

Little light is thrown on the subject by the early history of the doctrine. It was merely an equitable remedy, adopted by the courts of different countries, to prevent inequality, modified and adapted to different institutions and usages. The Roman *collatio bonorum* was limited and applied to descendants, not to collaterals: By the old law, the succession was divided among the children *intra familiam*, the *sui hæredes*: those *forisfamiliated* were understood to have been otherwise provided. As this produced an inequality, the *praetor* interfered, and allowed the *liberi emancipati* to collate, or to take a share of the common fund of the father, provided they would

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and as having now stood for above a quarter of a century unimpeached by decision, though how far approved and how far acted on in practice we are not informed. The able argument of Lord Meadowbank in that case, full on many points, does not give me the light I desiderate upon the points to which I have adverted, and which I deem the main difficulties that encumber this question; nor can I close my eyes to the manner in which a very high authority, Mr Erskine, treats the subject. Though he gives no very explicit opinion upon the general question, and refers chiefly to the case of their being heirs-portioners, one of whom is made an heir of tailzie, and to the decision of *Riccart v. Riccart*, in 1720; yet he so expresses himself as to leave no manner of doubt in my mind that the rule in the Little Gilmour case would have been to him a great surprise. Lord Meadowbank, in his able, ingenious argument on that case of *Riccart v. Riccart*, does in no way meet the authority of Mr Erskine, nor the reason assigned by the learned commentator for that decision, namely, that the heir-portioner succeeding to the heritage by the father's entail or destination takes from one having full power over that heritage as well as over the moveables,—a reason just as applicable to a son upon whom the father entails lands to which he was *alioqui successurus*.

It is certain that the learned Judges have stated the Little Gilmour case to have given only the same law with former decisions. I have examined those older cases without being able to satisfy myself clearly and fully that it is so. The case of *Murray v. Murray*, in 1678, comes the nearest to it without touching it, while the case of *Rae Crawford v. Stewart* is far from going to that extent in my apprehension. As for the *Scotstarvet* case, that goes much further, if we take it to its full extent, and further than I conceive any one would think of holding to be law; for it sanctions the position, that there is collation wherever the heir takes, whether *alioqui successurus* or not.

On these points themselves, however, and on the question, whether or not the case of Little Gilmour was one of the first impression, I have no occasion now to decide. I only was desirous that, in sending back this important and difficult question to the Court below, for the benefit of further discussion by all the learned Judges than it has yet received, either now or in 1809, the light in which its merits appear to me should be accurately understood.

I have now stated to your Lordships, as this morning I purposed to do, the difficulties I felt in this case. I have done so much more imperfectly than I should have done had a longer period than the short adjournment of the House been allowed me for that purpose. I have only now to move your Lordships, that this case be remitted to the Court of Session for further consideration.

Ordered accordingly.

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throw into that fund the provisions they had otherwise received. Little information is to be got from the early introduction of the rule into this country. Feudal law introduced and fostered primogeniture: the heir was the favourite of the law, and, in addition to his rights as one of the other children, was entitled to take the heritage. This led to inequality; and although the law still treated him as one of the other children, it would not allow him to benefit by the moveable succession, without throwing it into the heritage, to which, by primogeniture, he was otherwise entitled. This bears out the view of collation, that it was rather a burden on the heir than a privilege. The heir of line is entitled to, and has an inherent right in the moveable succession as one of the nearest of kin; and when he comes to collate, it is merely a condition on which he is entitled to exercise his right. It is a proposition not to be disputed, that in moveable succession, not merely descendants, but all of the same degree of blood, without reference to representation or primogeniture, are to be accounted nearest in kin; *Stair*, iii. 4. 24; iii. 8. 31-2; Justice, 10th Nov. 1737, *M.* 8166; *Bankton*, iii. 8. 28. Whether collation is to be viewed as a burden or a privilege, the heir, in laying claim to the moveable succession, is only exercising an inherent right. If it is even considered as a privilege, still it comes to this, what is he to pay for this privilege? Clearly only the value which he derives from succession by intestacy, not that which is given to him by disposition or the will of a third party. To come to the more material arguments in support of this claim: In the first place, the claimant is not bound to collate his entailed estates, because collation has reference only to proper intestate succession. It may be assumed that this question can only arise in reference to intestate succession. The only object of collation is to remedy the inequality the law has produced. It is not intended to control the destination of a father, or any other individual who is an unlimited proprietor. As long as he is unlimited fiar he may dispose of his property in any way, and the law will not interfere. Collation has no such object in view. It is intended to remedy the inequality the law has occasioned in the case of intestate succession. Further, it has only reference to the succession which actually flows from the party deceased. What is the succession ab intestato of Sir John C. Anstruther? His succession was that over which he had control in his lifetime, and might have disposed of after death. The intestate succession is that which is divided among those interested by operation of law, not by disposition. The reason on which the whole depends is just this: The law, if left to itself, may sometimes lead to unequal distribution, therefore it allows the heir

of line to take the benefit of executry on collating,—what? just that intestate succession which the law itself would otherwise have given to him. It may be said this doctrine cannot be stated in such broad terms, because he is not only bound to collate in the proper case of intestacy, but likewise where there has been a *præceptio hæreditatis*. I admit, that whatever is taken by disposition, which is properly of the nature of a *præceptio hæreditatis*, the heir would be bound to collate; but in applying this principle, the law looks not to the form but the substance: it looks to *præceptio* as merely a means of propelling the succession to the heir, leaving the heir subject to all the liabilities which, by taking up that estate *ab intestato*, he would otherwise have been subject to. He takes it virtually by disposition of law, though, by means of the conveyance, his titles are more easily completed. This *præceptio* does not bar collation, because the heir, at the time he took up the right, had still in him the character of heir of line, and was subject to the liabilities to which he would have been otherwise subjected. If the law has gone so far against the heir as to look to the substance, not to the form of the thing, the distinction is in favour of the heir. If it be applied against the heir in this case, he has the benefit of the same principle under similar circumstances; and when you come to deal with the case of succession under an entail, you are not merely to look to the circumstance, how the heir completes his title, but to the substance, whether he does take in the proper character of heir of line, or as heir of entail, taking what is equivalent to the gift altogether of a third party. In considering this point, you must look at once to the distinction which exists between what is taken by him as heir of line, and what is taken in the character of heir of entail. First, look as regards the property he himself takes. The heir of entail takes in the character of singular successor: he does not take by disposition of law, but in virtue of a deed,—in virtue, in this particular case, of deeds executed, some of them, very nearly a century ago: he takes from different individuals who made different entails. The moment the late Sir John Anstruther died, the present possessor took in his own right: the right arose in his own person, neither by the will of his immediate predecessor, nor by the operation of law. It is very true he was bound to take up the succession by means of a service. The answer to any inference from this is two-fold: 1. What was the nature of the service? It was not a service as heir of line, because his attempting to take up the succession as heir of line would subject him to forfeiture of the estate. He took it up as heir of tailzie and provision: he took it by that form of service which implies a gift, not the disposition of law. 2. Supposing

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more weight to be attached to this, look not merely to the form, but to the character of the succession. What is the character of the succession as specially regards the right when vested in the ancestor, supposing, of course, that it is a case of succession under a complete entail? What are the powers of an heir of entail when in possession? He can't control the succession. Here is no question of proper succession. The rights of all parties are previously fixed by destination. Neither predecessor nor successor can make any change in their respective rights. Therefore it never can be said, because the heir of entail completes his title to his ancestor, he comes under any of the obligations he would have come under in the case of intestacy. Can you hold that to be his succession over which he had no control? Can you hold that to be the estate of a party, the succession to which he could neither disappoint nor alter? The proper succession of Sir John Anstruther is merely that which he could have destined, or which descended to his heir by operation of law uncontrolled by any will on the part of any party; *Ersk.* iii. 9. 3. This is just the doctrine we contend for. We say as to the whole proper estate which Sir John Carmichael Anstruther could have controlled, the succession of it is to be thrown into one mass. In consequence of his not having conveyed it, it descends by the operation of law. It is that alone which the heir is bound to collate. If we wanted an illustration of what is fairly the estate of the deceased, what not, the test is obviously the liability of the estate for debt. It is a rule of law, which, if any thing is settled, is so, that every man's proper estate is subject to payment of his debts, both during his life, and after his death in the person of his heir. There is no doubt that an estate, under the fetters of an entail, is not liable for debts. Why? Just because it is not the estate of the heir. The law does not regard it as his estate: it looks to the heir as acquiring the right by singular titles. The heir is liable for burdens which the deed or statute allows. But the point is this, he is not liable for the debts of the immediate ancestor. He may be heir of line, but is not, on that account, liable for his debts. Suppose the doctrine of the other party to prevail, and the heir called on to collate. The only way he can do it is by selling his life interest, and making that part of the executry. Supposing, what is not very likely, where the executry turns out not sufficient for payment of debts, unforeseen circumstances occur, creditors come and constitute their debts against the executors: to what extent are they liable? It cannot be said, both to the extent of the executry of deceased, and what they have received from the heir, because that would be bringing the entailed estate in computo. The executors then would be

entitled to retain a certain portion of the entailed estate, which is not liable for debts: And why? because it is not part of the deceased's estate. But if it was not his estate, what is the ground on which they can ask the heir to collate? The interest which an heir of entail has in the succession is little better than liferent. A party executes a trust-deed to provide liferents to certain individuals in succession. On death of one of these liferenters, his son, who is called as liferenter, takes up the succession. Could he be bound to collate this liferent on claiming a share of the moveables? What the principle? Just this: Each liferenter derives his right from the common granter; not each from the other: all derive right from a stranger. So is the case of heirs of entail: they are just donees, whose gifts flow from one common ancestor. They enjoy certain privileges; but in substance their right is merely a liferent right flowing from the original entailer. We are entitled to hold, that the heir of line who is heir of entail does all he can be required to do, if he offers to collate what he took as proper intestate succession. It is admitted that the principle and object of collation is to correct the unequal distribution of the law. In applying the equitable remedy, extend it not to a state of matters not contemplated by law: restrict the application of the remedy to the case where equity requires it. The heir of line claiming an interest in the executry is excluded without collation, as he draws part of the intestate heritable succession. What must he do to purchase immunity from this exclusion? He must just put into the common fund that in respect of which the law excludes him. The law holds him excluded in respect of taking something in the character of heir of line, and he purchases immunity by throwing into the common fund that intestate succession, in respect of which alone he is excluded. In equity, the principle is this, that it may be presumed the deceased would not have allowed so large a share of his succession to pass to the heir, except on the understanding that he would take no share in the moveables. So the law says, if you encroach upon the moveable estate, we shall restore the succession to the same situation in which it stood before it opened. What connection can it have with entailed succession? Does the heir of entail take away from the succession what might have otherwise been made to increase the moveable estate of the deceased? Was it a portion of his estate over which he had this control? So far from this, he acquired it from a third party: he is in truth just an intermediate step through which the right passes, and from whom it must go unaffected by his will.

A second leading consideration is this: The heir is not bound

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to collate the heritage he receives as heir of entail, because regard must be had to the character in which he takes: he takes as heir of tailzie and provision, not as heir of line. The distinction between the different classes of heirs is well known. It may be difficult to determine the liabilities of each: where one terminates and the other begins. If any thing is settled these extreme points are, that the heir of line on the one hand is liable universally for the whole debts; the heir of entail is not liable, in respect of the entailed succession, to any of those obligations which would attach to him as heir of line. Stair states this in broad terms, iii. 5. 8. Stair, and the whole of our law writers, hold these different classes of heirs as quite distinct; and the question comes to be, in the application of an equitable remedy, where is the occasion for transferring against the heir of entail a liability which he can only incur as heir of line? It is settled that the heir of entail is not bound to collate where he is not heir of line; Duke of Buccleugh, 1677; Stewart and Rae Crawford. Why then should there be transferred in equity against the heir of entail, because he happens to be heir of line, a liability to collate subjects which could not have been made available against him if he had taken merely as heir of provision? If a party, in the general case, is not bound to collate a gift, why should he be bound to collate that same gift, merely because the donor gives the use of it, ad interim, to one who happens to be his predecessor in law? You can only look to this in the light of being a gift, by the original entailer, in favour of all those parties respectively; and such transference of liability against them is against the analogy of our law. Whether you look to this party in character of heir of tailzie or of line, he is entitled to stand on his rights. As heir of line and next of kin he is entitled to go forward and take the succession which opens to him as such, and he is not to be affected in the enjoyment of this right by his being in possession of any thing he may take in a different character. This accords with the analogy of the entail law. Does it make any difference, that the heir of entail is likewise heir of line in an ordinary question of debt? Does it throw any liability on a subsequent heir, that he happens to succeed as heir of line to a father or more distant relation? If this transference of liability for debt is against the acknowledged principles of entail law, is there any thing to take the liability to collation out of the same rule? If there is any proper ground of distinction, the difference is in favour of the latter, in regard to which, you are merely dealing with an equitable remedy meant to correct the evil resulting from the operation of the law itself. The heir of line, when he does come to collate, is of course

bound to do so under such burdens as may have been imposed on the right. If he should himself acquire those burdens, as, for example, a wadset, could it be said that he was bound to collate if it should so happen that the burden exhausted the whole beneficial interest in the succession? The interest of the heir of line, so far as regards entailed succession, is merged, or rather extinguished by the entail. The moment the entailer executes the deed, he cuts off the spes successionis, or rights at law, of every individual heir of line. He, in substance, says to the heir of line, You had a spes successionis defeasible beforehand. I shall deprive you of any such right. Therefore the character of heir of line is gone. The heir of entail never can be subject to the liabilities, or take in the character of heir of line to the original proprietor. If he attempted to take under the character of heir of line, he would incur an irritancy. Put the case, that the claimant had been a nominatim substitute,—one of those immediately called; would he not have been entitled to say, I take this as a direct gift: it is given to me specially by name, not as an heir at all? Why should I, because I happen to be the favourite of the law, be compelled to waive the benefit of a provision settled on me, and secured by most anxious stipulations, merely because I hold in my person the character of heir of line to my immediate ancestor, who happens to be named before me in this deed of gift, and to whose intestate succession I am by law entitled to lay claim? Suppose a person leaves the liferent of two estates to a father, which he destines separately to his eldest and second sons: the father dies intestate: could either son be bound to collate in that case? The case is the same if the father had been the institute; and if collation could then apply, what would be the effect of it? Why, that the eldest son would be bound to collate, the second not. This is the result to which the doctrine maintained on the other side must inevitably lead. The eldest son, the heir-at-law, the law's favourite, must give up his estate before he can claim the benefit of a share in the executry, because he has in him the character of heir of line; but the second son is not bound to give up his estate, although both estates are equally the gift of their common ancestor. On this point there are one or two authorities; the case of Riccart, 19th Nov. 1720, *Rem. Dec. and Fol. D.* 2378, which is attempted to be explained away by Lord Meadowbank. Then there is Spalding, not reported, but referred to in 2. Bell. There a man died: his heir succeeded, but enjoyed the estate on apparenacy. He did not make up titles, then died. His heir, who took up the estate, claimed a share of the moveables. He was met by saying, You must collate. His answer, No; because, in making up

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titles, I pass him by and serve to the previous proprietor. If this case had been decided the other way, it would not have been materially against us: it comes within that class where there is a præceptio hæreditatis; but looking to the decision as it stands, it operates most materially in our favour. There is also Russel, June 2. 1822. Suppose, in the present case, the guardians of the deceased had not made up titles, Sir W. would have been entitled to share in the executry. He is now called on to collate merely from the accidental circumstance that the tutors made up titles. The acts of a tutor can't affect the succession. As to the cases hostile to us, Scotstarvet, 15th Nov. 1786, was considered by Lord Meadowbank, in Gilmour, as wrong decided: it has this specialty, that there was no entail. Gilmour is the only other case. It is in a great measure against us, but different in two respects. The one is, it had reference merely to a question among descendants, not collaterals. On this is founded the whole reasoning of Lord Meadowbank. It is further different, that it was in a question with a party whose character of heir of line could not be disappointed. He was the eldest son, whereas the claimant here is the uncle. I am aware the principle is against us: at same time the principle there established is unfavourably viewed by the late judgment, which requires that the point should be reconsidered.

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Keay, for executor.—Sir W. C. Anstruther has succeeded under two different entails. By each of these certain parties are called nominatim, and as heirs-male. Sir W. comes in, in the character of heir-male of tailzie and provision. The only peculiarity in this case is, that hitherto the legal order of succession has not been in any degree changed: every heir of this estate would, independently of the entail, have taken in the character of heir of line. What may be the case in time to come is immaterial. Sir W. is not only heir of line of his nephew, but of both entailers. The predecessor of Sir W. was a pupil, necessarily dying intestate. That Sir John could not have regulated the succession is true: as a pupil he could not have done it, if he had possessed the estate in fee-simple. There is no dispute as to the heritable subjects taken up by the heir of the investiture,—there is no question as to his right,—there is not any question about legitim, as in case of father's death. The moveables go among collaterals; and the only question is, whether the heir taking ab intestato, in terms of the investiture, is or is not bound to collate, before he can participate in the moveable estate. Where the succession is partly heritable, partly moveable, the heir, by the fact of taking the heritage, is excluded by law from a share in the

moveables; but as a relaxation of that rule, a privilege is conferred upon the heir, where he considers a share in the moveables more valuable than the heritage, of collating or throwing the heritage into one mass with the moveables, and drawing an equal share of the common fund. The plea of Sir W. rests on the ground, that the heir of line only is bound to collate; that if a party, though heir of line, takes the heritage in any other character, he is entitled to take the heritage and a share of the moveables besides. In this case we are told that he has taken something as heir of line; but we have not been able to detect what it is. Taking the matter on his own assumption, it was admitted that this position had been stated a little too broadly. We are told that Sir W. is in the same situation as if he had been a stranger; that he took the estates per formam doni; and in supporting this position, a point was touched upon which appears not at all material, viz. whether collation is to be considered as a privilege or a burden. The practical result is the same in both views; because it is admitted, in the general case, that if the heir keeps the heritable estate, he is excluded from any share of the moveables. They certainly have not been able to shew, by any antiquarian research, that at any time the heir could take both. The words made use of by our institutional writers are well known, yet they completely favour the idea of exclusion from the moveables except upon condition of collation. Balfour and Mackenzie, as cited in respondent's case, and Erskine, iii. 9. 3. The reason given by all these writers, why the heir is permitted to share in the moveables, is, that he should be in no worse condition than the other next of kin. Taking a plain popular view of the matter, whatever the form in which the heir here has succeeded, can there be a doubt he has got a large heritable property by the death of his nephew? Can it be said he is not in a much better situation by his death? How can it be said that he can take advantage of this equitable rule, upon the ground that he is worse off, in respect to the succession of his nephew, than the executors? Another observation is fairly justified by the language of the text writers; and it is this, that not the heir of line only, but every heir who takes the heritage by the decease of his predecessor, is bound to collate. They do not speak only of the heir of line, but the heir generally. The words of Erskine are, The proper heir in heritage.

Before considering what may be termed the merits of this case, disencumber it of some extraneous considerations. It was said, if there is no heritable estate, then the eldest son comes in as one of the next of kin. Who doubts it? He has the abstract character, but he makes no use of it. In truth, he collates, for he gives what he

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gets, viz. nothing. Where a person is sole next of kin, and also heir, he takes the whole, because there is nobody to compete with him. The rules of division arise only where there is competition; but still de facto he takes in both characters. If he takes by the deed of a third party, he is not bound to collate that; or if the estate be burdened with debt which he acquires *tanquam quilibet*, he is bound only to collate what he took as heir *deductis debitis*, that is, all he got by succession to the ancestor. The case was put, that the heir of entail might be led to form an exaggerated view of the value of the executry, and having consented to collate, it turns out that the executry is barely sufficient to cover debts, would the executors be entitled to claim a right in the rents of the tailzied estate? We are not bound to consider that question. It is enough to say, that the same consideration would occur in regard to an unentailed estate. Another consideration was alluded to: The heir is, by form of law, called on to make up titles, not to his immediate predecessor, but to a remote ancestor, if he was last infeft, and in such case is not bound to collate as to the succession of such predecessors. This proves that the heir so making up titles is not bound to collate, simply because he takes nothing out of the *hæreditas jacens* of his immediate predecessor. Another consideration was, the impossibility of collating in this case. *Esto* it is impossible; what does that prove, but that he can't comply with the condition on which alone he can claim a share in the executry? Are the executors to be injured, because restrictions have been laid on him? Any allusion to this consideration comes with a very bad grace from the other party. Is not Sir W. C. A.'s interest in these estates already sold? It is not he who sues here, but a trustee for his creditors. It is matter of indifference to him how this case is decided, except in so far as every man must be presumed to wish the situation of his creditors improved. A very extravagant case is put in the written pleadings. Suppose a man gets an entailed estate of L.100 a-year from his predecessor, who left L.100,000, would you hold him excluded if he could not collate? The answer is plain: It may be impossible to collate, but there is nothing to prevent his renouncing. No man is bound to take up the succession to an entailed estate, if it is not for his advantage to do so.

Having disposed of these objections, perhaps at too great length, let us observe the situation in which the party truly stands. By the death of his nephew he has got a large estate, which would have descended to him in course of law. He superadds the character of heir of line to that of heir of tailzie and provision. He takes the very estate he would have succeeded to as heir of line, not certainly

unburdened, but it is the same estate. His situation is not very different, so far as limitation goes, to that of an heir succeeding under the burden of heritable debts. It is in one sense less valuable; but this is just an element for consideration in making his election, whether it will or will not be for his advantage to take up the tailzied succession, and so bar himself from a share in the moveable succession. Here he has made his election, and is confessedly in a much better situation than if he had declined the tailzied succession to enable him to share in the executry. Under such circumstances, what possible pretext can there be for applying the equitable remedy of collation? Again, let us see whether, according to our decisions, the proposition be true, that it is only what a man takes as heir of line he is bound to collate. In *Murray*, 23d July 1678, *M.* 2374, the question was, whether the eldest son was bound to collate that which he did not take by service, but by disposition during the life of his father. It was found that he was bound so to collate, because he had in him the character of heir, and would have taken the same estate by service. *Baillie v. Clerk*, 23d Feb. 1809: in this case a father had made a purchase of an estate, and had taken the disposition to himself in liferent, and his eldest son in fee, with a power reserved to burden. It was taken for granted, if the father had directly disposed, the son would have been bound to collate; but the distinction was taken, that as the subject came from the seller, the original right in the father was merely a right of liferent. That was met by the argument, that it was substantially a right of fee in the father, since there was a reserved power; and the purchase was made with the father's money, and taken in such terms simply to save the heir from the expense of making up titles by service; and this argument prevailed. In both of these cases it was said, and truly, that the disponees, when they did come to succeed, were not heirs. The distinction is well known. They did not take by service: they owed their right to the voluntary conveyance of the predecessor. If it were generally true, that nobody but the heir of line taking up the succession as such was bound to collate, there could not possibly have been such decisions. Although he has a singular title in his person, that does not extinguish his character of heir of line. He can have no privilege on that account, in a question with executors. We are therefore entitled to assume, that any one conveying to the heir *alioqui successurus* during his life, puts him under an obligation to collate, as much as if he had taken up the succession by service. These were cases of disposition by persons in possession in fee simple: let us take another case of such disposition. Supposing a person in possession of an estate in fee simple conveys to the heir *alioqui*

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successurus, with an ulterior destination to another not so ; does it vary the case, that after his death, or in one or two generations, there may be a deviation from the ordinary line of succession ? The ulterior fate of the subject disposed makes no difference : the question is, how does this donee take it. I may here observe a distinction taken between this and Little Gilmour's case. In the printed paper it is said that the party ceding the entailed estate would have propelled it to the next of kin, whereas, in this case, the estate goes to the next heir-male of the Anstruther family. It is clear that would by no means follow in every step of the descent, and of course that makes no ground of distinction as regards the principle. In short, there is no solid distinction between this and Little Gilmour's case. Let us now take the case of a marriage-contract, where the heir of a marriage is at the same time heir *alioqui successurus* : is he bound to collate ? This is the case put by the noble Lord, at page 7. of his speech, as raising the difficulty. If any one point was admitted in Little Gilmour, it was this, that the heir under a marriage-contract is bound to collate. We have almost a direct authority in a very old decision ; I refer to the case of Brown, *D. v. Collation*, 2375. There the question was raised with an heir under a marriage-contract claiming part of the executry ; and he would have been held excluded, but for a special clause in the contract. Suppose a great many other cases : For example, estates conveyed under burden of specific legacies, or of paying debts, reversing the ordinary rule of liability : In any of these cases, though there is a burdened fee, still the heir takes that which he would have succeeded to as heir-at-law. The last case I shall put is this : Supposing a proprietor of an estate to convey to his heir *alioqui successurus*, under fetters of strict entail, in that case is he not bound to collate his interest in the entailed estate ? Undoubtedly a great part of their reasoning does not apply to such a case, because they can't say the heir does not take from his father. I don't know how they mean to deal with this case. Do they mean to say, that it is only in the case of the immediate predecessor being the entailer, he is bound to collate ? If so, that presents all the difficulties arising from the peculiar tenure by which he himself holds. Whether it be the entail of an immediate predecessor or remote ancestor, all the difficulties started present themselves. If these difficulties are to be the groundwork of decision, it must be held that the immediate successor is in the same situation as the remote. Though no case in point, there is a case which justifies me in saying, that where the father is the entailer, the son cannot share in the moveable succession, I mean the case of Riccart. I see in the course of the argument there, it

is taken for granted, that if the father had executed a strict entail, i. e. in favour of heirs-male, there would not have existed the peculiarity, that it was not conveyed to the person *alioqui successurus*. The eldest of three heirs-portioners is there considered in a situation analogous to a second or third son. This is an indirect authority applicable to the present case. I observe in the speech of Lord Meadowbank, he makes what he calls a subtle distinction: he says, that in a nice and critical view, the daughter could only be called on to collate a third, because to that only is she *alioqui successurus*. One plain common-sense view of the matter is this; in the case of a father giving to a son *alioqui successurus*, he gives to a person who, in that character, is excluded from a share in the moveable succession. In the case of a daughter, he gives to one who *ex lege* had a right to the moveable succession. There is no analogy between the cases. It is just the same as if it had been given to a second son, who, *ex concessu*, is not bound to collate.

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If I have succeeded in shewing, that a conveyance made in favour of an heir *alioqui successurus*, in whatever form, does not liberate from collation, I have advanced one step, because I have only the second case, that of a taking from a predecessor more remote. Let us consider whether any legal ground has been stated to shew a peculiarity in this second case. In the argument in the House of Lords, the great object of the appellant was to shew that an heir of entail does not succeed to his father at all; and accordingly the Attorney-General, in support of this view, made this observation, that the heir of entail is not heir to his predecessor, but heir to his predecessor's estate. This is a distinction we don't recognise, yet on that a great part of the argument was founded. It was said he took *per formam doni*, and not by succession to his predecessor. If that be true in the case of entails, it is true in every case of provision. Supposing, instead of strict entail, the parties here had executed simple destinations of the estates, the heir would take equally *per formam doni*. So that if this proves any thing it proves too much. Is it not true of all succession? If a man buys an estate, he takes the conveyance in such terms as pleases him; and when he completes the investiture it becomes the *lex feudi* of that estate. Every person succeeding to a feudal estate virtually takes in terms of an investiture; and while a certain destination remains unaltered, every man who comes to succeed, at however long an interval, owes his succession to the original investiture, and takes just as much *per formam doni* as an heir of entail. Upon this point the opinions of Lords Braxfield and Eskgrove in the *Scotstarvet* case, as set forth in Hailes, No. 1048, are not unworthy of consideration. At page 7. of the appellant's case; it is admitted

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distinctly, that an heir taking under the simple destination, even of a remote ancestor, is bound to collate; and while he maintains that an heir of entail is not bound to collate, he passes over the intermediate cases, and says in substance, I will not deal with these cases, but will take my own case, which is that of an entailed estate. Suppose a very common case: An entail is made by a proprietor in favour of his son as institute, and certain heirs substitute; by a common omission he neglects to apply the prohibitory clauses to the institute; the institute dies, having done nothing to alter the tailzie: it is taken up by the next substitute strictly fettered, although the institute had the full disposal of it. All the tests they give would have occurred here; still he would have taken a strictly entailed estate, not by a deed executed by his immediate predecessor, but by a remote ancestor. Put another case: An heir of entail takes an estate strictly entailed, but the deed of entail is not recorded. In this case it is plain all his debts and deeds must affect it; so that here, again, one of their tests completely fails. Although the estate be entailed in the strictest manner it is completely at the disposal of the heir in possession, by onerous contracts, while the deed is unrecorded. In all these cases the heir takes the estate in terms of the investiture. A limited estate is held by the immediate predecessor, and the successor takes it ab intestato in one sense, because the succession is not regulated by the deed of the predecessor. In furtherance of this view of the matter, consider the state of all feudal investitures in the early stages of our law, when collation was confessedly admitted: Could the vassal then change the investiture? To all intents and purposes the estate was entailed, except in so far as the act 1469, c. 37, permitted the entry of comprisers. I think they are rather unfortunate in making the power of disposal a test; and still more so in alluding to the fact, that the succession could not have been disappointed in this particular case. In all cases of succession to a minor, pupil, or fatuous person, the heir *alioqui successurus* is just as secure in the inheritance as if the estate had been entailed. The power of disposal, therefore, cannot be the proper test.

The grand test they appeal to is, whether the estate is or is not affectable by the predecessor's debts; and if not so, it cannot have been his property. It is true, at common law, every man's property is liable for his debts; but entailed property is created by statute, which declares substantially, that a man may hold property, and yet it may not be affectable by his debts. This species of property is limited and protected by 1685, c. 22; but still it is not less the property of the possessor: it equally vests in him, and equally passes out of his person, on his death, to that of his successor. It is

only less valuable in so far as it is not at the disposal of the possessor; and on the other hand it is more valuable to the successor, in so far as it comes to him unaffected by the debts and deeds of his predecessor. I hold the decision in *Rae Crawford* directly in point here. Lord Braxfield in the Outer-House, adopting the opinion in *Scotstarvet*, found that the heir was bound to collate, being heir of investiture. At a subsequent period he altered this judgment, assigning, as a special reason, that the party was not the heir of line, but heir of provision under a particular destination. The Court adhered, recognising the *ratio decidendi*. Therefore, this is an authority very nearly as direct as in a great many cases of a similar nature can well be expected. I really believe, in a great proportion of cases of succession, you can hardly get any authority more express than this. The inference is irresistible, that if the party succeeding had had the character of heir of line, the decision would have been unquestionably different. Whether well or ill decided, there is no departing from the broad principle, that wherever the proper heir takes by disposition he is bound to collate. We are told, however, that the law looks not to the form, but to the substance: if the eldest son takes the estate by disposition of the father, the Court won't go into nice distinctions as to whether he is heir or disponent: they regard not the form, but the substance. By reference to authority, it will be found that in every case they are guided by the form. I have cases both ways, where collation was admitted contrary to substantial justice, and where it was excluded solely from the form of the titles. There is the case of *Law*, first case under collation, *D.* 2365, and *Stewart v. M'Naughton*, 2d. Dec. 1824. These are two cases in which the doctrine was applied against the heir, although he had really succeeded not as heir *alioqui* successor to his predecessor. Take the converse of this, the case of a person possessing on apparençy. In popular language he succeeds to his predecessor. If you take a popular view of the subject, having respect to the substance, not to the form, can it be doubted that he is heir of his father? The case of *Spalding* naturally suggests a test by which to try the illustration on the other side. In this case the liability for debts applies in the strongest manner: the next heir passing over him possessing in apparençy does not take the estate unencumbered by his debts; yet the Court, overlooking this consideration, and thereby disregarding the substance, looked to this, How does he serve. There is also the case of *Russell*, before cited. A case was very ingeniously put. Supposing two entails by two remote ancestors: the succession to these estates is at one time united in one individual, and is separated afterwards in

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the persons of two sons: This is a very common case: Is it not extraordinary the eldest son should be bound to collate, the second not? Unquestionably, in regard to every rule of law, some cases of apparent hardship may be put. No doubt the eldest son must collate, the second not. This, however, is a case not a whit more repugnant to reason than the case of Russell; and, in truth, it must be admitted, that a great variety of the results of the Scotch law of succession appear anomalous. No reason can be assigned for many of our rules, which are continually acted upon. Their origin is lost in antiquity. Why is it that the younger brother succeeds to the heritage, the elder to the conquest? Why has the widow a terce only out of the lands in which the husband was infeft at his death? Why has she no terce out of burgage subjects, or out of feu-duties, as was lately decided in the case of Nisbet, although feu-duties are neither more nor less than rent? The answer to all this is, that the rules of succession are arbitrary. It is matter of indifference how they are fixed, if they only are so. Every man must be presumed to know, and to have adopted them, if he has not provided otherwise. Any argument touching their effects is altogether out of place. It is enough to say, that it is of importance that the rules of succession should be fixed and known; and this observation strengthens and gives the greatest possible weight to our reliance on the case of Little Gilmour, which has been acted on for more than half a century, and which, I say in a word, is not distinguishable from the present case in any one particular. This was a case which was argued with the utmost ability, was most deliberately and maturely considered, and finally decided by the unanimous voice of the Second Division of this Court. It has been insinuated, that this was an amicable suit. We have the best proof that that did not blunt the edge of the argument on either side. (*Lord President.*—It was by no means an amicable suit in the sense insinuated: the parties were brother and sister; that was all.) (With a view to establish his position, that the decision in Little Gilmour had been acted upon, the learned counsel read various passages from Mr Baron Hume's copies of the papers in Johnston of Straiton's case; and he also referred to opinions delivered by the late Lord Eldin, when at the bar, and the late Mr Matthew Ross, both according with the above decision, in reference to the succession of Sir Thomas Moncrieffe; and he concluded by pointing out the danger which would result from now disturbing the decision in Little Gilmour.)

Rutherford, for heir of entail.—It has been observed, as if matter of importance, that the pursuer is proceeding here, not on his

own account, but for his creditors. I am not aware how that affects the question. There can be no doubt Sir Windham Carmichael Anstruther has a most material interest. If he succeeds in the present suit, he will relieve himself entirely from embarrassment. It has been further strongly urged, that the case of Little Gilmour has stood for a long period, and been acted on as a precedent. That consideration was most forcibly urged in the House of Lords. That high tribunal looked most narrowly to the case of Little Gilmour. They were not satisfied with the reasons on which it rested. Notwithstanding the statement, that it had been acted upon in many cases in the intermediate period, they thought they were called upon no longer to permit it to be regarded as a precedent, unless its foundation should be proved to be sound. I am aware of the disadvantages the party labours under, whose object is to disprove the reasons of a prior decision; but these disadvantages are completely met by the fact, that it has been deemed expedient that this decision should be reconsidered; and I am persuaded that this consideration will induce the most severe and rigid scrutiny upon the present occasion. Without resuming the facts, and taking it, that the present case is similar to that of Little Gilmour, although I certainly don't think the distinction we have taken is by any means whimsical, let us see what is the established rule in respect to collation. It is this, that where a party dies, leaving an heir of line and other next of kin, the estate divides into heritage and moveables. The heir, when he is next of kin, is entitled to take a share of the moveables, on condition of collating the heritage. That is the general rule of law, as laid down in all the books, and it is not our intention to impeach it. Whether the power of collating is regarded as a privilege, or as a burden on the exercise of an inherent right, is not of vital importance. The fact is, the condition of collating is the condition on which he exercises the right; and the only thing which can give importance to the distinction, is what is said by Lord Meadowbank in Little Gilmour. If the judgment is examined on that point, it will be found to rest on matter of antiquity, which, as has already been observed, is lost in obscurity; but I am willing to take it in either view.

With reference to this rule, the first point to be observed is this, that in order to enable the heir to take a share of the executry, he must be not only heir of line, but next of kin. It will be observed here, as must strike every one on reference to the authorities, that this point, though now well established, was decided within a comparatively recent period. It was brought into question in the case of M'Caw, (28th Nov. 1787, *M.* 2383,) and in that case it was, for

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the first time, definitively settled, that the heir is not entitled to share in the executry if he is not next of kin. The counterpart of this, that where he is not heir of line he is not bound to collate, was settled in the case of Buccleugh; and this decision influenced the Court in *Rae Crawford*. The second part of the rule more immediately approaching the question is, that the heir of line, in proposing to take a share of the moveable estate, must collate what was truly a part of the heritable estate of the deceased, though he should take by a title singular in form, and not by his title as heir. This is important with reference to the application of the rule, because when it is once ascertained that part of the heritage was truly that of the deceased, the heir is bound to collate just as much as if he had taken by service. This was first distinctly ruled in *Murray and Baillie*, and precisely the same point occurred in *Stewart*. It is important to observe here, as seems in part admitted on the other side, that the Court are not always guided merely by the form: they will take into account the truth and reality of the thing; and therefore, though in some instances the heir does take in a form in itself singular, still he is bound to collate. It must, however, in these instances distinctly appear that the heritage taken by the heir was truly and properly the heritage of the deceased. It can't be disputed that the object of this law of collation was not to equalise the fortunes of a family: it was not to be applied, because the heir was rich, and the other children poor: it was simply to induce a certain equality in a certain succession; and therefore, unless it be proved that the heritage to which the heir succeeds was truly the heritage of the deceased, there is no room for collation, even if the heritage comes to him by the death of the common ancestor. The case of *Spalding* very strongly illustrates this; and before proceeding to observe upon it, I may notice, that the same point occurred again in *Russell*, where a hearing in presence was ordered; but the case went no farther. This appears in the new edition of *Shaw's Reports*, vol. i. p. 435. In these cases the argument was, that this was truly the estate of the ancestor, who was three years in possession, because it was subject to his debts. If this decision had been the other way, I should not have considered that it would impede or obstruct me. Even if so found, it would have just brought the matter to this, which I wish to be kept in view, that the substance and truth will be looked to; and if it should have appeared that, by the terms of the act 1695, c. 24, it was truly to be considered as part of the inheritance of the ancestor, of course there would have been room for collation. But the argument pressed, for its being part of the ancestor's estate, entirely overlooked the proper effect

of the statute. No party not entered, and not infeft, can by any deed, onerous or gratuitous, bind the estate. A party three years in possession may grant the most onerous deeds, but these will not, properly speaking, affect the estate. The nature of the remedy provided by the act is not to make such deeds touch the estate: it is only to induce a certain passive title against the successor. Accordingly, the law admits, that if the heir remains unentered, the creditors of the party who has been thus in possession have no remedy at all. In short, estates so possessed on apparency cannot be held as the proper heritage of the deceased: his creditors cannot immediately affect or touch the estate so held in apparency: he could not himself directly convey it, and in no way is it to be considered as part of the heritage of the deceased. Now, consider the situation of an entailed estate, as to which I apprehend the substance of the argument of the respondent will be found just to result in this, That such estate, by the form of the title, was vested in the ancestor: he held what the law accounts a fee; and his successor can only take by service to him: the feudal form of conveyance renders that necessary, and looking to that form, here is an heir taking from an ancestor; and that being the case, it must be held to have been his heritage, and therefore must be collated. No doubt this is the form; but we must look a little to the substance. First, then, what is the situation of the entailed proprietor: what his powers: he can't burden the estate: his debts cannot in any degree affect it: he can't alter the succession. He can no more touch it by any deed of his, whether inter vivos or mortis causa, than the heir apparent. In short, he is a mere liferenter. I admit the law says he has a fee; but it is in reality so limited and restricted, that he has de facto nothing but a liferent. I admit that the party coming after him is bound to complete titles to him; but that is in substance simply recording evidence of his death, and of his consequent right to take; so far as the estate either comes from, or passes to the successive heirs, it is in truth but a liferent right. While this is the case on the one hand, observe how the substitute takes. He owes nothing to the direct deed of the ancestor, or even to his omission or forbearance: he takes under the will of the original entailor, though he takes, in point of form, through the party deceasing. If you are going to look to the substance, and to apply the previous cases, I ask whether it is possible, in point of substance, to distinguish this from a mere succession of liferents? Are you going against the principle of these cases to hold, that, in reference to an entailed estate, you are to proceed on the form, neglecting the substance? Lord Meadowbank, in the beginning of his judgment, talks of popular

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principles. If such principles are to be brought into view, if any thing like common sense is to be his guide, I ask, whether it is possible for any man to say, that the heir of entail takes from the party who held the entailed estate before him? When a man is subject to none of the liabilities of his predecessor, he takes truly as a purchaser. Suppose an estate left to A in liferent, and to B in fee, (indeed it is very easy to constitute a conveyance in such a way as to make all the heirs of entail in so many words liferenters); A has all the powers of an heir of entail. A dies, B being heir-at-law. A leaves moveables, and a question is raised as to the necessity of B's collating. It never could be held that B was bound to collate his interest in the fee. The same effect would be produced by a trust for the benefit of different parties, one after the other. If one of these parties claimed under the trust, by coming against the trustee, would you there apply the doctrine of collation, and say, that, on the death of any of the parties, his interest is to be collated, as truly part of the heritage of the party deceased? Look at some results. Suppose, as is not uncommon, that an entail comes to an end, by passing into the person of the last substitute; and to relieve the case of difficulty about the possibility of an heir, suppose this person a female in very advanced life; the previous heir dies, leaving a large executry; what is this heir bound to collate? She receives, but in her own right, an estate much larger and more ample than the last heir; what is to be there collated? Is it the full value of the estate, which did not exist in the ancestor at all, which he could not have transferred to her, or any person whatever? I should think it a monstrous absurdity to say, that it is to be the full value, when the person who died had only a life interest. What is the proper situation of an heir of entail? He is creditor against the party last in possession for the whole of the estate. He takes it by means of a *jus crediti*, not by the bounty of the deceased. Suppose the party whose succession is in question to have committed an irritancy, and then the next heir brings an action of forfeiture, and deprives him of the right; what are we to say to this case? He may have made up titles as heir of entail; but if he commits an irritancy, the substitute or next heir may pass him over, and make up titles to the prior heir. Suppose this to happen in the case of a father, who afterwards dies, leaving a moveable intestate succession; what is to be done in this case? Is the entailed estate to be taken in *computo*, to entitle the son to share in the moveables? Is this a case in which the son has taken *præceptione hæreditatis*? On the contrary, it is taken altogether independently of the father. It is taken in the character of creditor, under the ori-

ginal entail. This therefore proves that the parties do not stand 20 Jan. 1836.
towards one another in the situation of heir and predecessor, but
that they take, by means of the original right, the right of the Anstruther v.
settler, who has made them all successively creditors for the value Anstruther and
of the estate. The other party put one case about an entail, on Husband.
which they seemed to rely. Take the case, said they, of an unrecord-
ed entail. Its not being recorded subjects the estate to the debts of Argument
the party last in possession. Suppose his succession in question, and for Heir of
then here one of your criterions fails. It does not appear to me Entail.
that the case here put in the least degree weakens our argument.
As regards the succession inter hæredes, the recording is of no consequence. The entail is, in substance, just as binding upon the heir.
He is equally bound to transmit the estate without encumbrances, except in so far as the rights of third parties may interfere. It
should likewise be remembered, when they talk of tests, that the liability for debt is only one criterion among a great many others.
There were some other cases put, which certainly, it is not to be denied, are a little puzzling, and do not admit of easy solution. Suppose the entail is made by the ancestor himself, whose succession is in question; or suppose the ancestor is the institute in an entail, to whom the fetters do not apply; what is to be said to this case? In the first place, where the entail is made by the party whose succession is in question, and there is a competition between his heir and executor; if collation is to apply, it can only be on this ground, that though the heir is taking under the entail, still he takes by the bounty of the deceased. He may have got less than if it had descended to him in fee simple, but still he takes by the deed of a party who might entirely have deprived him of the succession. In this way the matter just rests where it was before. Where he takes from a remote ancestor, and not by the deed of his predecessor, he takes by means of his *jus crediti*, and not by succession to the deceased. In Hailes, 1032, a difficulty is started as to the effect of a settlement by a party, by means of an entail, whether it may not virtually be taken as an exclusion of collation. If such difficulty exist as to an estate settled in this way by the immediate predecessor, there can be no difficulty where the estate comes from a remote ancestor. It is not long ago since you sustained, in *Gray of Carse's case*, (Graham, Nov. 14. 1828, 7. S. & D. 13,) a bond affecting the liferent in an entailed estate; and though it is at last fixed what is the proper way of adjudging an heir's interest in an entailed estate, there cannot be a doubt, that, in point of fact, such adjudication is a contravention of the entail, and done contrary to the wishes of the entailer. The only way in which it is supported is simply this, that by being limited to the lifetime of the party, the interest of

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the substitutes is discharged. I have no interest to dispute, that if a party settles an estate under entail, he is introducing a form of settlement which appears to exclude collation. The point is not yet decided, and there is certainly room for doubt upon the subject. If it was incumbent on me here to deal with that question, which is thus raised as a difficulty, I don't know if it might not be met satisfactorily on some such ground as that stated in regard to an adjudication. If the question were put to me, whether a person succeeding an entailer, or an unfettered institute, be bound to collate his right and interest in the entailed estate, I should incline to answer in the affirmative, in respect he takes it not independently of him. This last observation solves a great many of the difficulties in the cases put. It seems to be taken for granted in the argument in the case of Gilmour, and is assumed in the observations of the noble and learned Lord in the court of appellate jurisdiction. In a great many instances, the party who takes from the omission of the previous holder,—who takes from his forbearance,—is precisely in the same situation as if he took from him directly by gift. There is a great deal of reason in this view of the matter. It is this view of the case which justifies me in applying the case of Spalding to that of a strictly entailed estate, where the ancestor may have had a determined purpose to disappoint his successor, and could not do it. In such case the successor takes the estate, not by any thing his predecessor has forborne to do, and still less by a bounty on his part. With reference to this part of the case, I submit, that the substitute is really not to be considered as an heir: he is therefore not bound by the obligations properly attached to the character of heir. If I have made out that we are entitled to look beyond the form to the substance, then I say he is not heir but creditor, and as such, is entitled to take the estate in his own right,—a right derived from another source than the will of the party who predeceased him; and therefore, whether collation be viewed as a burden or a privilege, it is strictly attached to the character of heir; and being so, it is impossible, in equity or fair construction, to say that the heir shall collate more than he takes in that character.

Again, if you look to the estate itself, and the powers of the last proprietor, it is impossible to consider it as part of his estate, because he is without any of the powers which make property valuable. He must leave it to be taken by his successor: he cannot divest it from him: it has been left by a party who had power over both. The other party were pleased to smile at a remark made by the Attorney-General. That remark appears to me to be a good and fair one. It points at the very essence of the distinction which we

have been desirous to take. The heir of entail in reality succeeds to the estate, and not to the party who precedes him, because he does not represent that party in any of his responsibilities.

There is a case which may be put. At first sight it seems somewhat extreme. Suppose a party to die, leaving an entailed estate of L.30,000 a-year; also an unentailed estate yielding L.5000 a-year, and personal succession of more than L.400,000. Suppose there is a son and daughter, and that, by a deed of trust, vesting his property for accumulation, he disinherits the son, and purposes to disinherit the daughter; the question arises with the daughter claiming legitim. She has of course no claim of executry or dead's part; and then the point in dispute comes to be, whether this heir, claiming his legitim along with his sister, shall be bound to collate the rents of the entailed estate. He is asking what the law gives him as his proper estate, of which the father could not disappoint him. His father has disinherited him from every one thing he would have taken as heir. The only estate he takes, is an estate his father could not keep from him, being under entail. It is an estate held by the party who died, and now by the son, as the heir called by the original granter. I ask if this is a case in which you would admit collation; and can it be said, that before the son can claim his legitim he must so collate, although his father has deprived him of every thing he had the power to keep from him? This, as I have said, is an extreme case, but it is not an imaginary one. It is a case which is now in Court. The precise circumstances above detailed arise out of the succession of the late Marquis of Breadalbane; and before disposing of the present, you ought to have that case under your view.

I shall now allude shortly to the remaining cases. I do not think a great deal of information is obtained from the institutional writers. One case is referred to at an early period of the feudal law, and it is said that at that period all estates were entailed. I am at a loss how to answer any argument as to the state of the law of collation before 1469, because I am obliged to profess ignorance upon that point. They have gone back in the present instance, and given us what appears the earliest information, viz. in 1550; and I know that in one of the printed papers in the case of Gilmour, though I don't know the effect of it, they carried the matter further back, in an argument as to the state of this country, when a King of the Picts was converted by a certain Saint, and a King of the Scots was inaugurated by the same Saint. It is in vain to say, that because vassals could not alienate their feus, they were in the same situation as entailed proprietors. There is no resemblance between their situation and that of a party possessing under 1685, c. 22.

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In the latter case nothing can help the possessor: the estate must go down to his successor; and if he attempted to divert it, that would resolve the right, and give the estate to the next heir sooner; whereas, at the period alluded to, the superior and vassal might have concurred in alienating. When the superior was inclined to use his right, he generally could be got to waive it for a composition. The very earliest of the cases to be relied on is that of Riccart. If this case be considered as a mere question between heirs-portioners, it is certainly an authority against the claimant here. I think I am entitled to hold it as an authority in my favour, when we find Lord Meadowbank considering the case, not on popular principles, but as a lawyer and technically. His Lordship seems to think it was not well decided, because, according to the more substantial view, she was bound to collate only a third. If this be the true view, the case of Riccart is with me. If this be the view which a lawyer ought to take, then it is in my favour, because the party was not bound to collate what she took under the entail. The case of Scotstarvet will not be considered as an authority. It was reversed, I admit, on another ground; but still the whole judgment was recalled, thereby neutralising the case as a decision; and on referring to the report of the case of Gilmour, it will be found that it was considered as wrong decided. So that, so far as we have gone, unquestionably there is nothing like authority against us. Rae Crawford certainly can't operate against us. It is nothing but a repetition of the case of Buccleugh. The estate came to a sister. The parties in competition were a brother and another sister. Therefore, it is just a case where an estate came by settlement to one of the younger children. Mrs Rae Crawford was not heir of line, and not being so, was not bound to collate. That was sufficient for the decision. But there is a great deal of argument on the nature of the title on which she took; and it is said that the case was so decided, because the Court found she was not heir of line. How they can infer that the Court would have decided that she must collate, if heir of line, I can't see. The inference is quite artificial. It was enough to exclude the heir from collating, that, in point of fact, she was not heir of line. The case of Gilmour was decided with great difficulty, and I think may very fairly be said to have been what is termed a case of first impression. The point was never before really touched. The only other case is that of Straiton, in 1814: that is the only other case they have been able to appeal to. I have seen the notes, papers, summons and defences, &c., and the report of the accountant. In point of fact, the question arose in this way: It was a case between two infant children and their tutors. A sum was claimed by a daughter as legitim, the

father having left the whole estate to his son. L.20,000 was claimed as legitim by the daughter. The sum which afterwards turned out to be her fortune came to about L.25,000. In the contract of marriage the *jus relictæ* was excluded; and there was afterwards a settlement, by which the entailed, unentailed, and whole moveable property was given to the son, under burden of a provision to the daughter, with which she was not content. One of the points argued was, the *jus relictæ* being excluded, that goes to the dead's part; and so the daughter said the division should be bipartite, so as to increase the legitim. I can't understand how this question is of any importance. It was truly not necessary to raise the question as to the entailed property, whether he should be obliged to collate it, till it was settled whether he must collate the unentailed. So I observe the tutors state the matter for the consideration of the Court by this sort of argument, with respect to the property not entailed, that he was not bound to collate it, because he had it by the special disposition of the father. As to the entailed, they refer to the case of Gilmour; and the other party so little went on that case, that, in their information, it is not even mentioned. It furnishes no means for reconsideration: it does not contain any long argument: it merely refers to the case of Little Gilmour, and asks the Court to review it if they are to adhere. This is a case plainly of no authority at all. If it were of more authority, it comes so close upon the case of Gilmour, that it can only be considered as a repetition of that case.

These, then, are the whole cases, and there is, in truth, nothing but the case of Little Gilmour, if Straiton is to be disregarded. But then they say, we have the practice of the country for half a century regulated by Little Gilmour; and there is a great deal of argument on the expediency of adherence, and the consequence of non-adherence to that decision. With reference to the practice of the country, I wish to call attention to that point, because it is of some importance to notice, that, with all their research, they have been able to mention only one case. That case is certainly a very respectable one, but it is but one. On the other hand, observe that all this was stated very strongly in the House of Lords; but it did not satisfy them. I don't know that either the case of Johnston or Moncrieffe were mentioned; but the presumption of many cases placed the matter in a more favourable light for the other side than it now stands in. In my humble apprehension, the law of this country will be much more endangered by giving way to a bad principle, or retaining an unjust one, than it could possibly be by overturning this single decision; more especially when the vast and important interests which await your decision are considered, and still more especially

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when you consider how desirable it is that the rules of law should rest as much as possible on a sound and rational basis. There is nothing peculiar in going back upon erroneous judgments of this Court. It will be remembered, that in the case of *Scotstarvet* the law of domicile was completely changed, in so far as it was ultimately settled, that it was not to regulate moveable succession. This is just an instance of the benefit the law derives from such changes. To tell me that we are denying the right of primogeniture, or the right of executors to take the moveable succession, or that we are undermining the fixed principles of law, is altogether out of the question. We are only disputing a point which arises in a very peculiar case, as to which the rule has been neither very correctly or definitively laid down. When it is considered that the judgment now required to be reviewed passed not more than fifty years ago, at a time when the Court had nothing but general principle to guide them, I think I do not go too far when I say, that you are quite in time to go back and to revise and correct this decision, if it shall be found to be inconsistent with law.

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Dean of Faculty, for executor.—The result of this discussion is, that no case has been pointed out, or decision cited, as settling the practice, that where the heir of line is one of the next of kin, and takes the estate which was vested in the deceased, he has been allowed to take a share in the executry without collation. The state of the fact on the authorities and practice is, that when the heir of line comes forward to claim a share in the executry, he cannot do so without collation. It then comes to be of great importance to see whether the rule is laid down in such terms as to admit of any exception at all. In the course of the argument both sides have represented it as of no importance in what light you are to consider the claim of the heir in any case to come against the executry. It is said to be matter of little consequence whether it is to be viewed as a burden or a privilege. I am surprised the other side have so treated it; because, in the very able, ingenious and learned case on the part of Sir W. C. Anstruther, it will be found that, in point of fact, the matter is treated very differently. There is a very able argument to shew, not only that it is a burden, but that it is a burden imposed only in certain cases on the unquestionable right of the heir. We consider it is of some importance with reference to the way in which the rule is laid down, and the principle on which it is treated. We hold generally that the estate opening to the party by the death of the deceased whose executry is claimed, and vested in that party as heir by infestment, is his *portio legitima*; and that the executry, on the other hand, is the *portio legitima* of the bairns or next of kin,

whoever they may be. We don't differ as to the case of collaterals, who are in the same situation as descendants. The argument applies to son, father or brother. In maintaining the general proposition as to the *portio legitima*, I don't use the words of one Judge alone. I state it, as presently will be shewn, in the language of Stair. I state it as used in the argument in the case of *Little Gilmour*, before the opinions of the Judges were given; yet it has been supposed that this was a new term invented for the occasion. I state it in the words of the first Lord Newton, which shall be afterwards quoted. I think I am entitled to say, on this ground alone, that the claimant must either collate or abandon. Whether he takes the estate burdened or not, he takes what has been gratuitously received by him; and an estate so received the law has declared to be subject to collation. I may add, that I state the proposition in the words of Professor Bell,—in words introduced as the proper technical language of the law of Scotland, and so received without dissent for generations. In *Stair*, iii. 8. 29, allusion is made to a total separation of succession into heritable and moveable property. The author treats of collation as to moveables before he comes to speak of heritage, although a passage was quoted here on the other side as if both had been treated of collectively. It is at sections 48, 49, that collation by the heir is particularly treated of. At the close of section 53, another matter is referred to, which seems to test the character in which the heir takes, namely, the rule that executors nominate have a certain share of the moveables for their trouble in executing the testament. Here Lord Stair refers to a decision in 1690, which I have not found. Almost the same terms, indicating that the heir has no share in or right to the executry without collation, are employed by Sir George Mackenzie, vol. ii. p. 329. Bankton, in a passage referred to in the cases, uses the same language. In this view, I would call attention to the importance of the old case of *Law*, July 1553, *Balfour*, 233, *M.* 2365. The report is fuller as taken from Maitland's MSS. Last of all, you have it laid down by Erskine, if possible even in stronger terms, iii. 9. 3, in which he states the object of the rule to be, that the heir may not be in a worse situation than the executors. This is also well and fully explained by Professor Bell. Objection has been made to quotations from this work. My answer is, that it was twice quoted by Lord Tenterden in the King's Bench as to a bill of exchange, and also as to the doctrine of stoppage in transitu. (The learned counsel then quoted page 2, Lord Brougham's speech, as corroborating above position.) If the heir is excluded from the moveables except on collation, it is clear it lay on Sir W. C. Anstruther to make out, that though he is heir of line, and takes the estate vested in the

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person of the deceased, and which is taken out of his person by service to him, yet he can claim a share in the moveables without collation. I think it not unimportant to attend to the way in which the argument has been conducted on both sides of this question in former times, in the cases, for example, of Buccleugh, Murray, Riecart and Rae Crawford. For a century and a half it has been admitted by lawyers on both sides, that the heir is excluded except by collation. The question there was, whether the specialty of there being no service to the party whose succession was disputed exempted the heir from collation. Anderson, in the course of his argument, and Rutherford, more fully in his case, urged that the burden of collation is not to be transferred to such a case as the present. Why? If the institutional writers are right in saying that collation is only introduced that the heir may not be worse off, it lies on him to make out a right to claim at all without collation. We are told the estate is entailed by the deed of the ancestor, not the predecessor; and the fee in the person of the deceased was limited. On this point I shall make one or two remarks.

First, with reference to the question between the heir and executor: The case of tailzied succession very nearly brings the matter back to the right of succession according to the more ancient state of the rights of the heir: very nearly so indeed, because the succession was then secured to the heir equally as it has been when entails were introduced. This is the more material, because it is admitted that there is no period in the law of Scotland in which collation did not obtain. If you are carried back to the period when feus could not be alienated, you find that, at that period, the rule as to collation obtained exactly as now. You see at once that the right to tailzie was simply a bringing back from intermediate relaxation the former state of our law.

The second remark is this, That the principle of the law, as to the heir being excluded, was established long prior to 1685, c. 22. Therefore it is necessary to shew that that act, introduced for a special purpose, contains words which will give the heir different rights, and a different status from what he formerly possessed.

Third, That it is certainly a very singular ground on which the heir of tailzie's plea is founded. Observe, an estate is once vested in the ancestor, be it father or nephew, say under an open destination, or without a destination at all; it is the estate of the heir, unless altered by the party in possession. In case of tailzied succession, the ground on which the heir claims exemption from collation is not because he is excluded from the estate that he would otherwise succeed to. He founds on this, that that estate is more completely secured to him, not that he is excluded from it. The whole

object of the entail is to secure his succession; so that he is in fact, by this plea, turning round upon the law introduced for the very purpose of securing the estate to him. But then it is said the estate is of less value. If he has less to collate, I could have understood the principle upon which the executor might refuse him a share in the executry; but it is a singular ground for pleading that he is not to collate, that he has less to offer the executor than the fee-simple proprietor. Without meaning any thing offensive, this appears a most selfish plea, because the plea he argues is just in amount this, that because he has an immeasurable advantage over the next of kin, both during the life of the ancestor and after his death, he is to take a still farther advantage of him, by taking a part of his succession without offering him any equivalent. Put the case of a small entailed proprietor, of frugal habits, and a large family, making large insurances, and out of his limited means accumulating some executry for his younger children, out of the only part of the estate which is left free to him, what justice would there be in allowing the sons to come in for a share of it without collating? It is against the will of the deceased. He receives it without debt, and solely because the deceased had no power of diverting any portion of it towards the maintenance of these younger children. That is the proper way to view the effect of the law which the other side would contend for, and not by dressing up an extreme case. The principle for which I am contending, viz. that the heir has no claim upon the executry, is not confined to this branch of the law. We have an instructive example of the nature of the heir's claim as regards heirship moveables. The right to claim heirship moveables belongs only to the heir of line in heritage. The deceased must have heritage in the proper sense of the term. If it is a case of proper liferent, there are no heirship moveables. Again, the eldest heir-portioner has no such right. It is well known and admitted, that there is a mistake in Erskine, in citing the case of Garnkirk, as to this point. See how Stair explains this principle, B. iii. t. 5. § 9. The right to heirship was introduced, because the heir is excluded from the moveables: therefore, to entitle him to heirship moveables, he must be heir of line. There is a very important account of the reason why he is allowed to get heirship moveables in the case of Cruickshank, 27th May 1801, *F. C., M. App. Heir-Portioner*, No. 2. In that case it was found, on full argument, in opposition to the claim of the heir, that the law as to heirship moveables was introduced exclusively to indemnify the heir from his being excluded from the moveables. It was stated on the other side, that the character of heir was in this case extinguished. How did Sir W. C. Anstruther get heirship moveables if his character of heir of line was

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lost by the entail. He did get heirship moveables, as was decided, and properly decided, by the learned arbitrator in his favour. This is no new point. The heir of tailzie always has a right to heirship moveables. Then we were told in the course of argument, by Anderson, and substantially by Rutherford, that the coincidence of the characters of disponent and heir of line should not prejudice this party. Because a gift has been made in his favour, that should not exclude his legal rights; and they talk of the transference of a remedy against the view of law. Put the strongest of all cases of gift, a disposition of the deceased party himself, as in the case of Murray. If in that case the coincidence operates against the gift, I should like to know where, in principle, is the difference. Its being used as descriptive of one case makes it applicable as far as it goes. And here they take in the consequence of a right of credit. Is that case as strong, in point of principle, in a question with the executor, who has nothing to do with the state of the question between the heir and predecessor? Is this a case as strong as the case arising out of the obligation in a marriage-contract? The party, strictly speaking, has no power of squandering the estate, because, if he does so, the heir may claim the value of it out of the executry. Yet if he takes the estate itself, he cannot claim damages against the executry, nor can he claim any share in the executry without collating. This was assumed and admitted by all parties in Murray and Brown. The judgment of the Court implies it. It is expressly admitted by Mr Clerk, who pleaded the case, that the heir must collate. Then take the case which I see is stated by Lord Meadowbank, and again by Lord Newton, as a settled point, by which the universal practice throughout the country is regulated, the case of a tack secluding assignees. The heir who claims a share in the executry must collate that tack of which the tenant could not effectually disappoint his heir. I refer to the opinion of Lord Newton, who states the matter rather more concisely in the case of Little Gilmour. He treats it as a point settled in the practice of the country, and regards the principle as by no means new.

4. Let us now see what is to be said as to the principle maintained by Sir W. C. Anstruther in the case in hand. We are told that an estate, when entailed, is not the proper heritage of the deceased; that it is not taken up by his successors as his estate; that the substitute owes nothing to him; and that the service is a mere form: that it is a series of liferents, and just like a subsisting trust, operating for the benefit of a succession of persons nominatim et seriatim, and that each takes in law solely by virtue of a right of credit. If that be a true definition, then, assuredly, a great change must have been introduced by the act 1685, c. 22. (The learned

counsel went over the act, and noted particularly the words, ‘in- 20 Jan. 1836.
 ‘feft in the fee,’ ‘representing the contravener,’ &c.) There are
 many obligations which the successor must implement and fulfil, Anstruther v.
 such as obligations to grant tacks, obligations under subsequent Anstruther and
 statutes, sales of teinds, excambions, &c. Can you, on the statute, Husband.
 affirm that the estate, vested by infestment in the person of the de- Argument for
 ceased, is not his heritage? Does it make it less the heritage of the Executor.
 deceased that it was completely secured to him, or less a succession
 to him because the deceased could not keep his heir from it? I
 shall not repeat the dicta of writers as to the fee being in the heir
 of tailzie,—as to his being the proper heir of the deceased. I
 shall refer to branches of the law which test it. First, Let us look
 to the situation of parties in reference to the rights and claims of
 the superior, when the heir of tailzie happens to be heir of line.
 Is the superior entitled to hold his character of heir as sunk, and
 to view him only as a creditor, whereby he may plead against
 him the form of the title under which he claims an entry? Can
 the superior demand from him a composition as a singular suc-
 cessor? The only case in which such a demand has been insisted
 in, was where the heir was not heir of line at all; and this is a ques-
 tion reserved. We have another test in a statute passed after 1685,
 which fully brought out the question, whether the heir of entail was
 a proper heir; whether he took as heir, and was received in our law
 as heir in every sense of the term. I mean the act 1695, c. 26.
 The point was brought out very forcibly in *L. Glencairn v. Graham*
of Gartmore, May 23. 1801, *M. App. Heir-Apparent*, No. 1; affirm-
 ed on appeal. (This case was fully quoted by the learned counsel.)
 Heirs of entail have been fruitful in devices to avoid every respon-
 sibility which the law might impose upon them. Thus it was de-
 nied, that an heir of entail could be charged to enter, because his
 entry cannot be held equivalent to a service,—because you could
 not charge him to fulfil the conditions of the entail. This matter
 is very clearly stated in *Sir W. Binning v. Lauderdale*, June 10.
 1742, *F. D.* iii. 9; *M.* 5262. An important view is given in
 5. *Brown’s Sup.* 735-6; *Monboddie’s Notes*. But then there was
 another point contended for, and tending to introduce a more general
 doctrine. It was that which was long struggled for, that the entry
 of a party as heir of entail did not impart universal responsibility;
 for they really took by disposition. The matter has been very learn-
 edly discussed by *Dirleton*, after the date of the entail act. (The
 learned counsel here quoted the passage, *v. Heir of Tailzie*, 210,
 octavo edition, observing, that he would give the other party the
 full benefit of what is stated by *Sir James Steuart* in answer. He
 then cited the case of *Murray*, 28th July 1748, of which there is a

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full note in 5. Brown's Sup. 764.) I admit the opinion of Arniston begins with a weight of authority against me. Elchies and the other Lords are of opinion that the heir of entail, like other heirs, was liable universally. The argument of the heir of entail is set forth by Falconer, i. 378. Again, Elchies, v. Tailzie, 34, quotes the previous judgment of Arniston.

But then, in the fifth place, observe the principle for which we are contending, and which lays at the foundation of the distinction which the Court have drawn between the institute and the heir of tailzie. The argument, that the substitute is a proper heir,—the proper heir of the party vested in the estate,—lays at the foundation of this case. *Leslie v. Leslie*, 1752, *Elchies, Tailzie*, No. 49, shews that this is no new view; see also *Erskine v. Hay*, Feb. 14. 1758, *M.* 4406. Then, I call attention to the *Duntreath* case, Nov. 24. 1769, *F. C.*, *M.* 4409, which shews that the term had no technical meaning when used in entails. If it had any such meaning when used, it is plain this case never would have been so decided.

6. The accuracy of the view taken as to the nature of the estate vested in the heir of entail, so as to make it his heritage in the sense of law, was completely brought to the test, when the Court came to apply the law of forfeiture for high treason. If an entail was but a succession of liferents,—if the heir took nothing from the predecessor, and owed him nothing,—if he did not take by inheritance or right of blood, then the forfeiture would only affect the estate during the lifetime of the party in possession. You are aware that no such right or privilege was competent to heirs of entail after 1685, c. 22. It required a special statute to protect heirs of entail against the confiscation of the whole estate. (The learned counsel here quoted the act 1690, c. 33.) The act 1707 made the law the same in Scotland as in England as to treason, and the Court had to consider the effect of it in the case of *Gordon of Park*. It was there found that the forfeiture could only affect the estate in the lifetime of Sir W. Gordon. The cause went to appeal, and we have a very authentic account of the *rationes decidendi*, in the well-known letter of Lord Hardwicke to Lord Kames. His Lordship's difficulty was not as to altering the judgment, but as to stopping short of a total forfeiture of the estate, on the admitted principle that the whole fee was in each heir of tailzie. (The learned counsel then read the letter from the 42d page of Kames' *Elucidations*.) Lord Hardwicke was well assisted on this occasion; among others, by Lord Marchmont. This brings into view a class of cases, which tests the principle for which we contend. It evidently produced an inequality in the application of the treason laws, because the fee being wholly in the traitor, the legal reasoning would have carried the principle to the

full extent of that law, and would have put tailzied fees in the same predicament as remainders in England.

7. I ask, how it is, when a creditor comes to adjudge, he must adjudge the lands themselves, and not the life-interest of the party in possession? The fee of the lands must be adjudged, otherwise the adjudication is inept.

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Dealing with this matter in point of principle, I would like to have it explained to us, on tracing the various sort of deeds, from a disposition in fee-simple up to a tailzie, when it is that it can correctly be said, in point of law, that the estate was not in the deceased. How do they make out that the party taking from him is not an heir, and does not take as an heir? I should like to see when it is, in the gradation, (though taking under the same words, same form, same mode of transmission, and under a statute introducing tailzied succession as in favour of heirs, and declaring each heir to be infeft in the fee,) and how it is, you slide into this new notion about his taking per formam doni. If we are right in our view, there is no difficulty in explaining all the cases which have occurred, or have been put. As to apparency the principle is plain: the estate was not the heritage of the deceased apparent heir, because he was not infeft in it. Another test is, that the apparent heir leaves no heirship moveables. The argument used by the other side only explains, at the utmost, the liability for debts: it throws no light on the question between the heir and executors. The true principle is, that the heir-apparent takes no estate out of his ancestor's hæreditas jacens. Take the case of an unrecorded entail, which was not answered by Rutherford, who observed, that it was good inter hæredes. This is not a question between heir and predecessor, but between him and the executors. How does it follow that the heir is not bound to collate so far as he can, because the entail is binding on him? Does he not owe every thing to the forbearance of the deceased, just as much as to the man who does not alter a fee-simple investiture? He took the case of a contravener, and put it as one of difficulty: If a person contravenes, a declarator is brought, and the estate is taken from him, and he dies, leaving large executry; it would be very hard that the party who thus took his heritage, by means of the provision of his author, should be deprived of a share of his executry. The answer is plain, that it is not his estate, but fell from him before his death. Sir George Mackenzie, in observing on the act 1474, c. 53, vol. i. p. 213, puts the case of a person divested before his death, and says, he has no heir in heritage. Put the case of a man renouncing the estate that opens to him: Suppose Sir Windham Carmichael Anstruther had renounced in favour of his son, and then claimed on this executry; in that case some diffi-

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culties might arise in equity, and two considerations might suggest themselves; 1st, Whether he did it in bona fide; 2d, There is this consideration, which might be very maintainable, whether, as Erskine says, and there is no authority against it, the grandson must not collate. It is no answer to say, the grandson does not claim on the executry; because the father has disqualified himself from collating, by transferring his right to a party who had as great an interest in the succession as himself. Then they put the case of the last substitute being an old lady. No difficulty in that case. According to our principle it was the heritage of the deceased. Then a number of cases were put of puzzles and enigmas, and difficulties appearing to arise from certain coincidences, all of which anomalous results were brought about by losing sight of the principle we are contending for. There is nothing an enigma may not be made upon. Our principle is clear; and when you keep it in view, all these apparent difficulties vanish. It is simply this, that he is to collate that which he takes from his ancestor, because he finds it in the inheritance of the deceased. There is a passage in the 8th page of the noble Lord's speech, in which reference is made to Erskine, iii. 9. 3. Is it not plain that Erskine uses the word heir to denote the heir of the investiture? In every case he must be the heir of an investiture of some kind or another. Still we are told that the case of Riccart is a stumbling-block. I don't deny there is some confusion; but I think Mr Keay's explanation of it is sufficient. Look at the argument in the case, and see whether there is not the most solid ground laid down for the principle. An heir-portioner is not the heir alioqui successurus in the entirety of the heritage at all. (The learned counsel concluded by referring to the cases of Rae Crawford, Little Gilmour, and Johnston of Straiton, already commented on.)

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Rutherford, in reply to the Dean of Faculty, by special leave of the Court.—In making the observations which I consider it my duty to offer, in consequence of the extensive array of authorities which have been brought forward for the first time on the other side, I shall confine myself entirely to these authorities. It may be in the recollection of the Court, that the part of the argument in which the Dean of Faculty produced these new cases, was where he attempted to maintain, that looking not merely to the form, but to the reality and substance, an heir succeeding to a party previously in possession can't be considered to take in any view as a singular successor, but really and truly as an heir; that the fee which really and truly is in the heir, the party substituted to him takes under the ordinary liabilities of an heir; and all the rules of law which

apply to the relation of these two parties, as ancestor and heir, will be found to apply to the case of an heir of entail. One of the points which was most pressed, and as to which he appealed not only to the law of Scotland, but to that of England, was the case of the heir committing high treason; and it was stated, that in a question of forfeiture, the estate is dealt with as an estate really and truly belonging to the heir in possession, and in the same way as if he were the heir in an ordinary fee-simple estate: that, he said, would be the case if it were dealt with solely under the act 1685, c. 22. That statute specially provides, that nothing contained in it shall prejudice his Majesty as to confiscations. I find it very early stated as a question, whether, under the old law of Scotland, the treason of the heir shall extend beyond his liferent, so as to prejudice the substitutes at all. This is stated by Sir George Mackenzie, at the end of his treatise on tailzies, as a question which might fairly be mooted. Nisbet, as appears from the argument in his Doubts, had suggested the clause, now very common, that the party in possession committing treason should not be held to forfeit so as prejudice his successor. Sir George Mackenzie resumes the argument, and thinks it would protect the substitutes, though, he adds, it might be right to have that matter cleared up by act of Parliament; and in a very few years afterwards the act 1690, c. 33, was passed, which specially provided, that no heirs in entails, with prohibitive and irritant clauses, should be prejudiced by the forfeiture of the predecessor. It is of importance to observe, that before that statute was passed, very grave doubts were entertained, whether, despite of a provision, treason would or would not bring the whole estate under the forfeiture. Sir George Mackenzie was of opinion that would not be the result, though, he adds, it might be right to clear it up by statute. Therefore, whether you look at the opinions of those Judges, or the acts of the Parliament of Scotland, with respect to treason, which, with great confidence, I put my hand to, I think this position is demonstrated, that an entailed estate was not one in which the heir in possession was strictly regarded as *fiar*, but there was such a division of right inter *hæredes*, that the party in possession forfeited only his life-interest, and it did not touch the substitutes. Nisbet very aptly compares the entailed estate, when treason is committed, to a ship in a storm, and recommends that the offending heir, like Jonas, should be cast out into the sea, that the crew and ship might be saved. This is a just analogy; and, as we say, each heir is truly a stranger; he is merely a passenger; whereas the other party would make him owner, not a stranger to the crew. Moreover, the Legislature did adopt the doubts of these lawyers, and in the end they solved the difficulty

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on the above principle, by declaring that the estate should be considered as but a life-estate in the person of each heir. In consequence, however, of the act of Union, which imported into the law of Scotland the English law of treason, the matter came to be reconsidered, in consequence of the proceedings in 1745, in the case of Gordon of Park. With respect to the law of treason in England, as regards the present subject, the statute 1. Ed. I. c. 13, commonly called the statute *de donis*, was the ruling statute till the 26. Hen. VIII. c. 13, which declared, that the offender should forfeit all lands, tenements and hereditaments in which he had any estate of inheritance. This being the case, the question arose in Gordon of Park, whether a tailzied estate was to be regarded as an estate of inheritance,—whether the heir of entail in possession had such an estate of inheritance in this tailzied estate, that by his treason it was forfeited, so as to prejudice the next heir of entail. No human being doubted that he had but a life-interest; but the question was, whether Gordon of Park, holding this estate under a strict entail, if the same were to be regarded as an estate of inheritance, did, by this forfeiture, not only destroy the life-interest in his person, but the whole estate. The date of this case is Nov. 16. 1750, *M.* 4728. It will be seen, from the statement there made on behalf of the Crown, that it was contended that the heir held an estate of inheritance, which therefore became subject to forfeiture. On considering this argument, however, it was held, that the heir in possession being disabled from contracting debts, altering the order of succession, or in any way affecting the rights of his successor,—having, in short, none of the powers of a *fiar*, therefore the estate and barony of Park could be forfeited only during his life. You see this proceeded precisely on the principles we hold here. The only question was, whether this was an estate of inheritance. It was held the heir in possession had only a life-interest, because, as in a question with those who took after him, he had no power, by any deed of his, to alter his interest; therefore, it was said, that looking to the relation of these parties, it is plainly not an estate of inheritance in the sense of the English act. The question then came before Lord Hardwicke, in the House of Lords. How did his Lordship consider it? What was the result at which he arrived? Where was his difficulty? The rule of law in England about attainder and forfeiture is, that if an estate be to A, and certain heirs in fee-tail, with remainder to B; if any one of these heirs commit treason, that carries not his *liferent* only, but it carries the estate tail to the Crown. The only one not injured by the forfeiture is he who has the estate in remainder, which remains independent of the estate tail, although in England they consider a remainder necessary to support an estate tail. The view which seems to

have been taken of a tailzied estate was, that the heir came very nearly towards the situation of the remainder man. Although it could not be said that it was carried out into a succession of life-rents, yet on looking to the relation of parties in substance, to the impossibility of affecting the estate in a question with a substitute, the situation of the heir appeared in many respects the same with that of a remainder man; therefore the forfeiture ought to be of no prejudice to the substitute. That struck Lord Hardwicke very forcibly. The only thing that moved him was the technical form in which the titles were made up; and then it was pressed by the Crown, that, in point of fact, there was a succession of fees; that the fee was fully in the heir, and if he committed treason, the whole fee passed to, and was vested in, the Crown by the forfeiture. No doubt, if that were the correct view, in justice the forfeiture of the heir of entail would have taken away the right of the whole substitutes. Lord Hardwicke thought it impossible to justify that result. His Lordship could not act simply on the form of the titles: he would not extend the law of forfeiture in that way. I don't think his Lordship was touched so much by lenity as by another consideration,—the extent of the punishment. The punishment of treason in a pecuniary way would have been very inconsiderable, if it were merely to have the effect of casting the Jonah out of the ship. If, for example, he were a father, it might not touch his eldest son. It was therefore seen, that the substitute must be dealt with, to a certain extent, as a remainder man, and to be viewed, not so much taking by succession, as by recurrence to the original gift;—seeing that it would be inconsistent with justice to deprive the whole substitutes of their right, to take the whole estate from them; on the other hand they saw the difficulty of declaring simply, that the party holding by this tenure should forfeit only for his own life. They therefore came to this result, to hold the forfeiture to extend only during the life of the traitor, and that it should exclude the heirs inheritable to him in case he had not been attainted. No doubt there was a compromise between these conflicting views, and it was impossible to make out a clear ground of settlement. It will be found, that they dealt with the different nominatim substitutions, in a question of Scotch entail, as so many separate estates in remainder. The person taking as nominatim substitute was held to take as a separate heir of entail, notwithstanding the forfeiture. Even, according to the law of England, they found it impossible to hold that the fee of the estate was in the heir to such an extent as to justify a total forfeiture, but that the heir-substitute, not the issue of the body of the party committing the treason, was entitled to take notwithstanding the forfeiture. So that, in point of fact,

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the heir-substitute was regarded as a purchaser; and as it was found impossible to deal with a tailzied estate in Scotland as with an estate tail in England, they were obliged to consider the heir as a remainder man.

Another point was, with respect to the act 1695, c. 24, in the case of heirs of entail. It was said this was an instance in which an heir of entail taking up the succession to a party last infeft was subject to the liabilities of passing by intermediate parties. The first case in which this was held at all was the case of *Lady Graham v. Graham*. I observe, from what is stated by Lord Alloway in the subsequent case of *Kennedy*, Feb. 11. 1809, this was a point ruled against the expectation of a considerable part of the profession. But what was found in this case? Nothing beyond this, that if the heir of entail possessing on apparency shall execute certain deeds, which, under entail, he was entitled to execute, and if he dies without completing titles, the next heir passing him by will be subject to make good that liability. Though true it was so found, it is in reality in the same situation with an entailor's debt; and in a question as to an entailor's debt, any person taking would be liable to the very same terms and conditions to which all the heirs successively taking the estate must have been. Therefore it is nothing to tell me, when considering mutual relations, because an heir might be liable to entailor's debts, or, under 1695, he may be bound to give effect to deeds executed in apparency, because there his liability arises out of the terms of the tenure on which he holds. He can't take without being subject to what is contained in his original title. If he incurred the real liabilities of an heir, in making up titles to a remoter ancestor, it would have been the opposite of another case, the case of *Dickson*, Feb. 24. 1801; *Graham v. Graham*, May 13. 1795, *M.* 15,439. In these cases the heir of entail possessing on apparency incurs debts, and then the next heir makes up titles, passing him by: it was found, notwithstanding 1695, there was no passive title whatever incurred. There was a case in which the statute did not and could not apply, because no representation was created. It is in the other cases only that there is any representation under an entail, in consequence of the terms and conditions of the tenure. But where these terms do not concur with 1695, c. 24, the heir will incur no responsibility, merely because his titles are in a certain form, or because the act is applicable as well to an heir of entail as any other heir. With respect to the case of *Binning*, there can be no doubt the liability was contracted entirely from the terms and conditions on which the estate was given.

Reference was also made to certain passages in *Dirleton's Doubts*, on this question, whether the heir of entail can be considered as an

heir properly speaking, or only as a creditor or purchaser; and a passage from that work was read with great triumph, in which the author is stated to have considered such heir as a successor titulo universalis. The answer given to this by Sir James Steuart, though treated with contempt, cannot, I think, be so lightly regarded, even when in contact with a doubt of Dirleton. If this volume had been more deeply looked into on the other side, they would not have been so much disposed to exalt Sir John Nisbet at the expense of Sir James Steuart. The authority of law relied on by them is entirely disregarded by Dirleton, and Sir James Steuart concurs with him. This, at least, destroys one of their authorities. This is not all. Under the head Collation, which we are told is so clearly understood and defined, I do find it stated seriously as a doubt by Sir John Nisbet, whether a person succeeding to a great landed property, and also to heirship moveables, and so the heir of line, is not entitled to share in the executry, however great, giving only the heirship moveables as his contribution. I apprehend, therefore, with respect to these cases, and these authorities, that they go strongly to shew that the point has never been properly disposed of.

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Looking then to the substance, and that will be looked to in no question more than collation, I think it will be found, that heirs of entail do not successively take as heirs to each other, though they do so by the form of the title. They always recur to the original deed, and their liability extends only so far as is pointed out by the deed of the original entailer, and for such deeds only as he has authorised to be done. As to the case of Duntreath and others, what their connection is with the present argument, I confess, though I have listened with all the attention in my power, it has been impossible for me to discover. I could enlarge considerably here, but feeling that I have confined myself to the narrow limits of a reply, I shall be content with asking your Lordships to make that calm and deliberate application of what has been above stated, to the subject-matter in dispute, which the difficulty and importance of the present question deserves.

The Judges of the First Division and Lords Ordinary returned the following opinion :

Lord President, Lords Balgray, Gillies, Mackenzie, Corehouse and Fullerton.—The question remitted by the House of Lords for the reconsideration of this Court is, Whether the heir-at-law, taking the heritage of the predecessor by succession, or, what is equivalent, præceptione hæreditatis, can be admitted to a share of the moveable estate, as one of the next of kin, without collating the

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heritable estate, when it is holden under the fetters of a strict entail? This question, occurring in the simplest and most abstract form, was decided in the negative by an unanimous judgment of the Second Division of the Court, in the case of Little Gilmour, Dec. 13. 1809,—a judgment which has ever since been considered and acted upon as having settled the law. But in pursuance of the remit, it is proper, in the first instance, to lay that judgment out of view.

We think it unnecessary to engage in any inquiry as to the origin of the law of collation between heir and executor, at what period or on what account it was introduced, and, in particular, whether it arose from the collision of the consistorial and the feudal law. There are no materials in our records to throw light on the subject : our earliest law writers, as Craig and Hope, are silent with regard to it ; and we should not have known that the privilege of collation existed before that time, had it not been for a single decision in 1555, shortly noticed by Maitland and Balfour. Instead of resorting to conjectural history, therefore, for a principle to guide us in this case, it is safer to confine our attention to the rules laid down by our institutional authors of acknowledged authority, or expressly sanctioned by the decisions of this Court.

With regard to the *persons* who are entitled or bound to collate, the following propositions are indisputably established :

1. If the heir-at-law claim a share of the moveable estate as one of the next of kin, he is bound to collate the heritage. This is the general and fundamental rule.

2. If the heir-at-law is himself next of kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

3. In the case of heirs-portioners being themselves exclusively next of kin, there cannot be collation, for they are all heirs, and all executors.

4. Heirs-portioners being in the same degree of kindred with others not heirs-portioners, the former, claiming a share of the moveables, are bound to collate with the latter.

5. One of the next of kin, not being heir-at-law, may take his share of the moveables, and is not bound to collate, though he should succeed to the whole heritable estate by destination.

6. The heir-at-law, not being one of the next of kin, is not entitled to collate.

Proceeding next to the *subject* of collation, it is established on similar authority, that the heir who shares the moveables, and who is bound to collate, must collate the heritage vested in the predecessor, and transmissible by succession ; and therefore, conversely,

that he is not bound to collate what is not heritage, what is not vested, and what is not so transmissible. The rule is laid down to this effect, and in unqualified terms, by all the text writers; and in none of them is there an allusion to any distinction arising from the subject being holden under a destination or under no destination; and if under a destination, from the nature of the destination, as whether it be to heirs whatsoever, to heirs-male, to heirs of tailzie, to heirs of provision, or to heirs of a marriage. If any such distinction existed, it was unknown to Stair, to Stewart, to Bankton, and to Erskine; for if it had been known to them, it was too important to have remained unnoticed.

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Let us consider, then, the grounds on which the appellant contends that the estate now in question, which was heritage vested in the person of the defunct, and which has passed to the appellant by succession, should be exempted from the general rule, to which none of the text writers knew of any exception.

In an early stage of the cause the appellant maintained that collation takes place only in the case of *intestate* succession, understanding by that term, it is thought, what the heir succeeds to by the act of the law, independently of any deed or conveyance executed by the defunct or his predecessors. That position is plainly erroneous, and is now admitted to be so. He is bound to collate, without distinction, property which has not been made the subject of destination, as heirship moveables, a personal right to land under a minute of sale and the like, and property which is holden under the most express destination in the investiture. Thus he must collate an estate conveyed by the defunct to himself and his heirs whatsoever; or to himself, whom failing, to his eldest son nominatim, and the heirs of his body; whom failing, his heirs whatsoever. If the completion of a feudal investiture in the ancestor, containing a destination, were to bar collation, there are few estates in Scotland which would not be exempted from it. The distinction between intestate succession and succession by destination is therefore plainly untenable.

Afterwards, the appellant's argument took a different form, and it was maintained that the subject of collation is that to which the heir succeeds in the character of heir-at-law exclusively, or that which it is said he inherits in fee-simple. Some misapprehension seems to have arisen here from the use of an ambiguous term. In the law of Scotland 'fee-simple' has two significations. Sometimes it means a fee destined to heirs-at-law, in opposition to a tailzied fee: for example, a fee taken to heirs-male, heirs of a marriage, or other heirs of provision. Sometimes it means an absolute fee, in contradistinction to a limited fee, that is, a fee holden under

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conditions or fetters. If the term is employed in the first sense, it is inconceivable how it should form the ground of any distinction in the question of collation. Whether the eldest son, for example, takes an estate, being an absolute fee, as heir-at-law of his father, or as heir-male of his father, his situation in reference to that estate, and his rights over it, are identical. In either case, the investiture may have been framed by the father himself, or it may have been framed by an ancestor more remote; but in both it is to his father to whom he succeeds, and to whom he must enter heir. His powers and liabilities, after he has entered, are the same in both; he may gift, he may sell, he may burden, he may alter the investiture at his pleasure, and by the very same means. In both he takes by an universal, and not a singular title; and in both the effects of his representation are the same. It is not necessary with us, as it is in England, to convert the fee tail by fine and recovery, or by any act whatever, into a fee-simple, that the heir may enlarge his powers over it; nor is it possible for him to enlarge his powers by any such act. If he dies without disposing of it otherwise, it goes to his heir-male, just as if he dies without disposing of a fee-simple; otherwise, it goes to his heir of line, or his heir of conquest, as the case may be. He cannot alter the succession of the tailzied fee on deathbed, but neither can he alter the succession of the fee-simple. Then why should he not collate what he takes by the force of an investiture, in the one case as well as in the other; the thing which he has taken being absolutely the same as to use, disposal, liability, and every other conceivable attribute of ownership? And the case is the same whether the fee is tailzied to a man and the heirs-male of his body alone, or to a hundred extraneous substitutes in the male line. What is said of a tailzie to heirs-male applies to every other species of tailzie, the destination being unfettered, and the heir-general succeeding under it. For example, a tailzie to heirs whatsoever, excluding heirs-portioners, to the children of a particular marriage, excluding other children, or, what is quite competent by the law of Scotland, a tailzie to a series of individuals, excluding the heirs of every one of them.

As a tailzied fee, unfettered, is indisputably a fee-simple as to every right in the person of the heir, so it presents as little difficulty in applying the rules of collation as a fee standing to heirs whatsoever. Thus, if the heir of tailzie claims a share of the moveable succession, no conveyance, nor any other act on his part, is requisite to enable the next of kin to obtain a share of this estate. Though he refuses to execute a disposition, by simply taking a part of the executry, he incurs a debt to them, which they may render effectual by a decree of constitution, and a charge to enter, followed

by an adjudication. It may be added, that the very same steps would be necessary on the part of the executors, if the estate, instead of being destined to heirs of tailzie, were destined to heirs whatsoever, and if the heir, with a view to avoid collation, should refuse to make up titles, and to dispoise.

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But it is needless to enlarge upon this point, which seems to have created some difficulty in the House of Lords, because it is distinctly abandoned by the appellant himself. He admits that whatever is the form of the title,—whether the investiture stands to heirs whatsoever, or whether it contains a special destination to heirs of provision,—yet, if the deceased had the full power of disposing of it during his life, it must be collated. ‘Where the deceased,’ he observes, ‘has held an estate in fee-simple, and over which, during his life, he had the full power of disposal, the heir-at-law must collate it, though the investiture may have been one of special destination, instead of leaving the succession to be regulated by the mere operation of law. But this peculiarity, namely, where the heir-at-law must take in form, as an heir of provision, an estate which the ancestor held in fee-simple, and which, without adverting to the particular form of the investiture, he has allowed to descend to his heir-at-law, is just one example of the more general rule, that the form of the title makes nothing against the truth of the case, and the rights of parties thence arising.’ This is in some measure to reverse the argument, as it was put at first, holding that the subject of collation is the heritage which does not descend ab intestato to the heir, but which he takes in virtue either of the express or implied will of the deceased. If the deceased has made an unfettered investiture, under which his heir-general takes in the first instance, it is admitted to be of no moment whether that investiture be conceived in favour of heirs-general, or heirs of tailzie or provision. And, in like manner, if he allows an investiture made by a remoter ancestor to remain unaltered, when he had the power of altering it, which gives the estate, in the first instance, to his heir of line, this is said to be equivalent to a donation by himself to his heir of line, it being the indirect expression of his will to that effect. The admission is very material; it discards from the argument all pleas resting on the form of the destination, as whether it is simple or tailzied; and on the circumstance whether it was framed by the deceased or by a remote ancestor; and puts the case on the point, whether the deceased had or had not the power of disposing of the property, which on his death has devolved on his heir-at-law as in his right. Stating the question in this general and abstract form, it is plain that it must be answered unfavourably for the appellant. There are many well-

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known instances in which the deceased has no power to alter the investiture, whether standing to heirs-general or heirs of tailzie, in which collation undoubtedly takes place. The investiture may have been framed by a remote ancestor, and the deceased, who succeeded and made up his titles, may have died in minority, or he may have been insane from the time he succeeded till his death, or he may have succeeded while he was on deathbed. In all these cases the heir takes independently of the will of the defunct. In some of them the defunct is incapable of having any will upon the matter; and in others his *enixa voluntas*, distinctly expressed, may have been, that the heir-at-law should not take. Thus, if the late Sir John Carmichael, who died in minority, had held any lands as in absolute fee, whatever might have been the destination, the law, holding that he could express no will with regard to them, would have allowed them to descend in terms of the Earl of Hyndford's, or of Sir John Anstruther's investiture; and if Sir Windham took them as heir under that investiture, he must have collated. It is in vain, therefore, to contend that the criterion of collation is, whether the estate was or was not taken by the express or implied will of the ancestor.

These preliminary observations have been thought necessary to clear the case of much irrelevant matter which has been introduced into it, and to raise the question of law on which parties are properly at issue, namely, whether the estates in question are not subject to collation, because they are not absolute but limited fees? If the case of Little Gilmour is not to be held a precedent, this question requires very careful consideration.

The general rule of law, as already stated, being, that all heritage in the person of the deceased is subject to collation, and that rule being laid down by every authority, without qualification or exception, it is incumbent on the appellant to shew why the lands in question, which, though strictly entailed, were heritage in the person of the deceased, should not fall under it. He attempts to do so on various grounds. *First*, He maintains that heritage, in the sense of the text writers, is heritable property; but that an estate holden under the fetters of a strict entail is not the property of the heir, because he has no power to alienate, burden, or alter the order of succession. The criterion of ownership, he says, 'is the liability of the estate for the proprietor's debts;' and, as the heir in possession of the entailed estate cannot affect it with his debts, therefore it cannot be considered as his estate.

If there be any point undoubtedly settled in the feudal law of Scotland it is this, that the heir of an entailed estate, however strictly limited or fettered, as soon as he completes his titles, becomes the

proprietor of that estate. Before he enters, the fee is in the hæreditas jacens of his predecessor. He takes it up by special service, the mode by which feudal property is transmitted from the dead to the living; or by some equivalent form. The inquest declare that the predecessor died vested and seised as of fee, and that the claimant is the next heir, and entitled to be infeft. When he is infeft he becomes the vassal, not by a singular but by an universal title. If he refuses to enter, the superior can compel him to do so by means of a charge of horning, under the statute. In consequence of his entry, all the rights of a vassal open to him; all the obligations of a vassal are incumbent upon him; and all the feudal incidents fall in his person. Were it otherwise, the fee of a strictly entailed estate might remain in pendente for centuries, contrary to an axiom or fundamental principle of the feudal law. When we say that a strictly entailed estate is a *limited* fee, we do not mean that it is limited as to its integrity, for all and every part of the fee is in the heir who has entered. No fraction or shadow of a real right is vested in any of the substitutes, who are merely personal creditors, having power in that character to enforce the conditions of the grant. It is in respect of those conditions that the fee is said to be limited; for if the heir does not comply with them, he exposes himself to the danger of forfeiting his right, that is, of being divested of the whole fee, which before was wholly in him. In the words of the revised case for the Marquis of Chandos, now at avissandum before the Second Division of the Court, 'The title by which the estate is held,—the powers which may be exercised in regard to it,—the legal provisions that are payable out of it,—the mode of constituting securities, whether legal or voluntary, over it,—its liabilities for the debts of apparent heirs,—the operation against it of the statutory certification on a charge to enter heir,—the application of the law of treason in regard to it,—and the manner by which it descends to, and the title by which it must be taken up by the next successors; in not one of these particulars is there the shadow of distinction, *in point of principle*, between an estate held under the strictest entail, and the present instance of an estate in fee-simple. Both estates may be restricted and qualified in various respects by burdens, and there may be a certain degree of peculiarity in that special class of burdens which more immediately form the characteristic of an entailed estate. But in all that relates to the essence of the matter—in all that enters radically and fundamentally into the constitution of the estate itself, or in any respect touches the inherent character of the right and title of its proprietor, or of those succeeding to him, there is not so much as an iota of difference.'

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All this is so familiar to every one acquainted with the feudal law of Scotland, that the statement of it here may be thought superfluous, and the proof by authority or precedent would certainly be inexcusable.

That the *jus disponendi*,—that is, the power to alienate or burden, is no test of ownership, is a point equally clear. On the contrary, it is excluded by the very definition of that right in the law of Scotland, as well as in that of Rome. Property, says Erskine, ii. 2. § 1. ‘is the right of using and disposing of a subject as our own, *except in so far as we are restrained by law or paction.*’ And this is exactly the language of the Civilians, who define *dominium* to be ‘*jus in re corporali, ex quo facultas de ea disponendi, eamque vindicandi, nascitur, nisi vel lex, vel conventio, obsistit;*’ *Calvin, ad Verb.*

In the case of a strict entail, there is a convention between the entailer who frames it, and the institute or heir who takes under it, that the latter shall not have power to alienate or contract debt,—that is, the entailer disposes it under these conditions, and the institute or heir, by his entry, accepts the estate under these conditions, and becomes bound to comply with them. This convention, express or tacit, is authorised and rendered effectual against third parties by the statute 1685, and consequently the right of the heir, notwithstanding the restrictions to which it is subject, comes under the express legal definition of the right of ownership.

But the argument is put by the appellant in a form at first sight more plausible, and it is the ground on which he now chiefly, if not exclusively, relies. He says, granting that the heir of a strict entail, when entered, is the proprietor of the entailed estate, in point of form, and in correct legal language, nevertheless, in substance and reality, he is nothing more than an usufructuary; in equity, therefore, he ought not to be called on to collate his interest under the entail, on the same principle that he does not collate heritage, which, under the disposition of the ancestor, he holds in *liferent*. In illustration of this principle, he refers to the case of *præceptio hæreditatis*, when the heir is forced to collate what he has acquired, not by a universal but by a singular title; what he has not succeeded to by a deed *mortis causa*, and in consequence of the predecessor’s death, in reality, what he has not succeeded to at all, but what was conveyed to him by a deed *inter vivos*, and while the ancestor was alive. In that case, it is said, the substance and not the form of the right is regarded, that the executor may get equity from the heir in opposition to the strict rule of law; and therefore he must give equity to the heir in the present case, on the same principle.

To begin with the illustration.—The appellant's inference would have had some colour if the doctrine of præception had been introduced into the law of Scotland for the sole purpose of equalising the interests of the heir and executor in the case of collation, for it might then have been considered as an interposition of equity to remedy the defect of the general and strict rule of law. But that is not its origin. The doctrine of præceptio runs through the whole law of succession; for if the real estate, or any part of it, is propelled by the ancestor during his lifetime to his heir alioqui successurus, without a valuable consideration, the subject so taken shall be accounted inheritance, and to a certain extent shall infer representation and liability for debt. The heir receives it by a universal, not a singular title: it constitutes a succession, and not a gift, and is no contravention of a prohibition to alienate under which the ancestor may have been laid. In accordance, therefore, with this rule of universal application, and without any reference to equity in the particular case of collation, the heir must communicate what he has taken præceptione.

The doctrine of præceptio, therefore, though affecting collation, as well as every other department of the law of succession, affords no analogy for holding a limited fee as equivalent to a liferent, though in some, but indeed in very few respects they may be similar. In truth, the common law of feudal succession uniformly resists the intervention of equity to temper or modify its rules. Thus, if a brother dies infest in lands, his sister-german succeeds: if he has omitted that ceremony, his brother consanguinean takes the estate. Thus, in the case of heirs-portioners, if one dies infest, her sister-german is preferred to the other heirs-portioners, being consanguinean only. Thus, if an heir-portioner dies, leaving a child who dies uninfest, his aunts, the other heirs-portioners, succeed; but if the child has been infest, the estate does not go to them, but to the child's brother or sister consanguinean, if he has any, and if he has not, to his father, or failing him, to his father's heir-general, however remote. What is it that sends the succession into channels so widely different, in these instances, contrary to every feeling of equity, and every principle of natural justice? Nothing but the mere ceremony of passing an infestment, which may be done without the knowledge or consent of the heir, and sometimes, as in the case of an infant, when he is incapable either of knowledge or consent. But if the mere ceremony of infestment produces such extensive and important consequences in all the ordinary cases of heritable succession, is it surprising, in the case of collation, that the circumstance of being seised or not seised in the fee should produce similar effects?

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The doctrine of collation itself affords many remarkable instances of the strict exclusion of equity in applying the rules of feudal succession, as to which there is now no dispute. If the defunct, though in possession for more than three years, and therefore capable, under the statute, of burdening the estate with his debts, shall remain unentered, his eldest son and heir-at-law making up a title to the lands may take a share of his moveables without collation; but if he has passed an infestment, his heir-at-law is bound to collate. It is in vain to say that in the one case the defunct is proprietor of the estate, and in the other that he is not. That is true; but it is the very same circumstance which imposes the obligation on the heir of entail having completed his titles, and by so doing having rendered himself proprietor. If equity were to interpose to relieve the heir of entail from collation, *à converso* it should interpose to make the successor of the apparent heir liable to that burden. A distinction resting on the naked ceremony of infestment alone ought not to be adhered to in the one case, and abandoned in the other.

So also, had equity been regarded, a younger son succeeding to the whole heritage of the defunct by destination would at least have been equally bound with his elder brother, the heir of line, to collate. Here, in like manner, it is in vain to argue that there is an analogy between the younger son and the heir of entail, because they both inherit, not by the act of the law, but *provisione hominis*. It has been already observed, that although the heir-at-law takes an unlimited fee by a deed of provision not made by his immediate predecessor, who from circumstances might never have possessed the power of altering it, he is nevertheless bound to collate. The analogy, therefore, entirely fails, while the strict rule of law, contrary to every equitable view, bestows a privilege on the younger child, which it withholds from the elder, the heir *alioqui successurus*.

Another illustration of the danger of resorting to equity may be found in the case of a grandson by the eldest son deceased representing his father, and coming into his place, who has not the privilege of collation which was competent to his father. Here the equity is so manifest, that even Mr Erskine was led to hazard an opinion, in the absence of precedent, that the grandson was entitled to the privilege; but the Court soon after decided otherwise.

But even if equitable considerations were admissible, or, in the words of the appellant, 'if the substance and not the form of the 'right' were to be regarded, it would not avail him. The right of an heir in possession of an entailed estate is generically different.

from that of a liferenter, to which the appellant resorts for an analogy. When the heir of entail has completed his title, as already observed, he is *fiar* in every respect; but no *infestment* which the liferenter can take, no ceremony which he can perform, will vest a fee in him, or any thing of the nature of a fee. His powers are different from those of a *fiar*—his liabilities are different—his *liferent* is incommunicable *inter vivos*, and intransmissible by succession. In the language of the Civilians, *inhæret ossibus usufructuarij*.

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The appellant pleads, that, since it is conceded that the fee of an heir of entail is limited, on that ground alone he should be exempted from the burden of collation, which he assumes to exist in the case of absolute fees exclusively. But there is no ground for that assumption. The reverser, the wadsetter, the appriser before the legal has expired, the owner of every other redeemable right, the *fiar* burdened with a *liferent*, or any other encumbrance, or with a clause of preemption, or an obligation of real warrandice, are all vested with limited fees: not absolute proprietors, but subject to restrictions more or less extensive, according to the nature of their respective rights: Yet all these *fiars* are indisputably bound to collate. Nay, it has been decided that a tenant under a lease for years, who, according to modern ideas, has no feudal fee in him at all, whose right is not only limited as to duration, but restricted to one among all the various uses of property, if he, being heir-at-law, take the lease by succession, is bound to throw it into the fund of division before he can obtain a share of the executry;—a decision resting on the general canon of the law of collation, so often referred to, the lease, though not a fee, being heritage in the person of the defunct.

Next, it is said that the heir of entail is not the heir of his predecessor who last entered under it, but of the remoter ancestor who framed the entail, and that he does not take by legal succession, but *provisione hominis et secundum formam doni*; and then again, not very consistently, that he does not take as an heir at all, but as a purchaser, and by a singular title.

But an heir of entail does not enter by his service to the maker of the entail, except in the solitary case when the maker is his immediate predecessor. The statute 1685 expressly declares that he shall serve himself heir to the heir who died last *infest* in the fee, and did not contravene, that is, whose right was not evacuated by forfeiture. By service, he necessarily becomes an universal and not a singular successor; for it is a contradiction in terms to say that a right transmitted by service is not a right of inheritance, but a right by purchase. By his service he represents the

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deceased, to whom he succeeds in all his rights and all his obligations, in so far as those obligations are not prevented from attaching upon him by the act of the law itself. In other words, he must fulfil every obligation of the deceased which is not prohibited and declared to be null by the entail, a prohibition and irritancy which the statute has rendered effectual. He is not liable *ultra valorem* for obligations not prohibited, for the same reason that the heir of a simple destination is not liable *ultra valorem*, if he enter *cum beneficio inventarii*, or on a precept of *clare constat*. But under the protection of the statute, he is the heir of the person last infeft; therefore, he does not take by a singular title. To say that he takes *provisione hominis et secundum formam doni*, is to say nothing more than that he takes in terms of the investiture, in the same manner as the heir whatsoever, or any other heir of a simple destination, takes in terms of the investiture. The heir *alioqui successurus* succeeding, not by virtue of an investiture to heirs whatsoever, not in the character of heir-at-law, but by virtue of a deed of provision, by a service as heir of provision, *et secundum formam doni*, in terms of his deed, is nevertheless bound, if unfettered, to collate. That was explicitly admitted in the case of Little Gilmour, and is as explicitly admitted here. But if the fetters of an entail create no distinction in this matter any more than any other encumbrance on the fee, or any other limitation of the fiar's right, as we think we have satisfactorily shewn, it is plain that the combination of these two pleas, aided with the groundless assumption that the heir in possession is the heir, not of his immediate predecessor, but of the maker of the entail, must be entirely unavailing.

Great weight is laid by the appellant on another view of his case, presented sometimes by itself, and sometimes in support of the pleas which have been already considered. Granting, it is said, that the substitutes under a Scotch entail have neither the fee, nor any portion of it, vested in them, in which respect their situation is altogether different from the remainder man of an English fee-tail; still they have a right of credit to the estate, not feudal indeed, but personal, which entitles them to demand that the entail shall be recorded, to insist in declarators of irritancy, and to take other steps for enforcing the fetters: and that right is not derived from their predecessor, but conferred upon them directly by the entailor. Further, it is a right which is frequently not gratuitous, but purchased with a price; for example, the execution of the entail may have been stipulated in a marriage-contract, marriage being confessedly an onerous consideration. If the son purchase the estate from his father, or from a third party, for a sum of money, and obtain a disposition to it, he is not bound to collate it; and, therefore, by parity

of reason, it is said he ought not to be required to collate in the case supposed. This view seems to have occasioned considerable difficulty in the House of Lords.

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But the law of Scotland affords an obvious, and, it is thought, an invincible answer. The substitute, as already mentioned, has no right to the fee; his right is to *succeed to the fee as an heir*, and therefore under the obligations which attach to an heir. As a personal creditor he is entitled to nothing, but to enforce the conditions of the grant; and unless he actually obtains a decree of irritancy, the heritage remains in the defunct, and as heritage, therefore, must be collated. No personal claim which the heir can have against his father can prevent collation of what he takes from his father by inheritance, although it may indirectly and ultimately render the subject which he has collated less valuable. An heir so-situated must collate the estate under its burdens, and so does the heir of entail when he collates his fee, which is a limited fee. It is true the heir is not bound to collate a subject which he has purchased from his father, if by the terms of the purchase it is to be conveyed to himself. But if he has not purchased the subject, but only *a right to succeed to the subject, as heir of his father*; and when, therefore, it is not to be conveyed to himself, but to his father in fee, whom failing, to himself, such purchase is no bar to collation. So it is in the case of a marriage-contract, in which, for example, the father of the bridegroom, being a party, binds himself to the bride and her relations that he shall execute an entail of his estate in favour of himself, whom failing, of his son, whom failing, the heirs of the marriage, in consideration of the marriage, and of the portion of the bride, conveyed to the married pair. This was stated to be a settled point as early as 1678, in the case of Murray, (Mor. 2374,) and it was not disputed on the other side of the bar. The question arose in the case of præceptio, the father having put forward a tennement to his son; but it is said that ‘it is ordinary for fathers in *their son’s contract of marriage* to infeft them in their whole heritable estate, whereby there remained no heritable succession, and yet they were never admitted to partake of the moveables, but were excluded as heirs per præceptionem hæreditatis.’ Thus in the a fortiori case, where the father, an obligant in the contract of marriage, and bound to make a provision for his heir, instead of leaving the heir to succeed to that provision, actually put him into the fee in fulfilment of his obligation, no doubt was entertained, for it was an ordinary case that the son was bound to collate. There is another case in 1680, where the same principle is recognised: ‘By contract of marriage the lands being provided to the heir by the first clause, and the conquest to the bairns in a subsequent

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‘ clause—the Lords found the heir had a share in the conquest, (though it was most part executry,) without collation, because he was also a bairn;’ Brown, July 21. 1680, *Mor.* 2375.

In that case, collation was excluded, not because the heir had a *jus crediti* to the lands under the marriage-contract, which, if the appellant’s argument were well founded, would of itself have been conclusive, but on a totally different ground, namely, that by another clause of the contract, the father had bound himself to give the children, and therefore the heir, being one of the children, the conquest of the marriage, which was chiefly moveable. A father has at all times the power of excluding collation; but he does so by conveying to the heir a share of the moveables, which, unless so conveyed, would have gone to the executors; and it is plain from the *ratio decidendi*, that if the father had left personal estate which was not conquest of the marriage, and therefore not falling under the second clause of the contract, the heir could not have claimed a share of it without collating his lands.

Thus, it appears that a *jus crediti* in an heir, (even although it be not acquired by gift, but for an onerous consideration,) to succeed to his predecessor’s heritable estate, does not relieve him from the obligation to collate; nor is he relieved though the predecessor, in fulfilment of his obligation, chooses to propel the succession by a deed *inter vivos*.

It has been said that the heir is not bound to collate a fee strictly entailed, because he cannot alienate the lands to the executors without the risk of incurring an irritancy. If it were so, the consequence would be, as is well laid down in the *Little Gilmour* case, that he would never get a share of the personal property at all, because he could not comply with the condition under which exclusively he is entitled to that share. But it is undoubted law that the heir collating is not bound to convey to the executors an absolute fee. He must share the heritage with them, subject to all the burdens under which he himself has taken it. There is nothing to prevent him to convey to them a right to the lands, or to their produce, defeasible in the event of his own death, or of a decree of irritancy being obtained against him. This is no contravention, if the decision in the case of *Nairne*, Feb. 15. 1810, and the ordinary practice of the Court, in dealing with entailed succession, can be relied upon. If not, certainly there is no impediment to his sharing the produce of the tailzied estate with the executors; and if they consent to hold that as collation, it is enough. It is a case *a fortiori* in their favour, that he is not able to pay all the price which ordinarily they receive for a communication of their right to the moveable succession.

We are of opinion, therefore, that the general principles of the law of Scotland afford no ground for holding a fee limited by strict tailzie, more than any other limited fee, to be exempted from collation; or for supposing that it forms an exception to the rule laid down by the institutional writers, in absolute terms, as applicable to all heritage whatever in the person of the defunct, descending to the heir *alioqui successurus*. Neither do the decisions of this Court, or of the House of Lords, exhibit a trace of evidence that such an exception was ever recognised. The cases of Murray and of Brown, on the contrary, as we have just seen, negative the plea that heritage, because it is taken in virtue of a deed of provision, or because the heir who takes it has a *jus crediti* to the succession, is exempted from the rule. The case of Scotstarvet shews that lands holden under a special destination or tailzie fall under it. And in the case of Rae Crawford, Dec. 3. 1794, where the estate was strictly entailed, it follows, by plain inference from the interlocutor of the Court, that if the lady had been heir of line, which she was not, but only heir of provision, which by itself imposed no such obligation, she would have been bound to collate.

That neither the case of Riecart nor that of Scotstarvet can afford aid to the appellant is, in our opinion, sufficiently obvious. In the former, it was impossible that there could be collation, because the succession did not divide into separate channels. All the daughters were heirs-at-law, and all of them were executors. The fundamental principle of the law of collation is, that the heir who is excluded from the moveables shall purchase a share of them by throwing the heritage into the common fund. But in the case of heirs-portioners, each, *de jure*, has a share of the moveables, and therefore the eldest has no occasion to purchase that right. And this was only a repetition of the judgment pronounced in the case of Jack many years before, where the Lords found that there was no collation to be made by the law of Scotland but only in the case of moveables, which, according to Gosford's report, was looked upon 'as a constitute custom, without all controversy or debate.' The case of Scotstarvet, so far from giving any countenance to the appellant's plea, affords a direct precedent against one of his arguments; for the Court held that an estate taken by the heir-at-law *provisione hominis*, and that provision made not by the immediate but a remoter ancestor, was liable to be collated equally as if the investiture had stood to heirs whatsoever. It might be inferred from the report that the eldest heir-portioner was found by the Court liable to collate, not only with her cousin Mr Hay Balfour, but with her sisters, the other heirs-portioners; but that was not the case. It appears from the Session papers that the action was raised at the

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An ingenious view was thrown out by Lord Meadowbank in the case of Little Gilmour, as to the extent of the subject which Miss Scott was bound to collate with the Balfours, the other executors. His Lordship observed, that she was undoubtedly bound to collate that portion of the inheritance to which she was heir *alioqui successura*: but that it might be questioned whether she was bound to collate the other two-thirds to which her sisters were heirs, for those two-thirds were given to her by destination alone; and with regard to them, that she did not seem to have been in a different situation from a second son, or any other heir *alioqui successurus* who is not bound to collate what he takes by destination; and he states the ground on which he holds it was successfully maintained that the collation should extend to the whole subject. It may be thought by some, on reading this part of the report, which is somewhat obscure, that his Lordship has been more successful in raising the doubt than in solving it. Be that as it may, that point in the case does not touch the present in the remotest degree. This is not a case of heirs-portioners, where no one is heir *alioqui successura* exclusively; nor is it a case where the executors are contending, not with an heir, but what may be called an aliquot part of an heir. Here the appellant, as in the ordinary case, has the whole character in himself, and he is at issue with those who are exclusively executors. It is likely that Mr Erskine, the learned author of the Institute, might not have approved of this decision, in so far as the last-mentioned point is concerned, or in so far as it was plainly erroneous in holding moveable succession to be regulated by the *lex rei sitæ*; but in so far as it found that the heir must collate though he takes *provisione hominis*, it is in strict concurrence with what he himself lays down, what all his predecessors laid down, what the Court considered as settled in the case of Murray, and what, as Sir Windham Anstruther is now compelled expressly to admit, is the established law of Scotland.

The views which we have taken might be illustrated and enforced by much additional argument, and a citation of various other authorities and decisions. But we consider this to be unnecessary, as the question is, in our opinion, ably argued in the respondent's appeal case, and still more fully and elaborately in the revised case for the Marquis of Chandos and others, now at *avisandum* before the Second Division of the Court, to which we beg leave to refer.

Having, in obedience to the remit from the House of Lords, treated this as an open question, we must now advert to one con-

sideration, which, in our humble but very decided opinion, ought alone to set the matter at rest. We allude to the decision in the case of *Little Gilmour*, pronounced, as already mentioned, by the Second Division of the Court in December 1809. That decision was as solemn and deliberate as the forms of this Court allow. It was unanimous: it was acquiesced in by the parties: it has been subsequently followed by one other decision at least to the same effect, and one other case at least of great importance has been extrajudicially settled upon the faith of it. To disturb such a precedent would, in our apprehension, be contrary to principle, and might be attended with the most disastrous consequences. It is no impeachment of the authority of that judgment, that it was pronounced by a Division of the Court, and not by the whole Court. Many thousand decisions have been pronounced since the judicature act in 1808, when the separation took place, by one Division, without any communication with the other. Those decisions are all the country has to rely on as the established law of Scotland, in the matters to which they relate, and on them the country does rely. Still less is it an objection that the judgment in *Gilmour's* case was never sanctioned by an affirmance of the House of Lords. Were that essential, considering how extremely few cases comparatively are appealed, it would go near to upset the whole common law of Scotland. In questions of international law, such as that we have just alluded to in the case of *Scotstarvet*, namely, whether the succession of moveables should be regulated by the law of situs or domicile, if the Court of Session err, it is the province and duty of the House of Lords to set them right, and that although the judgment may have been again and again repeated; for it is not the law of Scotland, but the *jus gentium* which the House of Lords has there to administer, and as to which the court below is not equally authoritative. The same thing may be said of some questions in the law merchant, which it is expedient should be uniform throughout the empire, indeed throughout commercial Europe. But if a point occurring purely and exclusively in the municipal law of Scotland cannot be ruled with authority by a judgment of this Court, in either of its Divisions, especially when confirmed by subsequent judgments, and regarded and acted upon as settled for a quarter of a century, the people of Scotland would be deprived of what they have been taught to consider as the safeguard of their most important rights.

Lord Moncreiff.—I concur in the foregoing opinion. I certainly cannot think that it is an open question; because I have long considered it as settled by the case of *Gilmour*, and can never think, that no point of municipal law can become settled unless it has been

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I agree in every word of the above opinion, and should be prepared to deliver the same judgment if it were a case of first impression. I think that the principles laid down are in all points sound; and the exposition of the manner in which these principles are to be applied to the present case appear to me to be clear and satisfactory: I could only express my own opinion by writing the same thing in other words. I beg leave, however, only farther to observe, that the argument of the appellant has been brought almost directly to an avowal of a principle, that the interest of an heir of entail, in possession of a Scotch entailed estate, is little better than a *liferent*, and that the entail of a Scotch estate does not differ in substance from a trust, with a succession of *liferents*; and that, if the case does at all depend on any such assumption, I can only say, that it is contrary to all the principles and fixed rules of the law of Scotland, as they have been uniformly recognised, both by this Court and by the House of Lords. But, whether the argument be pushed so far as this or not, I am of opinion that it is a point of settled law, and that, if it were not settled, it ought to be settled in the same manner.

Lord Jeffrey.—If I could consider the question as entirely open, I should have some hesitation about concurring in the preceding opinion; and certainly could not bring myself to regard it as so clear and simple as it is there represented.

The difficulty of the case I take to be this: The fundamental principle of the whole law of collation being that the obligation (or right) attaches only to heirs of line, it seems to follow, almost as a necessary conclusion, that they should collate only what they take in that character. Certainly they can be called upon to collate nothing that was not vested in the ancestor to whom they stood in that relation; and nothing that has not come to them on a proper title of *succession* to that ancestor; and, this being the case, it seems difficult to suggest a reason why they should ever collate more than has actually descended to them in virtue of that relation. If the whole question were open, therefore, I conceive there could be little doubt that this is the rule by which it should be governed. But it seems to have been long settled, that collation may be required in many cases, where the heir of line takes the heritage which was in his ancestor, not by a service in that character, but as heir of provision or investiture, and by the act of a predecessor in the fee; and it is said that the case of an heir of entail is not substantially different.

There is no doubt that those cases are exceptions to the literal

or peremptory application of the rule. But it appears to me that they may still be reconciled to its principle; and that, except only in the case of a strict entail, there are grounds upon which it may be held, though perhaps not without some aid from hypothesis and construction, that what is thus collated is always truly taken in the character of heir of line.

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Where a fee is taken simply to a man and his heirs whatsoever, it is entirely at the disposal of the fiar in possession; and if he makes no disposition, it will go to his heir of line; not, however, it is conceived, upon any view of public policy, but *ex presumpta voluntate* of the defunct, and on the supposition that such heir is the person he most inclined to favour. But if this be the ground of the heir of line's right of succession where the fee in the ancestor was altogether unlimited, it is easy to see that it may be held to be the same, where it was only limited in such a manner as to leave him the full right and power of disposal. If he have power to change an existing investiture, under which the fee would be carried, in the first instance, to his own heir of line, then his not exercising that power may be held to be exactly parallel to his not making *any* disposition, in the case of a fee absolutely unlimited; and the heir of line may be held to take the succession, in *both* cases, *ex presumpta voluntate* of his predecessor, and truly in his character of heir of line; because in consequence of the favour which the law holds to attach to that character. The predecessor, in short, may be held, in both cases, to have adopted and made his own, the destination, of the common law in the one, and of an earlier ancestor in the other, out of love and affection for his natural heir; and *he* may therefore be regarded as owing his succession, in the latter case, as well as in the former, to his possessing that character.

But if the other cases of apparent exception may be reconciled in this way to what I cannot but consider as the principle and natural rule of law, it is plain that such an explanation will not serve for that of a strict entail; where the heir in possession has no power whatever either to defeat or confirm the succession of the other substitutes. The cases of personal or accidental incapacity, as from minority, insanity, or individual paction, do not seem to have any application. There the inability to alter arises, not from the quality of the right, but from the circumstances of the persons. As *fiars*, they have full power—though, as individuals, they may be disabled from exercising it.

The case of heirs of a marriage is more perplexing; and certainly comes nearest to that of a strict entail. Yet it is not exactly parallel; since the fiar, though under a personal obligation not to disappoint the succession of such heirs, is not absolutely disabled, by the qua-

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lity of his right, from so doing. He may accordingly sell or burden the settled lands, though he will be answerable in his general estate for the value.

But though doubts may be thus raised, and plausible distinctions suggested, if the question as to heirs of entail could really be considered as open, I am bound to say that I have no such confidence, either in the grounds of doubt or the sufficiency of the distinctions, as would induce me now to depart from such a precedent as that of Gilmour; and that upon this point I entirely agree with the other Judges. Whether I should have concurred in that judgment at the time, it is impossible for me to say. But it seems to me plain, that by now adhering to it, no clear or consistent principle, or rule of practice, in the law of Scotland, will be violated; or any thing, indeed, effected by altering it, but the substitution of one solution of a nice and perplexing question instead of another. It being quite settled that heritage, not taken on the proper title of an heir of line, is yet liable to collation, it was not perhaps an unwise course to disregard subtle distinctions between particular cases, and to decide generally for such liability, wherever an heir of line took by succession the heritage vested in his predecessor. At all events, this was the course adopted, certainly not without the greatest possible consideration, in the case of Gilmour, nearly thirty years ago; and I cannot think it safe or advisable now to disturb it upon speculative doubts and difficulties. It is matter of notoriety that it has ever since been regarded, and acted upon, as settling the law.

Lord Cockburn.—I concur in the foregoing opinion.

At the final advising this day their Lordships delivered the following opinions:

Lord Justice-Clerk.—In obedience to the order of the House of Lords, pronounced in this case, the question of law was most fully and ably argued before the whole Judges; and as the judgment ordered to be reviewed had been pronounced by this Division, we thought it right to require the opinions in writing of the Judges of the First Division, and Permanent Lords Ordinary, in order that judgment may, in terms of the order, now be pronounced, ‘according to the opinions of the majority of such whole Judges.’

Those opinions are now before the Court, and they unanimously concur in holding, in substance, that the judgment of this Division of the 28th of November 1833, finding ‘that Sir Windham Carmichael Anstruther cannot claim any share in the executry of the late Sir John Carmichael Anstruther, without previously collating the heritage to which, as heir of Sir John, he has succeeded,’ is well founded, and ought to be adhered to; so that even if all of us

present were now of a contrary opinion, such must be the deliverance of the Court.

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Directed, however, as we all were by the House of Lords to have the matter of law deliberately argued, I have, in common with your Lordships, paid every attention to the able arguments of counsel, and the various authorities referred to by them. But, so far from being shaken in the opinion I had formerly entertained upon the case, I have been more and more confirmed in it by all that I have heard from the bar, and since read in those most able and elaborate pleadings that have been laid before us in the important question, embracing the same point that has arisen between the Marchioness of Chandos and her brother, the Marquis of Breadalbane, relative to the succession of their late father, and which also stands for judgment in this day's roll.

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I am not at all surprised that the argument for Lady Chandos has attracted the marked attention of the Judges, who have favoured the Court with a full opinion in this case, because it does contain a most masterly and satisfactory examination of the whole principles of law that are applicable to this question, and which are expounded in a way to remove, in my opinion, all room for doubt or hesitation as to the manner in which it ought to be determined, if the law of Scotland is to rule the decision.

Concurring, therefore, as I most entirely do, in the luminous exposition which is given in the opinion of the Lord President, and the other Judges who concur and subscribed it along with him, I should consider it as an unpardonable and useless encroachment on the time of the Court were I to attempt to state in more imperfect language those views of the case which I entertain, and which in that opinion are so clearly and admirably expressed.

But as some notion seems to have been entertained, that in pronouncing our judgment in this case in November 1833, we proceeded *merely* upon the authority of the case of Gilmour, I shall, in my own vindication, now read the notes of the opinion which I then delivered, as deliberately formed, and to which I now adhere in every respect, after all the investigation that the case has since undergone. Those notes, which are now before me, are in the following terms: ' Upon considering these cases, in which the Lord ' Ordinary has taken this cause to report, (and which are drawn ' with great ability, and particularly that on the part of Mrs An- ' struther,) raising the question whether an heir of tailzie, who is at ' the same time heir of line of the deceased, is bound to collate his ' interest under the entail before he can claim a share of the ex- ' cutry of the deceased, as one of his next of kin, I have formed a ' most satisfactory opinion, that, according to a fair review of the

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‘ whole authorities in our institutional writers and decisions, that question must be answered in the affirmative.

‘ The question indeed was so fully discussed, both by the bar and the bench, in the case of *Gilmour v. Gilmour*, 13th December 1809, when the whole train of authority and decision was most thoroughly sifted, and a most elaborate opinion delivered by the late Lord Meadowbank, embracing the whole law of the case, and grappling with every sort of distinction that could be drawn as to the application of the principle of the judgment which was there solemnly and unanimously pronounced against the heir of tailzie and of line who refused to collate, that it appears to me wholly unnecessary to enter at any length into the discussion. That decision has not been altered by a higher tribunal: no contrary decision has since been pronounced, but, on the contrary, the law, as there expounded, has been held as settled and finally fixed. It would therefore have been on no light grounds, and certainly on no thin or fanciful distinctions as to the circumstances of particular destinations of entails, that I, for one, would have been disposed to depart from that judgment.

‘ But upon full consideration, however, of the argument in those cases, I have seen no reason to doubt of the soundness of the decision in the case of *Gilmour*, which establishes that the doctrine of collation does attach to an heir of entail, and who is also heir of line of the deceased, claiming, as one of the nearest of kin, a share of his executry. I must therefore be for preferring Mrs Anstruther to the whole fund here in medio.’

I abstained at that time from enlarging more on the grounds of my opinion, because I held then, that in the arguments and opinions in the report of the case of *Gilmour*, every thing was to be found that was necessary for the sound decision of the cause. And upon reconsidering that report, with the admirable opinion of the late Lord Meadowbank, in which the Lord President, the late Lords Polkemma, Newton and Robertson concurred, not to mention the high authority of my brother on my right hand, (Lord Glenlee,) I do maintain that there are to be found in it the basis of every thing that has since been urged in the late elaborate discussion of the question, taxed as the abilities of the bar and the bench have been in regard to it.

If, then, a case, after having been argued by the first counsel at the bar, so well considered, and so solemnly determined as that of *Gilmour*, and which has universally been ever since held to have settled the law in that department, and has been repeated, as it certainly was by us in the case of *Straiton*, as I find from my notes, and so long acted upon by the country at large, is to be departed

from and overturned, merely because the whole Court was not then consulted, or an affirmation of it pronounced on appeal, it may well be asked, where is there security for any of the legal rights of the people of Scotland?

Lord Glenlee.—I am one of the number of the Judges who concurred in the decision in Gilmour's case; and if I was satisfied of the soundness of that decision then, I am still more so now, from the able argument that has since been laid before us. I am clear as to the propriety of adhering to our former decision.

Lord Meadowbank.—As I, upon a former occasion, stated my opinion, it would be a waste of time to enter into the matter now. I was of the same opinion then which I am now, concurring in that delivered by the Consulted Judges; but I would not be doing justice to the profession of which I have been a member for so many years, to my learned friend at the bar, or to my own feelings, if I did not add, that I never read a more able and satisfactory argument than that contained in the case for the Marchioness of Chandos, which, upon the point now before us, is, in my judgment, quite unanswerable.

Lord Medwyn.—I am in the peculiar situation of not having previously had an opportunity, as all your Lordships have had, of giving any opinion in this case. I reported it at once from the Outer House, without even hearing counsel in the cause, as I was told it was intended to argue the point upon principle, to contest the decision of Little Gilmour's case, and call for a judgment in the last resort. Your Lordships, along with my predecessor in the Inner House, Lord Cringletie, pronounced the decision which was appealed from, and then delivered your opinions. When the case came back for the opinions of the whole Court, I had in the meantime become a member of the Division, and not being one of the Consulted Judges, had it not in my power to join in their deliberations, nor subscribe their opinion, but was under the necessity of studying the case, and forming my opinion alone and unassisted by those mutual consultations which take place on these occasions. I accordingly studied the case in the vacation, and drew up my opinion before I had seen the opinion of the Consulted Judges, or even knew of their unanimity. Upon seeing that opinion, as I concur in every word of it, I was much inclined to content myself with simply announcing that I acquiesce in it; and indeed for some time I had determined to do so; but, on farther reflection, lest it should be supposed that I assented merely from the weight of authority, without due consideration, or the necessary study in a case remitted from the House of Lords for the deliberate opinion of the whole Court, I am induced to request permission to occupy somewhat of

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your time, when I submit the opinion I have come to, (and I am sorry to say I have not been successful in making it a brief one,) after a very patient examination of the authorities; and I only hope, seeing I profess my entire assent to every word in the opinion of the great majority of the Consulted Judges, that nothing that I may say shall diminish the effect which that opinion ought to have in the ultimate decision of this case.

The parties have, in their pleadings, discussed at some length the origin of collation between heir and executor, and its introduction into our law. But, like other points in our legal antiquities, the materials for elucidating the inquiry are few, and some of doubtful authenticity; and, in truth, any such inquiry is of little practical value as a guide for the decision of the present question, nor if it were *hujus loci* to discuss it, am I competent to do so; but it may reasonably be assumed that the privilege of collation is a consequence of the law of primogeniture, and that primogeniture was introduced among us along with the feudal system. We may conjecture that prior to this the Saxon laws, which prevailed in the southern district of Scotland, were gradually introduced into other parts of the country, and that land was then divided equally among the sons, to the exclusion of daughters, as it was in England by the Anglo-Saxon law. The feudal law did not exist in England in a complete state till the Conquest; and it was probably received among us, and gradually extended throughout the country, from the example of our neighbour; for it sprung up among us with that peculiar feature, unknown to the feudal law of Lombardy and the other feudal states of Europe, which had been adopted in Normandy, and transplanted at once into England,—the law of primogeniture, by which the eldest son succeeded to the whole feudum, which he held of the superior for the performance of the feudal services, to the exclusion of the other sons; *Giannone Inst. di Napoli*, L. 11, c. 5, § 1; *Craig*, L. ii. D. 13, § 31; *Hallam*, vol. i. p. 186, 197, 201. At first probably, and till this right was fully recognised as the privilege of the eldest son, we may conjecture that what is stated to be *consuetudo in burgis Scotiæ de quo non extat memoria in contrarium* was the rule throughout the country at large, that the eldest son had the same portion of the moveable goods of his father as the other children, with the addition of the heirship moveables; *Ll. Burg.*, c. 124, 125. But when it came to be firmly settled that the eldest son took the whole heritage, custom seems to have introduced it as a reasonable and equitable consequence, (for we have no statute either for the one or the other,) that the moveables became the portion of the younger children, which, it will be afterwards seen, came to be the rule in burghs also; so that finally,

if the heir was named executor, he was considered in the same light as a stranger, and had the privileges of such; *Stair*, b. iii. t. 8. § 53. As with us, not merely the landed proprietor's or baron's eldest son was his heir, but the beneficed clergyman and the burgess enjoyed the same distinction, it would probably happen, in so poor a country as Scotland was in ancient times, that in the case of the two latter classes, rather than in the succession of the baron, the eldest son would sometimes find his a less lucrative succession than if he shared his father's succession equally with the younger children. To obviate such an inequality, the doctrine of collation was introduced by the church courts, and perhaps first in the succession of churchmen, from considerations of equity, in the same way as in other instances they adopted rules of equity to soften the strict provisions of the common law; for the churchmen, in their judicial capacity, were the great masters of equity in those times. Of course, the same privilege would be extended to heirs of barons and burgesses also; and hence it came to be a rule of our law, that the heir, being one of the next of kin also, was permitted, in the case of intestate succession, to claim an equal share in the moveables, provided he contributed or collated the heritable estate, to which he succeeded as heir to his father or predecessor, to whom he and the other children were alike next of kin, and in which estate his said father or predecessor was vested. This was early the rule with us, and perhaps it may be illustrated by referring to a statute of Robert III. c. 35, in an analogous case, *de collatione hæreditatis divisæ inter plures sorores*, the earliest notice of the term collation, I believe, in our law. The discussion related to the division of heritage among heirs-portioners, where a daughter had got a portion of land from her father in his lifetime; and as collation had been introduced by the church courts in questions within their cognisance, that is, the moveable succession, and was merely consuetudinary, it had probably not previously occurred to be considered in the civil court how far it was applicable to any other case. The controversy arising of course under a brieve of division, was therefore referred for determination to the king, who thus states the argument for the party wishing to exclude the necessity of collation: '*Quod non est de hæreditate patris sui; unde pater suus non fuit saisitus tempore mortis suæ.*' Hence we may conclude that it was then admitted law, that the father being infeft at the time of his death, and the heir then taking up the succession from him, was the criterion which rendered the heir bound to collate when he claimed a share of the moveables.

But the obligation to collate has not been confined to the heir of line when he takes the estate by service in that character, and it is

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admitted, that to obtain a share of the moveable succession with the other next of kin, the heir of line must collate, although he holds the estate præceptione hæreditatis, or as donee mortis causa, or although he succeeds in virtue of an unaltered destination by the deed of a remote ancestor, or under a marriage-contract. It is contended, however, that if the heir of line succeeds to, and takes a strictly entailed estate, he can claim a share of the moveables without being obliged to collate, on the ground that he has not succeeded, has taken nothing by the death of his predecessor, but succeeds by the will of a remote predecessor, whose heir of line he may not be,—at all events does not take in that character. For it is said to be highly anomalous and irreconcilable with any sound principle, to call upon one who takes no benefit as heir of line, but who succeeds in another character altogether, to bear a burden applicable only to the heir of line. But it is obvious that this difficulty does not affect the case of an heir under a strict entail alone; it applies equally to the case of an heir-male taking the estate under a simple destination. He also takes in virtue of the deed of the original granter of the disposition: he owes nothing to any act of the immediate predecessor to whom he serves heir, and it may be equally said that it is in form only that he can be considered as his heir. Yet, as already observed, in this case it is not disputed that collation applies. It may be difficult to assign a sound principle, or any principle at all for this; and perhaps we must rest satisfied with the fact itself, and the probable reason which engrafted it upon our practice. Mackenzie, in his Treatise on Tailzies, (Works, ii. 488,) says, that in the noted case of the Earl of Callander against Lord John Hamilton, ‘The Lords thought that the heirs of tailzie were una et eadem ‘persona cum defuncto,’ which is also Craig’s opinion, (Lib. 2, D. 18, § 27,) as well as that of Stair and Erskine, (Ersk. iii. 8. 51,) as to a feudum novum seu masculinum; and accordingly, on this principle, it was held that ‘heirs of tailzie and provision are liable universally, ‘in suo ordine, for the debts of the deceased, and not barely to the ‘extent of the succession.’ Indeed, with our feudal notions and preference of male succession, this was natural enough. In the direct line, a destination to heirs-male gave the estate to the heir of line; and even when it carried the estate past the heir of line, to a hæres factus, it was natural enough that he should be viewed in the same light as the heir he had superseded. Now, this being the light under which such heirs were viewed, when it happened that there was no heir of line to limit and qualify the effects of this universal representation, and when they themselves had the character of heir of line, and would have taken the succession as such, is it at all to be wondered at that they should have been held liable to

fulfil this condition of collation in favour of the younger children, 20 Jan. 1836. if they claimed any of the privileges of heir of line? The heir-male, by succeeding to the heritage, is excluded from any share of the moveables; and if he claims a share, he uses a privilege competent to him as heir of line; and it is natural that this should be subject to the same burden as in the case of one having the character of heir of line and no other; and the circumstance mentioned by Mackenzie, (vol. ii. p. 484,) that ‘tailzies in favour of heirs-male are now more ordinary than tailzies in favour of heirs whatsoever,’ probably confirmed our Judges in applying this burden in the case of the heir of line, who took the estate not in that character, but as heir-male or of destination, from the evident hardship upon the younger children, if they were obliged to surrender a portion of their scanty funds to their elder brother, who was already amply provided by his succession to the whole landed property of their father. But whether this be the reason or not, it is admitted that collation applies to the case of an heir under a simple destination to heirs-male, when he is also heir of line and one of the next of kin.

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Now, if, instead of succeeding under such a deed, the heir of line succeeds to his father or predecessor, as heir under an entail, which effectually prohibits alienation and the other modes of disappointing his succession, why should this have any influence on the privilege of the younger children to call upon the heir to collate, if he claims a share of the moveable succession?

It does not appear that when the act 1685 sanctioned strict entails, so as to secure the estate of a father to his son free from the claims of creditors or purchasers, it could be contemplated that it was in any other way to affect the interest of the heir, and still less of the younger children, either to deprive the heir of his right to participate in the moveable succession, if he found it for his interest to do so, or, on the other hand, to authorise him to claim a share without collating or contributing, if not the estate as a fee-simple, at least the value of his succession. That the predecessor had only a restricted right in the estate, and not the fullest powers of property in it, does not deprive him of the character of proprietor: he is vested in the estate: he is infeft as fiar, and not as life-renter: his right in it can be adjudged from him only by an adjudication of the lands themselves, not of his life-interest in them: on his death they fall into the state of his *hereditas jacens*, till they, the lands themselves, are taken out of it by the service of the heir to him; and the heir farther proceeds to vest himself with the estate in the same manner as if it were an estate in fee-simple, that is, by service to the person last infeft. In so far, then, as the heir takes these lands, he takes them by succession to his father or pre-

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decessor, to whom he is heir; and there seems to be no principle for any distinction as to collation between the case of the predecessor having the power of disappointing the succession, or not having such power. Collation was fully recognised when the proprietor had no such power. It was necessary, even in 1672, to provide that the superior was bound to receive an adjudger as vassal, and a voluntary purchaser could not compel this till 1748. A proprietor dying minor cannot alienate his estate, and the heir must succeed, and would succeed as heir of investiture; it may be in virtue of the deed of a remote ancestor, whose heir of line he may not be; yet collation would be necessary before such heir could claim a share in the moveable succession of the minor with the other next of kin.

In the case where the proprietor might have altered the destination, but has not done so, it does not seem to be the ground why collation applies, because it may be held that the estate comes to the heir by the forbearance or implied will of the predecessor. No such reason is assigned in any of our law books; and the law has not said that the heir is to collate only what devolves upon him by the will or forbearance of his predecessor; but what comes to him by succession on the predecessor's death, and in which he was vested, what, in short, 'he succeeds to as heir' to him.

Hence the heir claiming the moveables may not be the heir of line of the original vassal, or of the maker of the destination, or of the entail; it is enough that he is the heir of line of the person last vested with the estate, and, succeeding to him as heir by service, claims to share his moveables with the other next of kin. For nothing but the entailing clauses prevent an heir of entail from being liable, by representation, for the debts of the preceding heir; and if the ceremony of recording be omitted, the entailing clauses will not protect him from this liability to the creditors of the preceding heirs; Earl of Rosebery, 22d June 1765; at least in valorem of the estate; Baird, 15th July 1766; so that it seems of no consequence that he succeeds independent of the will of his predecessor. He takes in the character of his heir, and must be liable in that character as his representative, wherever the entailing clauses do not protect him.

It must not be supposed that any difficulty arises from the circumstance that the Court in the case of Baird, 16th July 1766, did not hold the heir of tailzie liable universally, but only in valorem of the estate, adopting the doubt of Dirleton and opinion of Steuart, instead of the opinions of Craig, Mackenzie, Stair and Erskine. For still the heir of tailzie, when effectually fettered, is considered as eadem persona cum defuncto, although not liable universally, proceeding on Steuart's view of his character, that it is similar to

that of an heir entered cum beneficio, a privilege recently introduced in favour of heirs, the estate itself being held equivalent to the inventory. So that he still represents his predecessor as his heir, although the effect of the representation is limited; and the same reason exactly applies in this case, for making such an heir, who is also heir of line, collate, as if the representation were universal. His representation as heir still affects the estate which he is called upon to collate, although it does not go beyond it.

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In truth, it arises from the view of this character of an heir of entail taken by our law that the clause as to making up titles, upon declaring an irritancy of the heir by contravention, was introduced into the act 1685. The heir pursuing an irritancy, or succeeding on an irritancy being declared by a substitute, although he succeeds, in the strictest sense of the word, in virtue of the entail, and neither by the will nor forbearance of his predecessor, yet if he made up titles by service to the contravener, which, by feudal forms, he must have done, would have been liable for his debts and deeds as heir served to him, had not the statute authorised him to serve to the person last infeft, who did not contravene. There was no other mode of preventing that representation and its consequences, incurred by an heir of entail serving heir to his predecessor in virtue of the original deed of entail, when he is not protected by the entailing clauses. Now, what is the protection these clauses were either intended, or can possibly be supposed to afford to the heir? They are to protect the estate from the claims of creditors, and purchasers or disponees; and how can they then be extended so as to affect the interest of the younger children, and deprive them of their right to insist on the heir collating? The law must always favour that claim, where the heir is insisting to share with the younger children that from which his inheritance as heir excludes him; and the entailing clauses are in no respect directed against any act of the heir necessary for fulfilling this condition of collation. Indeed, in applying the doctrine of collation to the case of an entailed estate, I have never thought it an argument of any weight, in his favour at least, that an heir of entail cannot collate or contribute the estate itself. It might afford a good objection against his participating in the moveables, since he could not fulfil the requisite condition by contributing his share of the father's succession; but surely this cannot exempt him from collating as much as he can, if the law shall hold that to be sufficient. He can always contribute, I will not say his life-interest in the estate, but the value of his succession, the yearly rents; or, on the principles of annuities, the value of this may be computed at once; and to call upon him to collate this value is giving him all the advantage he can

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claim as succeeding to an entailed estate. And I know of no sufficient interest in the younger children to maintain that they will not be satisfied with this, but must have the heritable estate carved out into portions and given to them. In truth, there can seldom be any practical difficulty. The heir has as little occasion to communicate the estate itself to the younger children, provided he contributes its value, as in ancient times the heir of a feudum or burghage tenement had. The heir is always to benefit, otherwise he has no interest to collate. He is to get a portion of the moveables, in addition to the heritage; so the collation of the heritage is in many, perhaps in most cases, effected by a simple arithmetical computation; and there can scarcely exist any interest in the executors to insist on an actual transference of any portion of the real estate. *That* the heir will retain *pro tanto*, whether he can alienate it or not, and he will obtain the surplus from the moveable estate to make his share of the succession equal to that of the other children.

It is said, and it is true, that an heir of entail succeeds by the will and destination of the maker of the entail. But what is the entailor's will? Not to constitute a series of liferenters, whose interests expire at their death, and are not taken up and inherited by their successors—who are, in short, independent of each other, and dependent solely on himself. The law of Scotland gives no such power to a proprietor. Wherever there is a liferent, there must be a fee somewhere. But the law has allowed the entailor, and his will in the present instance has been, to constitute a series of heirs, each holding the fee of the property in succession, and each in succession taking it by service as heir to the one last infeft, and of course representing him in every act and deed connected with the estate, except in so far as protected by the entail. In succeeding, therefore, though by the will of the entailor he must be liable to all the legal consequences of the exercise of that will in his favour, he takes up the fee that was in his predecessor, and is subject, on that account, to the same liabilities as any other heir of provision, which the prohibitions of the entail do not exclude. Indeed, if it be not inherent in the character of entailed property to exclude the necessity of collation, I do not know how an entailor could proceed if he wished to exclude this condition, and yet give each heir in succession a share along with the other next of kin in the moveable succession of his predecessor in the estate. He could no doubt prevent any of the heirs from claiming a share of the moveables, because he could make it a condition of the entail that no heir should do so; but how could he provide that the heir might share in the moveables without collating? These moveables are not his estate, and do in no respect belong to him, so as to entitle him to regulate the

succession to them. They are the property of the deceasing heir, may have been the fruits of his industry or economy, and the entailor can have no power over them. It is only his own estate, the succession to which he can regulate by entailing clauses.

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It has been further argued, that in this question the Court attends more to substance than to form, and that in form only it can be said that an entailed estate is taken up as the estate of the predecessor by the succeeding heir; and in proof of this proposition, reference is made to the case of lands taken *præceptione hæreditatis*, which must be collated, although they were given by disposition in the lifetime of the father, and not succeeded to as heir. But this instance seems insufficient to prove the point for which it is adduced. The very name shews that it is the inheritance of the father which the son takes; that he gets it because he is heir to it, and would succeed to it at his father's death. Hence he is liable to his father's prior creditors for its value; and most justly it seems to have been thought as unreasonable that the rights of the younger children should suffer by the anticipated right of the heir, as those of the creditors of the father: or that the eldest son should get quit of his obligations in the character of heir in affecting the interests of the younger children, while it is regarded with creditors. But can a stronger proof be given that form is, in this matter, at least as much attended to as substance, when it is founded on legal principle, that if the father never was infeft, although he may have possessed the estate for twenty or thirty years, and his son makes up titles, as he must do, to the person last infeft, he may claim a share of his father's moveables, without collating the heritage which he did not take by feudal forms, as an inheritance from his father; Spalding, Dec. 11. 1812, in 1 *Bell*, 102.

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The application of the principles on which collation rests to the succession of an entailed estate did not demand the consideration of the Court till the case of *Little Gilmour*. It could only occur after the act 1685, and it obviously must happen but in rare instances that it can be for the interest of such an heir to collate. I conceive that in that decision the rules which had been observed in analogous cases with great consistency were correctly followed out, and I have already anticipated the grounds on which this opinion is founded.

The cases on collation are not numerous in our law books. We are not to look for them at first among the records of our civil courts, nor perhaps in the earliest institutes of our civil law; for this matter, at an early period, fell under the cognisance of the ecclesiastical courts. Without laying much stress on the passage quoted from the Reg. Maj. in the case of *Mrs A*, it appears from the laws

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of William, c. 22, that the church had then a jurisdiction as to testaments and intestate succession; and in the canons of the Scottish Church, c. 50, enacted in 1242, (*Hailes*, vol. iii. p. 192,) among other delinquents directed to be excommunicated are ‘impedientes ordinarios, quominus de bonis ipsorum decedentium ab intestato, SECUNDUM CONSUETUDINEM ECCLESIE SCOTICANÆ, rite valeant ordinare,’ *Hailes*, vol. iii. p. 249. And in a provincial council, held at Perth in 1420, the clergy of each diocese were required to report on oath what was the practice as to the confirmation of testaments; when they unanimously reported, ‘that the bishops had been in the constant practice of confirming testaments, and of naming executors to those who died intestate,’ and then the order of procedure and distribution is set forth. This uniformity shews a well-established practice proceeding from an authoritative source, and referring to ancient practice. The doctrine of collation was fully established in these ancient times; but the destruction of the records of our ecclesiastical courts at the tumultuous period of the Reformation leaves little hope for much information from that quarter. I know of one such record only which has been preserved, the volume of decrees of the official of St Andrew’s for the Archdeacons of Lothian, from 1500 to 1551; but I do not know if it throws any light on this question, whether the vassal ever objected to collate his feu, when the predecessor had as little power to alienate it as in the case of a strictly entailed estate, and when the heir succeeded in virtue of the grant of the superior, the original granter. It appears, however, by the case of *Law in Balfour*, that this doctrine was at some early period firmly fixed in our practice. It struck me as singular that this question should have arisen and been decided at this time in the civil court, and it seemed as if collation only required the heirship moveables to be collated. But these points were cleared up on examining the decree itself. It appears that the parties interested in the succession of Steven Law, a burghess of Edinburgh—that is, the widow, two sons, and a daughter—had entered into a reference to arbiters, who pronounced an award, estimating the property at a certain amount, and assigning certain sums to the widow and each of the three children, as their portions of the succession. Some years afterwards, the younger son, Alexander, designed writer to the signet, raises a process of reduction of this award, citing as a defender Andrew, the son and heir of Robert, who was the eldest son and heir of Steven, complaining of the award on the head of minority and lesion, and craving to have it set aside, and that the defender should be decreed by the Court to pay the sum he claimed as his proper share of his father’s succession. The reduction was of course

raised in the civil court, the ecclesiastical court not being competent to reduce an award or decree-arbitral. The minority is stated to be, and is so found by the Court, that at the time of the reference and award 'Alexander was a pupil proximus infantie of nine or 'ten years, and had na tutor or curator, whereby he had na persoun nor power to transact;' and the lesion is made out, because the arbiters had undervalued the property; and further, had given a portion of the moveables to the eldest son, who had succeeded as heir. The defender did not dispute the law of collation as here laid down,—evidently holding it unquestionable,—just as little as he did the plea of minority; but he pleaded this defence against the application of the doctrine in this particular case, that at the time of his father's death he was not the heir, as he had an elder brother at the time; but the answer was held satisfactory, that this eldest son died soon after his father, before he had entered heir to his father, or got sasine of his lands, or received heirship, and further, died before the goods were divided, so that Robert came to be heir to his father when the children took up the succession, and it was therefore held that he could not claim a share in the moveable succession without collating his father's lands. This is the subject of the decision reported by Maitland, then a Judge on the bench, 13th July 1553, and 24th April 1554, *M. P.* 2365. The decree bears accordingly that the award was set aside on this ground, that the third part of the free funds should have been divided into two shares only, because for four years before Robert was heir and successor to his father, and 'enterit to his landis, heritages, and airship guidis, 'and therefor, be the lauchfull consuetude and use of our said burgh 'of Edinburgh, lauchfullie and continewallie observit and kept 'past memor of man, burges airis of the samen aucht nought to 'haif ony barnis part of geir nor falls thame by (besides) thair airschip guidis and heritage, without thai wald renunce the samen, 'and cast it in, and concur with the remanent of the barnis equallie 'thereintill.' The award is set aside on these grounds; but the Court does not proceed with the adjustment of the pursuers' claims,—that belonged to the ecclesiastical court,—but 'assoilzies the defender, and decerns her (the cause had been transferred against the 'sister of the original defender) quyte therfra as it is now libellit, 'reserving to the pursuer his action for persute therof before quhatsoever judge he pleases, as accords of law.'

The examination of this decree is valuable, because it shews that this matter was still within the province of the ecclesiastical court, and accounts for the few notices of this doctrine in our civil courts; and it is a declaration of the law past memory of man, that in the case of the heir of a burghess, he was excluded from a share of the

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moveable succession, unless he collated not merely the heirship goods, but the lands and heritage also 'to the which he succeedit 'throu the deceis of the said umquhile Stevin, his father.' (How Balfour has omitted to notice that the heir must collate lands as well as 'airship guidis' I know not. Maitland includes both, in terms of the decree itself.) This description of the succession to the heritage, which infers the necessity of collation, is important, when it is considered that the heir making up titles more burgi in fact takes the subject in virtue of the original grant, but still he succeeds through the decease of his father.

But the decision would be still more important in the present case if a burgess at that time had not the power of alienating his heritage, except of his own acquisition, unless of necessity for debt, after offering it to his nearest heirs, and when the necessity was proved before twelve of his neighbours. This was once the law even as remodelled in 1395, (*Ll. Burg.* c. 45, 125); but I will not take upon me to say, because I do not know the fact historically, that this continued to be observed down to 1520, the period of Steven Law's death.

As collation was originally consuetudinary, and introduced by no statute, and as the question occurred relative to the succession of a burgess of Edinburgh, the pleading of the successful party in the case of Law most correctly founds upon this doctrine as a consuetude of this burgh. This was all that was necessary. But the notice of this decision, both by Balfour and Maitland, contemporary lawyers of the highest character, (the latter then a Judge on the Bench, the other eminently qualified for the task for which he was selected, of drawing up, or superintending the drawing up, the Practicks, or digest of our law, by having been official of Lothian before the Reformation, and one of the first Commissaries of Edinburgh after it, also a Judge of the Session, and finally its President,) shews that both these lawyers recorded this decision to sanction the doctrine of collation, which they then recognised as a general rule of the law of Scotland.

If, a century afterwards, Dirleton, v. Collation, really seriously doubted whether the heir was bound to collate more than the heirship moveables, (and he may have been misled by the way in which the case of Law is given in Balfour,) these doubts must have been speedily resolved by the discussion this subject underwent in the cases of Buccleugh, 1677, and Murray, 1678; and Mackenzie, Stair, Steuart, Bankton and Erskine distinctly announce the doctrine of collation as we now hold it; and in truth, we may safely rest the law of collation upon the authority of their opinions, and the decisions of the Court pronounced in their time and since, which are

singularly uniform and consistent,—a very sufficient foundation for any doctrine of our common law,—without seeking the aid of any more ancient authority.

For, as to the opinion of Mr Erskine, iii. 9. 3, where he says it is only the legal heir, or the heir ab intestato, who is obliged to collate the heritage, I am inclined to think his meaning has been misunderstood. It may not be very clearly expressed, for the work was posthumous, and did not receive the learned author's last corrections; but it seems to me that he means only that it is the heir alioqui successurus who is bound to collate, which is quite true; and he does not say that the heir-at-law, or he who would be heir ab intestato if there were no destination, would be relieved from the necessity of collating if he takes by virtue of a destination. Indeed, if this passage is construed in the way attempted to be done, it would exclude from collation all estates under an investiture, even to heirs whatsoever. This certainly is not the law he lays down. He then contrasts the case of an heir with the case of heirs-portioners, who, in relation to the moveables, are altogether in a different situation from an heir succeeding either at law or by destination to the heritage, for the moveable estate, 'by legal succession, descends equally to all the daughters;' and if the father settles his landed estate upon the eldest daughter, having full power so to do, she takes it in virtue of that settlement, without affecting in the smallest degree her legal claim to share the moveables with her younger sisters. The case of the heir is quite different, because he has no legal title to the moveables if he takes the landed estate, unless he collate. I admit, however, that Mr Erskine's opinion in the same section has not been adopted by the Court, where he says that the son should have the same privilege that his father would have had; but it is there only that he seems to have given an erroneous opinion on a case which had not then occurred. But even were it true that Mr Erskine's opinion was as has been supposed, however high I rate the opinion of that learned author, I am not inclined, on a point of law which had not then occurred for decision, to put it in competition with that of the late Lord Meadowbank, and first Lord Newton, (I speak only *de mortuis*,) when called upon to consider and adjudicate the very case.

I have no intention of going farther into the decisions as to collation. I have already observed that they are uniform and consistent, and they support this proposition, that an heir of provision or tailzie, being also heir of line of the preceding heir, can claim a share of the moveables with the other next of kin only by collating that estate which would have devolved upon him, which he would

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Anstruther v.
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Opinion of
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Judges.

20 Jan. 1838. have taken as heir-at-law, and to which the deed providing it to him has only more effectually secured his succession.

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Judges.

I believe that in England there is something like this doctrine of collation among co-parceners at common law, and in the case of moveable succession by the statute of distributions; and that the succession to an estate-tail is not, in this matter, attended with the same consequences as with us; (*Blackstone*, vol. ii. p. 191 and 517.) There may be sufficient reasons in the varying circumstances of the two countries, why the burdens under which the heir is entitled to share in the moveable succession should not be the same in both; and in the different distribution of wealth in the two countries perhaps it may not be difficult to find a solid reason for this difference. But be this as it may, and even if the distinction were purely arbitrary, it is of much more consequence that the rules of succession should be fixed, and steadily adhered to when once deliberately laid down, than that in all respects they should be assimilated in the two countries: And, upon the whole, it appears to me that the application of the doctrine of collation in the case of an entailed estate was correctly made according to the principles of our law, when the question occurred in the case of the succession of Mr Little Gilmour; and that it could not be deviated from now, without adopting a view of the character of a proprietor of an entailed estate totally different from what is recognised by our law, and unnecessarily aggravating the inequality which the law of primogeniture has introduced among us against the interests of the younger children.

The Court pronounced the following interlocutor, repeating their former judgment:

Judgment.

‘ The Lords, in pursuance of the order of the House of Lords, having heard counsel in presence of the whole Court, having obtained the opinions of the Consulted Judges, and having resumed consideration of the case, find, that the claimant and petitioner, Sir Windham Carmichael Anstruther, Baronet, cannot claim any share in the executry of the late Sir John Carmichael Anstruther, without previously collating the heritage to which, as heir of Sir John, he has succeeded; find Mrs Marion Anstruther and her husband entitled to the expenses of process; and remit to Lord Jeffrey, as Ordinary, in place of Lord Medwyn, to proceed accordingly.’

Lord Ordinary, Medwyn. For Sir W. C. Anstruther, *Rutherford, Anderson*. For Mrs Anstruther, *Dean of Fac. (Hope), Keay, H. Bruce*. Ker & Dickson, W. S. and Hunter, Campbell & Cathcart, W. S. T. Clerk.

R.

SECOND DIVISION.

No. LVIII.

20th January 1836.

JAMES, VISCOUNT MAITLAND, AND OTHERS, (TRUSTEES
OF THE MARQUESS OF BREADALBANE,)

against

THE MARQUIS AND MARCHIONESS OF CHANDOS AND
OTHERS.

LEGITIM. — IMPLIED DISCHARGE AND RENUNCIATION. — *The daughter of a Scotch nobleman, on her marriage with the son of an English nobleman, executed a contract of marriage conceived in the English form ;—found, (1.) That she had not thereby discharged or renounced her right to legitim ; (2.) That as she was the only younger child of her father who had not renounced the right of legitim, her claim extended over one-third of his free moveable estate ; and that it was not to be reduced in amount by imputing thereto any sums provided to her by her father in said contract.*

COLLATION. — TAILZIE. — HEIR AND EXECUTOR. — *The Court repeated their opinion and decision to the same effect as in the preceding case of Anstruther, of this date.*

The late John, Marquess of Breadalbane, died in 1834. He left a widow, the Dowager Marchioness, and issue, an only son, the present Marquess, and two daughters, Mary, Marchioness of Chandos, and Lady Elizabeth, married to Sir John Pringle, Bart. He left a large succession both in heritage and moveables. The heritable estate he had held principally under strict entail, but partly in fee simple. The moveable estate amounted to about L.400,000. Narrative.

Upon the death of his father in 1834, the present Marquess succeeded to the whole of the entailed estates. The rest of the succession, consisting of unentailed heritable estates, and the whole personal property, were vested in Lord Maitland and others, the trustees nominated in certain testamentary deeds executed by the late Marquess. The trustees brought this process of multiplepoinding, in order that the respective rights of the parties interested in the moveable succession might be ascertained. The claimants were the trustees themselves, the Dowager Marchioness, the present Marquess of Breadalbane, the Marchioness of Chandos, and Lady Elizabeth Pringle.

As there had been no antenuptial contract executed by the late Marquess of Breadalbane, the Marchioness claimed, without dis-

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pute, her terce of the unentailed estate, and *jus relictæ*, extending over a third part of the free moveable estate of her late husband.

The principal point argued in the cases ordered by the Lord Ordinary, and now disposed of by the Court, related to Lady Chandos' claim to legitim. The present Marquess took the entailed estates and certain special bequests. Lady Elizabeth Pringle had expressly renounced all claim to legitim, in consideration of certain provisions in her marriage-contract.

Lady Chandos' claim to whole legitim.

Lady Chandos claimed the whole fund falling under the denomination of legitim, on the ground that she was the only child of her father who had not renounced or discharged her right of legitim. Her claim rested upon the legal effect to be given to the deed of settlement executed upon her marriage to the Marquis of Chandos in 1819. This settlement was prepared and executed in the English form of an indenture, to which the Duke (then Marquis) of Buckingham, father of Lord Chandos, (then Earl Temple,) and the late Marquess (then Earl) of Breadalbane, were also parties. By this indenture valuable interests were, by Lord Chandos and his father, secured to Lady Chandos and to her issue in the proposed marriage. *Inter alia*, her Ladyship was provided, out of the family estates then and still belonging to the Duke of Buckingham, in an annuity which was to vary in certain events from L.2500 to L.3000. This last provision was, by an express clause in the deed, declared to be in full of all Lady Chandos' legal rights as a widow by the law of England.

The deed contained these clauses : ' And whereas, a marriage is intended to be had and solemnized between Richard Plantagenet, Earl Temple, and Lady Mary Campbell : And whereas, upon the treaty for the intended marriage, John, Earl of Breadalbane, agreed that he would pay or secure the sum of L.30,000, as the portion or fortune of Lady Mary Campbell, in the manner herein-after mentioned, (that is to say,) the sum of L.10,000, part thereof, to be paid on or before the solemnization of the intended marriage; the farther sum of L.10,000 to be paid at the expiration of eighteen calendar months from the day of the solemnization of the marriage, and to carry interest in the meantime at the rate of 5 per cent. per annum; and the remaining sum of L.10,000 to be paid within six calendar months next after the decease of John, Earl of Breadalbane, with interest from the day of his decease : ' And it was agreed ' that the Marquis of Buckingham should receive from the Earl of Breadalbane the two sums ' of L.10,000 and L.10,000 first and secondly herein-before men-

'tioned, together with the interest of the sum of L.10,000 secondly
 'herein-before mentioned, from the day of the solemnization of the
 'intended marriage; and, in consideration thereof, should enter into
 'such covenant as is herein-after contained, for the payment of
 'the sum of L.20,000 within two years after the solemnization of the
 'intended marriage, and to pay interest for the same in the mean
 'time, and that the sum of L.20,000, and the interest thereof, should
 'be further secured in the manner herein-after expressed: And
 'it was agreed that the sum of L.20,000, so to be covenanted
 'to be paid by the Marquis of Buckingham, and the sum of
 'L.10,000, the residue of the portion of L.30,000, to be secured
 'by the bond of John, Earl of Breadalbane, and to be payable after
 'his decease, and the several securities for the same, should be vested
 'in George Neville and John, Viscount Glenorchy, their executors,
 'administrators and assignees, upon, and for such trusts, intents and
 'purposes, and with and under and subject to such powers, provi-
 'sions, limitations, declarations and agreements as are herein-after
 'declared, expressed and contained, of and concerning the same:
 'And in further consideration of the intended marriage, and also
 'of the portion or fortune of Lady Mary Campbell, the Marquis
 'of Buckingham, and Richard Plantagenet, Earl Temple, proposed
 'and agreed to settle and assign the said several manors or lordships.
 'And whereas, in part performance of the agreement on the part
 'of the Earl of Breadalbane, the said Earl hath paid to the Mar-
 'quis of Buckingham, upon the day of the date of these presents,
 'the sum of L.10,000 of lawful money of Great Britain, and by
 'his bond or obligation in writing, under his hand and seal, in the
 'penal sum of L.20,000, bearing even date with these presents,
 'the same Earl hath secured to the Marquis of Buckingham, his
 'executors, administrators and assigns, the payment of the sum of
 'L.10,000 of like lawful money of Great Britain, at the expiration
 'of eighteen calendar months from the day of the date of the same
 'bond, with interest in the mean time at the rate of L.5 per cent.
 'per annum, payable half-yearly, as therein mentioned: And the
 'Earl of Breadalbane hath also given and executed another bond
 'or obligation in writing, under his hand and seal, bearing even
 'date with these presents, whereby he has become bound to George
 'Neville and John, Viscount Glenorchy, their executors, admini-
 'strators and assigns, in the penal sum of L.20,000, subject to a
 'condition there under written, for making void the same, on pay-
 'ment of the sum of L.10,000 of like lawful money, to them,
 'George Neville and Lord Viscount Glenorchy, their executors,
 'administrators and assigns, within six calendar months after the
 'decease of the Earl of Breadalbane; together with interest on the

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 ' decease of the Earl of Breadalbane.'

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land and

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quis and Mar-
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The trust, created as above in the persons of George Neville and Viscount Glenorchy, is thus set forth: ' And this indenture further witnesseth, that for the considerations herein-before mentioned, it is hereby declared and agreed by and between the parties to these presents, that George Neville and Viscount Glenorchy, and the survivor of them, and the executors, administrators and assigns of such survivor, shall stand possessed of and interested in the sum of L.10,000, secured by the bond of the Earl of Breadalbane, to be paid within six calendar months after his decease, as herein-before recited, upon trust, that they George Neville and Viscount Glenorchy, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, with all convenient speed, after the sum of L.10,000 shall have been received, (with the consent, in writing, of the Earl Temple and Lady Mary Campbell, or such one of them as shall be living; or if neither of them shall be living, then at the discretion and of the proper authority of the trustees or trustee for the time being,) lay out and invest the same in their or his names or name, either in the public stocks or funds, or in or upon government or real securities, at interest, and do and shall from time to time, (with the like consent, or of such discretion as aforesaid,) call in the principal money so placed out, or make sale of the securities or funds whereupon or wherein the same shall be invested from time to time, and place out the moneys thereby arising in or upon such new or other stocks, funds or securities, of the same or like nature, as they, he or she shall think proper, and do, and shall stand possessed of, and interested in, the sum of L.10,000, and the stocks, funds or securities in or upon which the same shall be invested, and the dividends, interest and annual produce thereof, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisions, declarations and agreements hereafter expressed, declared and contained of and concerning the same.'

The first sum of L.10,000 having been paid at the date of the marriage, the second sum was paid, in terms of the obligation, at the period of eighteen months. In regard to the remaining sum of L.10,000, the late Marquess, in 1824, executed a bond, said to be in virtue of 5. Geo. IV. c. 87, wherein it was declared, ' that the foresaid sum of L.20,000, together with the present provision of L.10,000, are, and shall be in full satisfaction of all that my said daughter might have claim to in name of legitim, executry, or in any other manner of way.'

In a trust-disposition, executed by the late Marquess of Breadalbane in 1828, it is set forth, that 'upon the 29th day of January 1823, I executed a trust-disposition and settlement in the precise terms and words above written;' and therefore it is declared, that 'these presents shall be held as a duplicate copy thereof of the fore-said trust-disposition and settlement.' The second trust purpose in both these deeds is expressed thus: 'In the second place, for payment and performance to Mary Turner, Countess of Breadalbane, my said spouse, and to Lady Elizabeth Campbell, and Mary, Marchioness of Chandos, of all provisions and obligations in their favour contained in any deeds or deed granted or to be granted by me to them, or to which they may have right by law, in so far as the same may affect my general estate or effects,' &c.

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Lady Chandos' claim to whole legitim.

Against Lady Chandos' claim to legitim the trustees of her late father *pleaded*—(1.) That Lady Chandos' marriage, and the settlement which then took place, do imply or import a discharge of her right of legitim, or form a personal bar by forisfiliation to the demand. (2.) That even on the supposition that Lady Chandos shall be held entitled to claim legitim, she is bound to impute, pro tanto, in extinction of that claim, the L.30,000, being the amount of the provisions in her marriage-contract.

Trustees' Pleas in exclusion of Lady Chandos' claim to legitim.

(1.) If the question had turned upon the construction of a Scotch deed, it was admitted that the right to legitim would not be held to have been discharged unless by express words, that is to say, by words which, in the circumstances in which they were used, sufficiently and directly ascertain the intention of the parties, or else by facts and deeds, by acceptance of other provisions, in circumstances indicative of an intention to abandon legal claims, as the condition on which the party gets present benefit. But when the deed is drawn up between English parties, by English conveyancers, however strong the intention of the parties may be that a child should discharge all claims on the father in respect of certain provisions, still it is not to be expected that these intentions should, in such a deed, be expressed in language which is unknown to the law of England, and is peculiar to that of Scotland. It is sufficient if words are employed having a similar import or meaning to the English conveyancer,—words which he would most naturally make use of, if the intention of the parties had been distinctly intimated to him, and he had been desired to clothe them in his own language. The intention of the parties cannot be evacuated by the absence of Scotch phraseology in an English deed. The bond executed by Lord Breadalbane, in 1824, shews that the L.10,000 therein secured, and the other provisions, were in full satisfaction of all that

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Pleas for Marquess of Breadalbane.

Answered for Lady Chandos—The Marquess of Breadalbane, as only son, stands vested with the character of heir, and can take nothing beyond the heritable succession; *Ersk.* iii. 9. 19; *Mack.* iii. 8. 10; *Stair,* iii. 8. 48.

Pleaded—2. In a question with Lady Chandos, he was entitled to a half of legitim without collating his interest in the entailed estate, or benefits derived during his father's lifetime, or since his death. (See Condescendence, Art. 10, Plea, No. 5.) To which Lady Chandos *answered*, that he was not entitled to participate in the legitim without collating every benefit he has taken or succeeded to by or through his father. (Plea, No. 5 *.)

The Lord Ordinary made avisandum with the cases to the Lords of the Second Division. At the advising, the Court agreed to reserve for farther hearing before their Lordships, certain other questions arising out of the late Marquess' settlements, which, though touched on in the cases, had not been fully argued, and are therefore left unnoticed in this report.

Opinion of Court.

Lord Justice-Clerk.—Having fixed that certain ulterior questions arising out of the late Marquess of Breadalbane's settlements shall stand over for further hearing, we have now to proceed to give judgment upon the principal questions raised in these cases. And, in the first place, we have to consider Lady Chandos' claim to legitim from the moveable estate of her late father. She says, that as her mother is not excluded from her legal rights, the division of the fund must be tripartite; and on the ground that Lady Elizabeth Pringle has renounced her claim to legitim in her marriage-contract, Lady Chandos claims the whole fund constituting legitim.

She has been met by the defence, that there are facts sufficient to shew a discharge by her of this legal right, and an extinction of her claim to legitim. This is a relevant defence, if made out. It is for your Lordships to say, whether there are sufficient grounds for your holding that her Ladyship has discharged her legal claims. Now, how is this defence said to be made out? I have attended to all that has been said on this point, as it seems to have been supposed that the discharge is to be discovered in the marriage-contract entered into upon the marriage of Lady Chandos. But unless it can be shewn that a discharge of these legal rights was really granted, there can be no-ground for disallowing this claim; and I

* See Session Papers, in which the question here raised and decided, as in the previous case of Anstruther, is fully and most ably argued.

shall afterwards shew that there is no ground for holding the plea of forisfiliation to be applicable. 20 Jan. 1836.

In the first place, my Lords, I for one must say, that, in the marriage-contract, there appears to be nothing expressed or implied amounting even to an indirect abandonment of the claim of legitim. The deed was prepared by an able English attorney, Mr Vizard, and may be conceived in the most correct English phraseology; and it is not surprising, that as it was not prepared in Scotland, it should contain nothing affecting the Marchioness's rights.

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Opinion of Court.

The contract may be framed in such a way as to bar her claiming her English provisions. I have no doubt it may be correct according to the law of England; but, so far from affecting any such right in Scotland, it will be found to contain no other words than merely setting forth the amount of tocher to be paid, and the manner in which it was to be paid. His Lordship then quoted the clause relative to the payment and obligation to pay L.30,000, in different sums, by Lord Breadalbane, and he proceeded: This falls very far short of, and cannot be held to amount to a discharge. There is no declaration that these provisions are accepted of in full of her claim to legitim, &c. There is nothing like a direct, and nothing like an indirect declaration that the legal rights were to be abandoned. There is much to shew that Lord Breadalbane's intention was, that the claim of legitim should not be discharged. No effect can be due to the bond of 1824. The Marchioness was no party to it. It was granted behind her back, and merely for Lord Breadalbane's own convenience, importing nothing approaching to a discharge. As to forisfiliation, it is plainly excluded by the terms of the definition in Erskine, as quoted in the case for Lady Chandos. Forisfiliation must be attended with acceptance, as is plain from the case of Russell referred to, and Hogg v. Lashley; which shews that marriage could not have the effect of creating forisfiliation.

The next question is, Lady Chandos not being precluded from claiming legitim, to what extent is she so entitled? She is met by the present Marquess of Breadalbane, who also claims legitim, but without collating the rents of the entailed estates. But we have now decided, in an identical case, that this claim of the Marquess cannot be sustained. This second objection to Lady Chandos' claim must therefore fall to the ground, and her Ladyship be found entitled to the whole legitim.

As to the Dowager Marchioness's claims to *jus relictæ* and *terce*, these seem undisputed.

As Lady Elizabeth Pringle's claims may be affected by the decision as to the Marchioness of Chandos' claim on the unentailed

20 Jan. 1836. rents, reserved for farther hearing, I think these also should stand over.

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Opinion of Court.

As to the plea, that the Marchioness of Chandos must impute her provisions, amounting to L.30,000, as payment pro tanto of her legitim, I am satisfied that she is not bound to impute these provisions, and on the plain ground that nobody is entitled to the legitim but herself.

Lord Glenlee.—I can see nothing to induce one to hold that the Marchioness of Chandos has discharged her claim of legitim; and I also think she is entitled to take it without imputing the L.30,000, which formed the sums paid under a contract of marriage.

Lords Meadowbank and Medwyn concurred.

The Court then pronounced the following interlocutor:

Judgment.

‘The Lords, on the report of Lord Jeffrey, Ordinary, having considered the closed record in this process of multiplepounding, with the cases for the raisers of the said process, and for the several claimants on the funds in medio, and having heard counsel thereon, Find, that the claimant, Mary, Marchioness of Chandos, has not, by her contract of marriage, or otherwise, renounced her right of legitim, and is therefore entitled to make her claim for the same accordingly; and in respect that the said Marchioness of Chandos is the only younger child of the late Marquess of Breadalbane who has not renounced the right of legitim, find, that her claim extends over one-third part of the free moveable estate of her said father, and that it is not to be reduced in amount by imputing thereto any part of the sums provided to her by her said father in her contract of marriage, and decern accordingly: Find, that the claimant, now present Marquess of Breadalbane, is not entitled to any part of the fund in medio in name of legitim, without having collated his interest in the estates to which, on the death of his father, he has succeeded, and, in hoc statu, repel his claim accordingly, and decern: Find, that the Marchioness Dowager of Breadalbane is entitled to a terce of the unentailed estate in which her husband, the late Marquess of Breadalbane, died vested and seised, and to make her right to the same effectual in due course of law: And farther, find, that the said Marchioness Dowager is entitled to her *jus relictæ*, extending over one-third part of the free moveable estate of her said deceased husband, and decern: Find, that the trustees under the contract of marriage between Sir John Pringle, Bart. and Lady Elizabeth Maitland Campbell or Pringle, are entitled to the sums thereby provided by the said deceased Marquess of Breadalbane, the father of the said Lady Elizabeth Pringle, in terms of the claim for the said Sir John and Lady Elizabeth Pringle in this process: Farther, find, that the said Lady

‘ Elizabeth Pringle is now entitled to one-half of the yearly free proceeds of the unentailed estates of her father, the said deceased Marquess of Breadalbane, conveyed by him to his trustees, the raisers of the present process, in terms of his settlements referred to; and decern, and that without prejudice to any farther claims on her part, either on the predecease of her sister, the Marchioness of Chandos, or in the event of its being found that the claim of the said Marchioness to the other half of the said rents, in terms of the said settlements, cannot be sustained, on the validity and effect of which claim on the part of the said Marchioness appoint counsel to be farther heard in their own presence: Find, that the present Marquess of Breadalbane is entitled to the special legacies in his favour contained in the settlements of his late father, but under this proviso, that neither these legacies, nor any others contained in the said settlements, shall affect the rights, or diminish the claim of the relict, the Marchioness Dowager of Breadalbane, or those of her younger children; and reserve for farther consideration all other points and questions arising in this process which are not disposed of by the preceding findings.’

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Viscount Maitland and Others v. Marquis and Marchioness of Chandos and Others.

Judgment.

Lord Ordinary, *Jeffrey*. For Trustees, *Dean of Fac. (Hope,) Keay and H. J. Robertson.* For Marquis and Marchioness of Chandos, *Advocatus, (J. A. Murray,) Sol.-Gen. (Cunninghame,) Monteith and Ivory.* For Marquess of Breadalbane, *Rutherford and C. Baillie.* For Lady E. Pringle, *M'Neill, Marshall.* For Dowager Marchioness, *A. Anderson.* *Davidsons & Syme,* W. S. for Trustees and Dowager Marchioness. *Gibson-Craigs, Wardlaw & Dalziel,* W. S. for Lady Chandos. *W. B. Campbell,* W. S. for Lord Breadalbane. *J. & C. Nairne,* W. S. for Lady E. Pringle. T. Clerk.

R.

No. LIX. SECOND DIVISION, 21st January 1836.

GEORGE BAILLIE against SIR G. BAILLIE HAMILTON.

TAILZIE.—Action declaratory of the powers of the heir in possession under the entail of Jerviswoode, Mellerstains, &c. executed in 1724, to sell the lands for a fair price or other onerous cause. Argued on cases.—Decree in terms of the libel. The defender reclaimed, but the Court adhered. (See Papers.)

Lord Justice-Clerk.—The Lord Ordinary has, in his note, thoroughly dissected this entail.

Lord Ordinary, *Jeffrey.* Act. *Dean of Fac. (Hope,) Anderson.* Alt. *Patton.* *W. H. Sands,* W. S. *Tod & Romanes,* W. S. T. Clerk.

R.

SECOND DIVISION.

No. LX.

22d January 1836.

BRITISH LINEN COMPANY

against

MACKAY AND OTHERS, (WALKER'S TRUSTEES,) AND OTHER
CREDITORS OF GEORGE HENDERSON.

BILL OF EXCHANGE.—NEGOTIATION.—STAMP ACTS.—(1.) *A promissory-note payable on demand was not presented for payment, or protested by an indorsee, till upwards of four months from its date, —found, that the same was duly negotiated.* (2.) *The note having been written upon a stamp of the requisite value for a note payable on demand, but no demand having been made till after two months, — found, that the stamp was sufficient to sustain the note as a legal instrument at the time when the demand of payment had been made.*

INHIBITION.—NOTARY-PUBLIC.—BILL OF EXCHANGE.—NEGOTIATION.—*A protest taken on a bill by a notary, who was drawer and indorser, as also the inhibition following thereon, found invalid.*

WRIT.—PROOF.—*Found, (1.) That it is incompetent,—there being no improbation on the ground of falsehood,—to prove, by parole, that an infestment was taken upon a disposition, the testing clause of which was not filled up till after the act of infestment.* (2.) *That the title of an onerous purchaser from the grantee cannot be impeached on this ground.*

TRUSTEE.—PREFERENCE.—HERITABLE CREDITOR.—*Found, (1.) That a trustee under a disposition omnium bonorum in a cessio was preferable, in a competition, for expenses necessarily and profitably incurred by him as disponent in completing the titles of the common debtor, and in managing the property and bringing it to sale.* (2.) *That the trustee had no right of preference, or of ranking in competition with heritable creditors, holding valid and completed securities prior to the date of the disposition in his favour, for expenses incurred in the process of cessio, in the execution of the disposition omnium bonorum, or for commission as trustee.*

Narrative.

GEORGE HENDERSON, writer, Langholm, borrowed from Mr Niven L.500, and granted, on 25th April 1827, a bond and disposition in security over certain subjects, upon which infestment passed the same day. In August 1827, Niven granted a security to Profes-

sor Walker over these and other subjects, for a debt afterwards restricted to L.500, the security being also restricted to that of the subjects disposed by Henderson, the assignation being duly intimated by Professor Walker to Henderson.

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British Linen
Co. v. Mac-
kay, &c.

Narrative.

Previous to either of these transactions the Leith Bank had, in March 1827, executed inhibition against Henderson, in virtue of registered protests, (1.) Upon a promissory-note for L.500, by Archibald Scott, the bank's agent in Langholm, to Henderson, dated 15th September 1826, payable on demand, and indorsed by Henderson to the Leith Bank; and, (2.) Upon a bill for L.380, drawn by Henderson on Scott on 14th October 1826, payable two months after date, and indorsed to the Leith Bank.

Under a disposition omnium bonorum, granted by Henderson for behoof of creditors, John Irving was, in March 1830, appointed trustee, and incurred necessary expenses and trouble. Mr Irving was himself a creditor individually for the sum of L.500. Irving, as trustee, sold the subjects forming Professor Walker's security to the British Linen Company. The agents for the trustee held Henderson's titles under deposit, in security for the debt and expenses due to the trustee; and on the property being sold, they were only delivered to the purchasers, according to an inventory and receipt containing the declaration, that the 'title-deeds have been delivered by the seller's agents, under their right of hypothec, for the expenses incurred in completing the trustee's title, provided these expenses may be afterwards ascertained and declared preferable on the price in name of the trustee, otherwise the said hypothec is held to be discharged.' The purchasers, after consigning the price, to be payable on the records being cleared of encumbrances affecting the subjects, brought a multiplepoinding.

Professor Walker's Trustees claimed a preference to L.500, interest and penalties, conform to their security.

Claim of
Walker's
Trustees.

Objected by Irving and Leith Bank—The security is inept, in respect that the sasine in Niven's favour was taken upon a disposition, the testing clause in which was not filled up till a period subsequent to the act of infestment, the writer of the testing clause being in Edinburgh at the time the disposition was to have been signed.

Objection.

Answered—The allegation is not true, and is irrelevant against a bona fide onerous singular successor. The notary and procurator who officiated at the infestment officiated on the same day as instrumentary witnesses to the execution of the disposition in security. (See 4th finding in Lord Ordinary's interlocutor.)

Answer.

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Bank.
Objection.

The Leith Bank, in virtue of their prior inhibition, claimed the L.500 in the promissory-note, and L.380 in the bill.

Objected by Walker's trustees and Irving—(1.) The promissory-note for L.500 was not presented for payment, or protested until much more than two months after its date, and therefore was not duly and timeously negotiated. Farther, no demand having been made upon it within two months from its date, it is null, having been written upon a 6s. stamp and not an 8s. 6d. stamp, necessary when a note is payable beyond sixty days. (2.) The bill for L.380 was never protested against Henderson by any notary-public except Henderson himself, as appeared from the registered protest. Inhibition proceeding upon invalid protests must fall.

Answer.

Answered—(1.) Immediate presentation for payment is not necessary in regard to a promissory-note, and the stamp was sufficient for a note payable on demand, though not actually paid for more than two months from its date. (2.) When the L.380 bill fell due there were only two notaries in the place, Henderson and another, who was absent. Henderson therefore noted the bill, and at the same time granted a written obligation, preserving recourse against himself. (See 5th, 6th and 7th findings by Lord Ordinary.)

Claim of
Henderson's
Trustee.

Irving, as trustee, claimed expenses of the cessio, and in completing the title, in disposing of heritable property, in searching and clearing records, and for feu-duties and other disbursements, and for commission as administrator of this judicial trust; also as an individual creditor for L.509 : 0 : 2.

Objection.

Objected by Walker's trustees—As heritable creditors they were not parties to the trust in Irving's favour, and the proceeds of their security cannot be applied to their prejudice in paying such expenses.

Answer.

Answered—The other claimants were cited in the cessio, and did not object to, but sanctioned the trustee's proceedings. (See 1st, 2d and 3d findings by Lord Ordinary.)

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's
Interlocutor.

' The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, finds, 1mo, ' That the claimant, John Irving, is preferable, primo loco, over the ' fund in medio, for such sums as were justly due, and were paid or ' engaged for by him to the agents who held the title-deeds of the ' property in question under hypothec for business accounts, reser-

'ving all questions as to the amount or correctness of such accounts : 22 Jan. 1836:
 'Finds, 2^{do}, That the said John Irving is also preferable, primo loco,
 'for such expenses as have been necessarily or profitably incurred
 'by him as disponent in completing the titles of the common debtor,
 'and in managing the property and bringing the same to sale :
 'Finds, 3^{do}, That the said John Irving has no right of preference
 'or of ranking in competition with heritable creditors holding valid
 'and completed securities prior to the date of the disposition in his
 'favour, for expenses incurred in the process of cessio bonorum, in
 'the execution of the disposition omnium bonorum, or any other
 'expenses beyond those expressed in the previous findings, or for
 'commission as trustee : Finds, 4^{to}, That the title of the claimants,
 'Walker's trustees, is a good and valid title in their persons as
 'singular successors by heritable disposition and sasine ; repels the
 'objection taken thereto, and finds that the said title affords a good
 'and preferable claim over the fund in medio, beyond the sums for
 'which Mr Irving is found preferable, except in so far as it may
 'be excluded by the claim of the Leith Banking Company in virtue
 'of their inhibitions founded on : Finds, 5^{to}, That the claim of pre-
 'ference made by the Leith Banking Company depends essentially
 'on the validity of the diligence used by them on the two alleged
 'debts of L.500 and L.380, and separately on the legality and va-
 'lidity of these debts themselves : Finds, 6^{to}, That neither the debt
 'of L.500 itself, nor the diligence proceeding thereon, is liable to
 'any good objection, on the ground of the stamp on the promissory-
 'note having become insufficient to sustain the said note as a legal
 'instrument at the time when the demand of payment thereof was
 'made, or on account of any failure in the due negotiation of the
 'said note ; and repels the objections raised on these heads : Finds,
 '7^{mo}, That the objection stated to the notarial protest of the bill
 'for L.380, on which the subsequent diligence proceeds, that the
 'said protest appears, ex facie of the instrument, to be the act of
 'George Henderson, who is the drawer and indorser of the said
 'bill, is a well-founded objection ; sustains the same accordingly ;
 'and finds, That the diligence proceeding on the said protest is in-
 'valid, and can afford no right of preference to the Leith Banking
 'Company in this competition : Finds, 8^{vo}, That the question as to
 'the validity of the said two debts of L.500 and L.380, on other
 'grounds of objection stated on the record, depends on matters of
 'fact, on which the parties are directly at issue : therefore, finds,
 'That the cause cannot be further extricated without some proceed-
 'ing for ascertaining the true state of such disputed matters of fact ;
 'appoints the cause to be enrolled, in order that such proceedings

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Lord Ordinary's Note.

' may be appointed, and the other findings in this interlocutor may
' be applied so far as necessary or practicable; and, in the mean-
' time, reserves all questions of expenses.'

Note.—' In the first, second, and third findings of this interlocutor, the Lord Ordinary proceeds on the principles laid down in
' the cases of Campbell and Clason v. Goldie, Nov. 15. 1822, and
' Russell v. Goldie, March 1. 1823; and the distinctions expressed
' or implied in those decisions, as well as in the later cases of Brock
' v. Brown's Trustees, March 8. 1825; Maclean v. Robertson, Nov.
' 29. 1825; Gibson v. Stevenson, June 26. 1822; and Globe Insurance Company v. Turner, June 5. 1835.

' On the point determined by the fourth finding, the Lord Ordinary is of opinion that the objection to the validity of Mr Niven's
' sasine is not good. Both the disposition and sasine, as exhibited
' to Professor Walker, or those acting for him, are not denied to
' have been regular and complete instruments; and as a singular
' successor, he could not possibly discover the supposed defect in
' them now alleged. The objection now taken is not an objection
' to the validity of the disposition; for it is not, and cannot be disputed, that according to the long-established usage, it was perfectly
' competent (even assuming the fact to be as averred) to fill up the
' testing clause at any time, and by any hand, if the writer were
' specified; and it could form no objection to the deed, though it
' could be assumed that it was so filled up at Edinburgh by the person mentioned, who was also the writer of the deed. Neither is
' it an objection to the sasine in itself; for it is regular in all respects.
' But the objection assumes, as matter of fact, that the testing clause
' was not filled up at the time when the act of sasine took place, and
' then infers that there could be no sasine on the deed while in that
' state. The Lord Ordinary thinks that this admits of solid answers.
' The delivery of the deed to the granter was a warrant to him to
' get the testing clause filled up. When filled up, it is probatio
' probata of the fact of the deed being completed by subscription,
' and of the date of it; and unless it be challenged on the distinct
' ground of falsehood in an improbation, it cannot be objected to.
' There is no allegation of falsehood; and it could not possibly be
' alleged, the same persons having officiated in the act of sasine, who
' were witnesses to the execution of the deed. Is it competent;
' then, without any such averment or form of proceeding, to inquire
' at all into the time and place, when and where, the testing
' clause was filled up, and to go into a proof by parole on that subject? The Lord Ordinary thinks that it is not, and that it would
' be very dangerous to admit such a principle, against which no

‘caution of a third party could protect him. In point of legal theory, the law must assume, that the testing clause is always written at the time when the deed is signed; and the relaxation of this, introduced by practice, can make no difference on the theoretical assumption. When, therefore, the clause has been filled up, whether at the time or afterward, it concludes the matter, and must be taken as the due completion of the instrument at its date. It is apprehended, therefore, that the objectors cannot legally get at the assumed fact. But further, supposing it were otherwise, and that the matter could be inquired into, the Lord Ordinary is not prepared to sanction the principle of the plea founded on it. The argument is, that sasine cannot pass on a disposition where the testing clause has not been filled up, because the notary cannot know, from inspection of it, the date on which it was signed, or the designation of the witnesses, &c. The date is not a statutory solemnity, and may be known otherwise; (see Lord President’s opinion in *Durie and Doig v. Durie*, 11th March 1773). The names of the witnesses are affixed to the deed, and their designations may be perfectly well known. The name of the writer may be known by the handwriting, or otherwise. In the present case, the notary was himself a witness to the execution of the deed, and the other witness acted as procurator for the grantor, and is expressly designed in the instrument, ‘Servant to Robert William Niven,’ as in the testing clause of the disposition. Further, the notary, by his instrument, has expressly certified the fact, that the deed was written and signed in the manner stated in the testing clause. The question therefore is, whether, without impeaching either the disposition or the instrument of sasine as false in any one point, the objectors can challenge the title of an onerous purchaser from the grantee, transacting on the faith of the recorded instrument. The Lord Ordinary is not convinced that they could, even if there were any legal mode in which they could establish the fact averred.

‘In the *sixth* finding, the Lord Ordinary proceeds simply on this principle, that the statute has provided a specific stamp-duty in general terms for all bills or promissory-notes, ‘either on demand, or otherwise, not exceeding two months after date, or sixty days after sight;’ and that the stamp-duty upon the promissory-note in question having been in conformity to this rule, no penal consequence of nullity can be drawn out of the manner in which such a note, once legally constituted, might be used. The Lord Ordinary is also of opinion, that no sufficient ground has been shewn for the plea of undue negotiation. This was a *promissory-note*, and not a bill. It was evidently not intended to be immediately

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‘ enforced; and, assuming every thing ~~else~~ to be correct, neither Henderson nor any of his ~~creditors~~ can be allowed to object, that there was any unreasonable delay in its being presented for payment. Besides, the acknowledgment of it by Henderson is a sufficient answer on this point.

‘ In the *seventh* finding, the Lord Ordinary proceeds on the doctrine laid down in the cases of *Farries v. Smith*, June 9. 1813, and *Russell v. Kirk*, November 1827. The question is not, whether this bill has been lost *as a ground of debt*. The written obligation of Henderson may to this effect be sufficient to exclude any objection on the want of protest. But the question of competition here is on the *diligence of inhibition*; and as the inhibition proceeds expressly on the registered protest, it cannot stand if the protest is a nullity. Now, the notary who makes the protest is the drawer and indorser of the bill, the very person on whom, and on whose estate, recourse is to be had in respect of the protest, but the very person also, who, if there were funds in the acceptor’s hands, would be entitled to redress against him, in respect of the presentment verified by the protest. The Lord Ordinary cannot see how it is possible that this should be sustained.

‘ The record evidently embraces matter which could not be disposed of in this interlocutor. Mr Irving and Walker’s Trustees object to both the debts of the Leith Bank on more general grounds, alleging that they were bills illegally made, or at least illegally discounted, with reference to the judgment of the Court, and the House of Lords, in the case of *Ker v. Bell*, 12th May 1830, and 1st October 1831. The question involved in this must be otherwise discussed. If the objectors should succeed, the effect will be, that Walker’s Trustees would become preferable absolutely, and the residue would go to Mr Irving. If they failed, the Leith Bank would be preferable, according to the interlocutor, upon the debt of L.500. Walker’s Trustees would be preferable in the next place, which would probably exhaust the fund; but if there were any residue, the Leith Bank would rank with Mr Irving and the other creditors for the debt of L.380.’

All the claimants *reclaimed*; but the discussion was confined to the sixth and third findings.

Pleas for Wal-
ker’s Trustees.

Keay (for Walker’s Trustees) objected to the fifth and sixth finding. A bill or promissory-note payable on demand must be presented within a reasonable time. This was a question with an indorsee, who never dreamt that four months’ delay was allowable. See Thomson on Bills, p. 462, where it is laid down that there must be presentation without undue delay. Thus, then, (1.) There is no difference

betwixt a bill and promissory-note; see 12. Geo. III. c. 72, and 23. Geo. III. c. 18. They are in *pari casu* in a question with an indorser. (2.) Supposing the note was granted for an immediate advance, it should have been presented within two or three days. (3.) Henderson's acknowledgment of the debt related to the L.300 bill, not to the note for L.500, and the acknowledgment was made after Henderson's bankruptcy.

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Anderson, for Leith Bank,—In regard to promissory-notes, there is no fixed rule as to what is unreasonable delay; there is certainly no limitation to a few days; see Thomson, p. 465. Besides, there is an admission on record, (condescendence for Walker's Trustees, Art. 12,) that the note was not to be used; for after stating that the Leith Bank gave no value to Henderson, it is said, 'they received the same only from Scott, as an additional security for an alleged large balance which the Leith Bank claimed from him.'

Pleas for
Leith Bank.

Lord Medwyn.—With regard to the objection of undue negotiation of the promissory-note for L.500, I do not dispute that the law quoted from Mr Thomson's Treatise is correct in the circumstances to which it applies. The sole question is not whether there is any distinction betwixt the case of a bill and that of a promissory-note, although the Lord Ordinary is right in the view he takes as to this being a promissory-note. But the true question is, whether the promissory-note was intended as a remittance of money, or as a loan? If it had been a remittance, payable at the place to which it was sent, and the party had not thought proper to present the note without undue delay, he would unquestionably have been liable to the objection of undue negotiation. But what are the circumstances? It is perfectly clear that this note was intended to answer the purpose of a loan, or rather to remain as a security, and was not a remittance. It was not payable at any day certain, but on demand; and it was not payable at Leith. It is in no respect different from a bank note. It is not necessary, then, that payment of a note so granted should have been demanded within two or three days after, and a protest taken upon it, to keep up recourse, and Henderson would have been much surprised indeed if any such demand had been made upon him and the other obligants within a day or so of transmitting it. No doubt the parties were bound to keep up the recourse: this would have been sufficient, by protest and charge, any time within six years from its date, so that there was no undue delay here. Whether there was any thing incorrect in the conduct of the bank, arising out of their

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transactions with Scott, who gave this note as an additional security to them, which entitles Henderson to be free, is not now to be considered, since that and other points are reserved.

The other *Judges concurred*, and the note for Walker's Trustees was refused.

Pleas for
Henderson's
Trustee.

Whigham, for Henderson's Trustee, objected to the third finding. The expenses incurred in the cessio and in the execution of the disposition omnium bonorum had been beneficially expended for all concerned. As to the claim for commission, there was no decision in support of such a claim; but here the trustee was, in one sense, under the control of the Court, and having expended time and labour, was entitled to remuneration.

Opinion of
Court.

Lord Justice-Clerk.—It is generally one of the parties in whose favour it is made who takes charge of the execution of the disposition by the debtor. We cannot trench upon the decisions referred to by the Lord Ordinary, which settle the law, that heritable creditors are not liable for expenses thus incurred.

Judgment.

The Court refused the reclaiming notes.

Lord Ordinary, *Moncreiff*.
Bank, *Henderson*.
Wm. Martin, S. S. C.

For Walker's Trustees, *Keay, Marshall*.
For Mr Irving, *Whigham*.
John Bisset, S. S. C.

For Leith
Wm. Stewart, W. S.
F. Clerk.

R.

SECOND DIVISION.

No. LXI.

23d January 1836.

JEAN KING AND OTHERS *against* THE GREENOCK BANK.

WRIT.—VITIATION.—INHIBITION.—(1.) *Certain words essential to the validity of letters of inhibition were written as a note on the margin, which was signed by the writer to the signet who subscribed the letters, but no notice was taken of the marginal note at the end of the letters, there being no allegation of fraud,—the diligence was found effectual.* (2.) *Certain words or letters erased found not in substantialibus, and not fatal to the validity of the inhibition.*

JEAN KING and others brought a reduction, *ex capite inhibitionis*, 23 Jan. 1836. of securities granted to their prejudice over heritable subjects in favour of the Greenock Bank. Among other defences pleaded was an objection to the pursuers' inhibition, on the ground of nullity from erasure, and an unauthenticated marginal addition. The statement was: The letters of inhibition, upon which, and the executions thereof, the action is founded, bear to proceed upon the dependence of an action of count and reckoning, at the instance of the pursuers, against John King, William Morris, and William King, one of the granters of the heritable securities, concluding, that they should be ordained to pay to the pursuers L.1500 equally among them, or such other sum as should be found and ascertained to be the balance upon the accounts therein mentioned. The letters of inhibition (omitting the words erased and added) do not validly and effectually set forth what John King, William Morris and William King are inhibited from doing. In particular, the warrant for inhibiting them from contracting debt or granting deeds, &c. to the hurt and prejudice of the complainers, does not set forth that such inhibition had any reference to the implementing and fulfilling of any decree that might be obtained in any such action of count and reckoning. After the letters of inhibition were written, the complainers attempted to rectify their mistake, by inserting on the margin the words, 'the implementing and fulfilling to the complainers the decree to be obtained, at their instance, on the said depending process,' and by erasing part of the original text, and substituting the words, 'the whole sums to be therein contained *.' No notice is taken either of that marginal addition, or of that erasure and superinduction, by the writer to the signet who signed the letters; and the same are not authenticated in any way whatever.

The pursuers admitted the existence of the marginal note, to which, however, was adhibited the signature of the writer to the signet, and also admitted the partial erasure and superinduction of

* (Thus in original. *The letters and words in Italics have been superinduced, and are partly written on erasures.*)

Nor do any other act or deed, directly or indirectly, whereby the right to the said lands and others pertaining to them may be anywise evicted or adjudged from them, or they denuded thereof, in defraud and to the hurt and prejudice of the complainers, anent and payment making to them of the *whole sums to be therein contained*; and also, that ye, in our name and authority, inhibit, &c.

It concludes thus: Given under our signet, at Edinburgh, the 17th day of October, in the second year of our reign 1821.

Ex Delib. Dom. Concilii.

ROBERT SPEID, for Mr Wm. Campbell,

Written by Wm. Walker, his clerk, on these twenty-two pages.

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Robert
Speid.

A the implementing and fulfilling to the complainers the decree to be obtained, at their instance, on the said depending process,

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—
Narrative.

the words in the body of the writ, but denied that they were in *substantialibus*, or that any farther authentication was necessary. They also averred that no change had been made on the inhibition since it passed the signet. This the defenders neither knew nor admitted.

The Lord Ordinary repelled the objection, and pronounced an interlocutor, reducing in terms of the reductive conclusions, with the following note :

Lord Ordinary's Note.

Note.—‘ The objection of want of interest, though in the defenders’ pleas, is not within their defences. In this situation, the Lord Ordinary does not put his rejection of it, as he otherwise would have done, on its own want of merits.

‘ The objections to the inhibition are, that certain words and letters are written upon an erasure, and that a marginal note is not noticed in what has been termed ‘ the doquet.’ These statements are both correct in point of fact. But there is no offer to prove any fraud. The defenders, in their third statement, say, that what was done was meant to correct a *mistake* ; but at the debate, both parties intimated that they had no proof to adduce beyond what was implied in the admitted circumstances of the case. The pursuers, in their counter-statement, aver that no change was made on the diligence *after it passed the signet*. The defenders merely answer that they do not admit this, as they do not know the fact. But the pursuers prove it sufficiently by referring to the bill, and especially to the *executions*, which took place within a very few days after the signeting, and contain the marginal note and the erased passage, so that the question as to the effect of the note and the erasure arises quite purely.

‘ The Lord Ordinary thinks that the diligence cannot be set aside on account of the *erasure*, because it is not in *substantialibus*, and the writ is effectual although the erased words and letters be held as not written. The defenders argued, that the erasure and the note must be taken together. The Lord Ordinary does not see that this is necessary, or how, except as explaining in what way the correction was found expedient, it is of any importance. The case of Elliot, 26th June 1829, has no application to this one: The erasure there was most essential, and there was a disconformity between the bill and the letters.

‘ The *note* is essential to the validity of the diligence ; but the Lord Ordinary is of opinion, that its not being noticed at the end of the letters forms no ground of reduction. The principles which regulate deeds, where marginal notes must be mentioned in the testing clauses, in order to connect the parties’ signature with the witnesses’ attestation, have no application to writs like this,

‘ where there are no witnesses ; but the law gives credit to the subscription of a public officer alone. His power to subscribe a marginal note is not disputed ; but it is maintained, that the validity of a note depends on its being set forth in the doquet. The Lord Ordinary has been unable to discover any authority, of any description, for this opinion, which he thinks is against principle, as applicable to such an instrument. The Court, upon 7th July 1824, authorised the keeper to withhold the signet from letters which did not contain the name of the clerk by whom they were written, and to this extent there is judicial authority for a memorandum at the end of the writ. But neither this interlocutor, nor any thing else, makes the mention of marginal notes, or the enumeration of pages, either necessary or proper.

‘ No doubt, agreeably to a practice, which, though common, the Lord Ordinary does not understand to be by any means invariable, the pages here are de facto numbered ; and if that numbering had been signed, it might have been maintained, on the authority of the reversal in the case of *Hare v. Nasmyths*, that the writer *having chosen* to authenticate the letters by counting the pages, nothing beyond the numbered pages can be received. But the notandum is *not* signed ; and the Lord Ordinary understands such notanda very rarely are. So that the Court, for an object not at all connected with authentication, has sanctioned the specification of one particular at the close of the letters ; and the defence here is founded on an attempt to extend this to a different purpose, so as to include a precaution only required on common deeds.’

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Note.

The defenders *reclaimed*, but the Court *adhered*, and gave additional expenses. Judgment.

Lord Ordinary, Cockburn.
Alt. Keay and Marshall.
T. Clerk.

Act. Dean of Fac. (*Hope*), J. S. More and Maitland.
Campbell & Mack, W. S. Macmillan & Grant, Agents.

R.

No. LXII.

SECOND DIVISION, 23d January 1836.

LAWRENCE TWEEDIE against EBENEZER BEATTIE.

POINDING THE GROUND.—PROCESS.—An application for a diligence to recover writings, to instruct a defence against an action of poinding the ground, at the instance of an assignee of an heritable creditor, though uninfest, the defence being, that the bond assigned had been granted to cover advances by the cedent which had not been instructed, the poinding was allowed to proceed. (See papers.)

Lord Ordinary, Jeffrey. Act. J. S. More. Alt. A. McNeill. John Brown,
W. S. Mackintosh & Gemmell, S. S. C. R. Clerk.

R.

FIRST DIVISION.

No. LXIII.

26th January 1836.

E. AND W. SMITH
against
 THOMAS BINNY.

BILL OF EXCHANGE.—INDORSATION.—HUSBAND AND WIFE.—PROCESS.—EXCEPTIO FALSI.—(1.) *A married woman, residing with her husband, indorsed a bill of exchange drawn by herself upon her father, and alleged to have been accepted by him, in the knowledge that she was married,—found that this was not a valid conveyance to the bill,—and bill of suspension by the father of a charge by the indorsee passed simpliciter. (2.)* *The maxim, exceptio falsi est omnium ultima, found not applicable to exclude other pleas, where the record had not been closed on the allegation of forgery, and the charger had not been called on to abide by the bill, nor the suspender to consign previously to the statement of the new plea.*

Narrative.

E. and W. SMITH charged Mr Binny on a bill, bearing to be drawn by Mrs Gib on her father, Mr Binny, and to be accepted by him; and which was indorsed by Mrs Gib to the chargers, without the knowledge or concurrence of her husband, with whom she then lived. Of this charge Mr Binny brought a suspension, at first simply on the ground that his acceptance was forged; but he afterwards, in making up the record, without departing from the allegation of forgery, added the plea, that the indorsation of Mrs Gib in favour of the chargers was invalid without her husband's concurrence.

This plea was for the first time stated in the re-revised reasons of suspension; a correspondence having been by that time recovered under a diligence, from which it appeared that the transaction had been kept secret from her husband.

Chargers' Pleas.

The chargers *pleaded*—That the suspender having alleged forgery, could not afterwards recur to any other defence, according to the maxim, *exceptio falsi est omnium ultima*; Gordon, 22d Feb. 1676, *Morr.* 12,056; *Forrester v. Rowat*, 8th July 1697, *Morr.* 12,061; *Gray and Co. v. Gray*, *Elchies, Process*, No. 2: that, at all events, this new plea could only be admitted on the suspender departing from that of forgery, or at least paying previous expenses: that as—

suming the signature to be genuine, the suspender was barred from impeaching the validity of the bill, as he had accepted it in the knowledge that the drawer was a married woman. Besides, that a bill drawn by a femme couverte was not necessarily null, and that she could validly indorse it, if her husband did not object; *Mac-kenzie v. Fraser*, 18th May 1827, *Fac. Coll.*

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Smiths v.
Binny.Chargers'
Pleas.

The Lord Ordinary pronounced the following interlocutor:—
 ‘The Lord Ordinary having heard counsel for the parties, and
 ‘having afterwards considered the closed record, productions, and
 ‘whole process, finds, that the suspender’s plea, that the chargers
 ‘had no right to the bill in question, because it could not be va-
 ‘lidly indorsed by the drawer, being a married woman, might
 ‘be stated either as a preliminary defence, or objection to the
 ‘chargers’ title, or as a peremptory defence on the merits; and
 ‘therefore finds, that it is not to be held as passed from, by the
 ‘susponder’s allowing the record to be closed without argument on
 ‘the subject; and, in respect the record was not closed on the al-
 ‘legation of forgery, nor had the chargers been called upon to abide
 ‘by the bill, nor the suspender to consign, before the objection to the
 ‘indorsation was stated, finds, that the maxim, *exceptio falsi est om-
 ‘nium ultima*, does not apply to the case, and that it is competent
 ‘for the suspender to object to the validity of the indorsation, with-
 ‘out passing from the defence of forgery; and, in respect it is not
 ‘alleged that the drawer was engaged in trade, or that the bill was
 ‘granted in consequence of any transaction falling under her *præ-
 ‘positura*, or that her husband was made acquainted with, and sanc-
 ‘tioned her indorsation, while, on the contrary, it appears, from the
 ‘correspondence produced, that he was carefully kept ignorant of
 ‘the matter, and that the chargers were aware of this circumstance;
 ‘finds, that the chargers obtained no valid conveyance to the bill,
 ‘and are not now in right of it; therefore suspends the letters *sim-
 ‘pliciter*, and decerns; finds the chargers liable in the expenses
 ‘incurred since the time that the objection to the indorsation was
 ‘stated in the re-revised reasons of suspension, and in no other
 ‘expenses.’

Lord Ordi-
nary's Inter-
locutor.

Note.—‘The maxim, *exceptio falsi est omnium ultima*, even ac-
 ‘cording to the ancient form of process, was subject to various li-
 ‘mitations; and, in particular, it seems not to have been admitted,
 ‘unless an act of *litiscontestatio* had been pronounced. It is doubt-
 ‘ful how far it can be received at all under the present form, where
 ‘the rule is, that all defences shall be stated *simul et semel*, and
 ‘consequently that any one may be proponed without passing from
 ‘another. If it be admissible to the effect of excluding any state-

Note.

26 Jan. 1836.

Smiths v.
Binny.

Note.

'ment in fact, or plea in law, this can only happen if the record
'has been closed on the plea of falsehood, before the other plea has
'been stated.

'The nature of the transaction in this case, and the whole cor-
'respondence produced, are conclusive on the point that Gib, the
'drawer's husband, was studiously kept ignorant of his wife's trans-
'action in purchasing the jewels, and giving a bill for the price ;
'and there is no averment on the record to the contrary. The case
'of Mackenzie (18th May 1827) is not parallel : for there the hus-
'band and wife, the drawers, were called in an ordinary action along
'with the acceptor ; and as the husband allowed decree to go against
'him, it was presumed that he had authorised the indorsation. But
'Gib has not been made a party here, and there is neither pre-
'sumption nor averment that he was in any way cognizant of the
'matter.

'The suspender having neglected to state the plea which has
'now been sustained, until his reasons of suspension were re-revi-
'sed, he has been found entitled to expenses only from that period.'

Both parties *reclaimed*.

Opinion of
Court.

Lord President.—This case differs from that of Mackenzie's. There the action was an ordinary one, in which the husband was called, and had an opportunity of objecting to the transfer. He did not do so, and was therefore held to have consented to it. Besides, in that case, the husband being out of Scotland, and the wife being allowed to carry on business for her own behoof, she might validly contract personal obligations. But in this case the bill was the husband's, and could not be transferred without his concurrence, which was not proved.

Lord Gillies.—Suppose the suspender had granted a bond to his married daughter, and she had assigned it without her husband's concurrence, it could not be said that the granter was, in these circumstances, bound to pay to the assignee.

Judgment.

The other Judges *concurred*, and the Court *adhered*.

Lord Ordinary, *Corehouse*.For the Chargers, *Rob. Bell, Rutherford*.*Bell*& *Rutherford*, W. S. Agents.For the Suspenders, *Dean of Fac. (Hope)*,*H. J. Robertson*.*Pearson & Robertson*, W. S. Agents.

C. R.

FIRST DIVISION.

No. LXIV.

26th January 1836.

EDWARD COLLINS

against

JAMES HAMILTON, Esq. AND OTHERS.

TACK.—NUISANCE. — RESPONSIBILITY OF LANDLORD FOR TENANT.—JURY TRIAL.—(ISSUES.)—*A landlord having let premises to be used inter alia as a dye-work, in an action of damages for alleged injuries occasioned by some of the dyeing operations of his tenants,—an issue was granted against the landlord, Whether these operations were carried on under his authority ?*

THE facts out of which the present question arose are clearly stated in the following note, added by the Lord Ordinary to his interlocutor of the 19th Dec. 1835 : ‘ This is an action of damages brought by the pursuer against the defenders, for polluting, by their operations of dyeing, a stream on which the pursuer’s paper manufacture is situate, and rendering it unfit for the purposes of that manufacture. It is directed not only against the defenders, Macdonald and Mackay, the tenants and occupiers, by whom those operations in dyeing are actually carried on, but against Mr Hamilton, the proprietor of the premises, and Mr Arthur, a former tenant of those premises, who assigned or sublet them to Macdonald and Mackay. The main ground of action against Messrs Hamilton and Arthur is, that by letting the premises expressly for various purposes, and, inter alia, for the purpose of a dye-work, they are necessarily liable for the consequences of the acts of the actual possessors. This liability is denied by the defenders, and the Lord Ordinary has thought it expedient to afford the parties an opportunity of having the judgment of the Court on that point of law, before sending the case to a Jury.’

The case being verbally reported by the Lord Ordinary, it was pleaded for the pursuer—That the stream was very small, and therefore unfitted for a dye-work of any reasonable size : that the defenders, Hamilton and Arthur, in the knowledge of this, had let the premises for the purpose, amongst others, of a dye-work : that it was averred that they were cognisant of the pollution of the water,

Pursuer’s
Pless.

26 Jan. 1836.

Collins v.
Hamilton and
Others.

formerly pure, by the operations of dyeing, and aware of the injury thence suffered by the pursuer: that therefore these defenders were liable, and that an issue must be given against them as well as their subtenants.

Defenders'
Pleas.

To this the defenders *answered*—That in order to infer liability against them, the pursuer must undertake to prove, that in that situation a dye-work of any description must of necessity be a nuisance: that this proof they would not undertake: that a landlord, in letting a subject for a particular operation not in itself illegal, did not render himself liable for his tenant, should the latter push the operation to an illegal extent: that though an express authority had here been given to carry on the useful and legal work of a dye-work, it was always under the tacit limitation, that the tenants' acts should in the circumstances be legal; and that therefore, should the tenants create a nuisance by the mode of their operations, they alone were the parties responsible.

Judgment.

The *Court* remitted to the Lord Ordinary to approve of the following issue:

‘ Whether the said operations, so carried on by the defenders, Macdonald and Mackay, to the loss, injury and damage of the pursuer, were carried on under the authority of the defenders, James Hamilton or his predecessor, and Archibald Arthur, or either of them?’

Lord Ordinary, Fullerton. Act. Dean of Fac. (*Hope*,) A. M'Neill. Bowie & Campbell, W. S. Agents. For Hr Hamilton, Rutherford and Dunlop. Patrick & Crawford, W. S. Agents. For Mr Arthur, Brodie. James Burness, S. S. C. Agent.

C. R.

SECOND DIVISION.

No. LXV.

26th January 1836.

WILLIAM MITCHELL

against

THE WESTERN BANK OF SCOTLAND.

BANK MANAGER.—SOCIETY. — MUTUAL CONTRACT. — Circum-

stances in which it was found that Bank Directors had the absolute power of dismissing the Manager, without assigning any cause in justification of the act.

26 Jan. 1836.

Mitchell v. The
Western Bank
of Scotland.

PROCESS.—*The leading conclusion of an action being, that the defenders should be ordained to restore and reinstate the pursuer in the office from which he had been dismissed, and the next or alternative conclusion being for damages in case this should not be done, there being no independent ground of injury arising from the time, mode or terms of the dismissal, and the Lord Ordinary and Court holding that there was a power of dismissal;—found, that there were no sufficient grounds for a remit for trial by jury; and action dismissed accordingly.*

THE Western Bank of Scotland was projected in 1831, at which time the pursuer held the appointment of cashier to the Glasgow Union Bank. The pursuer set on foot a prospectus for a rival bank; to be called the Western Bank; and without divulging his intentions to any one connected with the Glasgow Union Bank, took the preliminary steps for the formation of such an establishment. The prospectus contained, inter alia, provisions, that a contract of copartnership should be prepared previously to the first general meeting of the shareholders, and that a committee of the shareholders should have it in their power to elect an officer, for the purpose of forwarding the business of the institution; and many respectable individuals having subscribed for shares, and a committee having been chosen, that committee, in virtue of the power conferred by the prospectus, named the pursuer as Manager, whereupon he accepted the appointment. At the time when this appointment was conferred on the pursuer he was not cashier of the Glasgow Union Bank, having previously resigned that situation. In terms of the prospectus of the Western Bank, a contract of copartnership was executed in the summer of 1832, whereby certain individuals were named Governor and Deputy-Governor, and Ordinary Directors, for the first year ending June 1833, and the Ordinary Directors so named were authorised to appoint Extraordinary Directors and office-bearers. The general duties of the Ordinary Board of Directors are prescribed in the 25th clause of the contract; and by the 26th clause, the Ordinary Directors are authorised and empowered to nominate and appoint, by a writing to be engrossed in their sederunt-book, ‘a Manager, Cashier, Secretary, and Accountant, to whom they may, from time to time, allow such salaries as to them shall seem proper; and it shall be in the power of the said Ordinary Board of Directors to dismiss any one or

Narrative.

26 Jan. 1838.

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Western Bank
of Scotland.

—
Narrative.

‘ more of the said officers, when they see occasion, provided that
‘ two-thirds at least of the said Directors shall concur in such dis-
‘ missal ; and they are hereby authorised to appoint a successor or
‘ successors to the party or parties so dismissed.’ The first general
meeting of the shareholders was held on 23d May 1832, when the
contract was approved of, and the Directors appointed ; and at a
meeting of the Ordinary Directors, on 10th July 1832, the pur-
suer’s appointment as Manager was sanctioned, and a resolution
came to, fixing his salary at L.500, with a free house, commencing
from 2d July 1832.

In terms of the contract of copartnership, the pursuer lodged a bond
of caution for his intromissions and management to the amount of
L.8000. This bond is dated in September and November 1832, and
contains, inter alia, a clause to the following effect : ‘ And farther,
‘ as I, the said William Mitchell, (pursuer,) only hold the foresaid
‘ office of Manager during the pleasure of the Ordinary Board of
‘ Directors of the said Western Bank of Scotland, and their suc-
‘ cessors in office for the time being, or at least of two-thirds of
‘ their number, in terms of the foresaid 26th clause of the com-
‘ pany’s contract, I hereby bind and oblige myself, at any time,
‘ when required so to do, by two-thirds at least of the saidordi-
‘ nary Board of Directors, to deliver up to them, or their successors
‘ in office for the time being, all sums of money in specie, bank
‘ notes, and notes of the said banking company itself, &c. with the
‘ keys of the repositories of the said banking company, and other
‘ property belonging thereto, that may be in my possession at the
‘ time, and the books, accounts and vouchers of the said banking
‘ company, without any manner of exception or reservation what-
‘ ever.’

The pursuer received the thanks of the Directors, and of a general
meeting of the proprietors of the bank, and an addition was made
to his allowance as Manager. These acknowledgments were
made by the Directors and by the Shareholders, under the im-
pression that they were merited. On the 21st of September 1833,
after the Ordinary Directors had had seventeen months’ experience
of the pursuer’s conduct and management of the affairs of the bank,
they addressed the following letter to him : ‘ William Mitchell,
‘ Esq. Glasgow.—21st September 1833. Dear Sir,—In conse-
‘ quence of your unremitted attention to the interest of the West-
‘ ern Bank of Scotland, as Manager, we, the Directors of said bank,
‘ have added L.100 sterling per annum to your salary, which com-
‘ mences at last balance, and we do expect you to continue to pay
‘ the same assiduous attention to its interest in time coming. We

'are, dear Sir, your most obedient servants, (Signed) JOHN BUCHANAN, JAMES W. ROBERTSON, GEORGE DOUGLAS, JOHN MACGREGOR, ALEXANDER M'ASLAN, ROBERT WEIR.' Besides his salary the pursuer had the use and occupation of a house and offices rent free.

26 Jan. 1836.

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From the date of his appointment, down to the month of October 1834, the pursuer continued to act as Manager, and the Directors and Shareholders, none of whom were practical bankers, were led, from the representations of his proceedings made to them by the pursuer, to believe that he was managing the affairs of the bank with skill and judgment. Afterwards, however, the Directors became dissatisfied with the conduct of the pursuer as Manager, for reasons condescended on upon the record.

A demand was soon after made by the shareholders, and the Committee of Management of the Edinburgh branch, for the instant removal of the pursuer; and the Directors determined to exercise the powers conferred by the 26th clause of the contract, as well as by the pursuer's own bond of caution; and accordingly, at a meeting of the Ordinary Board of Directors, held on the 14th October 1834, at which all the Ordinary Directors were present, they unanimously resolved to dismiss the pursuer from his situation of Manager, and to appoint Mr Miller in his stead.

The pursuer brought an action, concluding that it ought to be found and declared, 'that the proceedings of the said Western Bank of Scotland, and Committee of Management, and whole partners thereof, were illegal and unwarrantable, and contrary to the engagement entered into with the pursuer, and to the provisions of the contract of copartnery; and it being so found and declared, the said Western Bank of Scotland, and whole partners thereof, and their Manager and Secretary, as representing the said company, ought and should be decerned forthwith to restore and reinstate the pursuer in the said office of Manager, and in the full exercise of all the functions, powers and faculties, and in the full possession and enjoyment of the salary, benefits and privileges pertaining and belonging to the said office, both previous to and since his removal, and hereafter to fall due, in the same manner, and as fully and freely as if the pursuer had not been removed from the said office; or at least the said company, and partners thereof, as individuals as well as copartners, ought to be decerned and ordained to make payment to the pursuer of the annual sum of L.600, as the stipulated salary attached to and pertaining to the office of Manager, with L.100 in lieu of house-rent, &c.; or otherwise to make payment of L.15,000 in name of damages,' &c.

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of Scotland.

Pursuer's
Pleas.

In support of his action the pursuer *pleaded*—1. The act by which the pursuer was dismissed from the office of Manager of the Western Bank being illegal and unwarrantable, and in violation of the engagements come under when he was appointed, as well as ultra vires of the Ordinary Directors, the defender is bound either to reinstate the pursuer in the office, or to make reparation to him for the whole loss and damage he has sustained, or may yet sustain in consequence of his dismissal.

2. As the charges of incapacity, gross mismanagement, supine negligence and malversation as manager of the bank, on which the defender attempts to justify the dismissal of the pursuer, are not true in point of fact, they cannot warrant the illegal and injurious act of which the pursuer complains; but, on the contrary, they aggravate the claims already competent to the pursuer.

Defenders'
Pleas.

The defender, founding upon the terms of the copartnery, the pursuer's appointment, and bond of caution, *pleaded*—1. The present action is untenable, and the whole of the pursuer's averments are irrelevant, and not admissible to probation, in respect that both under the contract of copartnership of the bank, and under the pursuer's own bond of caution, he was expressly removable from his office of Manager at the pleasure of the Ordinary Board of Directors, and was removed accordingly; while he does not aver that he had entered into any engagement with the bank different from that set forth in the contract and relative bond of caution; Pollock's Trustees against the Commercial Bank, 4th July 1822, 1. *S. and D.* 459, as decided in the House of Lords, 3. *Wilson and Shaw*, 365 and 430.

2. Under the pursuer's engagement with the bank, the Ordinary Board of Directors had an absolute power to dismiss him either with or without cause; but, esto that the directors were bound to justify the pursuer's dismissal, that step was warranted by his incapacity for his situation, and by his mismanagement, negligence and malversation in the conduct of the bank's affairs.

3. The defender is entitled to have the questions of law and relevancy raised on the present record determined before the case is remitted to the issue clerks, or, at all events, before the issues are sent to a jury for trial; *M'Lean v. Richardson*, 1st July 1834, 12. *S. and D.* 865; *Law v. Gibson*, 3d Feb. 1825, 12. *S. and D.* 396.

The Lord Ordinary pronounced the following interlocutor and note:

'The Lord Ordinary having heard parties' procurators on the state of the cause as remitted from the Jury Roll, and the pleas of the defenders for excluding the action, and preventing any trial on the averments of the pursuer, as being irrelevant, finds, that sufficient grounds have been assigned why the cause should be decided without any remit for trial by a Jury; therefore appoints the cause to be enrolled, in order that the record may be closed, and ordains the parties to be prepared to close the record accordingly.'

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Lord Ordinary's Interlocutor.

Note.—'The precise meaning of this interlocutor will, it is presumed, be easily understood. The Lord Ordinary has fully made up his mind, that the action cannot be maintained on the summons, and the facts admitted in the record, and is prepared to pronounce a decree of absolvitor. But he cannot do so, according to the statute, the record not having been closed, in consequence of the contemplated possibility of the case being still remitted for trial. This form of the interlocutor, however, with the explanatory note, will enable the party, if so advised, to take the opinion of the Court on the present state of the cause, without closing the record, and waiting for a direct judgment on the merits of the action. If they prefer the latter course, it will be equally safe for them.'

'It is not necessary to go much into detail. The nature of the conclusions of the summons must be attended to. They all depend expressly and essentially on the assumption, that the defenders had not *power* to dismiss the pursuer from the office without assigning special causes, which the Court might hold to be sufficient; and accordingly the leading conclusion throughout is, that they should be ordained to 'restore and reinstate' the pursuer in the office; the conclusion for damages being *only alternative*, in case this shall not be done. There is no case of damages raised by the summons on the independent ground of injury arising from any thing in the particular time, mode, or terms in which the dismissal took place, *supposing that there was otherwise power* to do the act: And, indeed, it is plain, that if the power existed, the defenders might comply with the first alternative, to the effect of *restoring* the pursuer, and so put an end to the action; and then immediately dismiss him in some more formal and simple manner, according to his own view of the matter.'

'The case, therefore, must depend on the question of *power*. And the Lord Ordinary can only say, that when he considers, 1st, The terms of the constitution of the company; 2d, The terms of the pursuer's appointment; and, 3dly, and above all, the explicit terms of his bond and obligation to the bank; he finds it

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Note.

‘altogether impossible for him to hold, that the Bank or the Directors had not an absolute power of removal, which entirely excluded the idea of their ever being called on to justify the act in a court of law. This is the case of a private society, who were entitled to make their own laws and their own contracts, to bind all the officers appointed by them; and, if any words could be contrived more strongly to express the pursuer’s obligation to submit implicitly to the will of the Directors in removing him from office than those employed in his bond to them, the Lord Ordinary does not know where they are to be found.

‘The case of *Pollock v. The Commercial Bank*, as decided in the House of Lords, 3. *Wilson and Shaw*, p. 365 and 430, seems at any rate decisive of the principles which must govern this case.’

The pursuer having *reclaimed*,

Opinion of
Court.

Lord Justice-Clerk.—Many things may be held to be mismanagement which do not amount to moral blame. The Manager’s notions of banking may differ from those of the Directors, and this may amount to mismanagement in their estimation. If the Directors entertain doubts of his capacity, they may dismiss him.

Lord Medwyn.—I am clear that they were entitled to dismiss him when we look to the conclusions of the summons. It is scarcely conceivable that this act was contrary to the minute and bond of security, on which I rest my opinion.

Judgment.

The Court adhered to the interlocutor, and found the defender entitled to the expenses of opposing the note; remitted to the Lord Ordinary to proceed accordingly *.

Lord Ordinary, *Moncreiff*. Act. *Rutherford, Whigham*. Alt. Sol.-Gen. (*Cunninghame*,) *P. Robertson*. W. Bell. James J. Smith, S.S.C. *Graham & Anderson*, W. S. T. Clerk.

R.

* The Lord Ordinary subsequently dismissed the action, and found the pursuer liable in expenses.

SECOND DIVISION.

No. LXVI.

26th January 1836.

DAVID WEMYSS AND RICHARD COWAN

against

MRS THOMSON AND HENRY DUNCAN.

SUPERIOR AND VASSAL.—FEU-DUTIES.—*A party feued out an area of ground for the purpose of building ; certain tenements were built thereon by the vassal, and sub-feued in different flats to various parties, with holdings a me, and for payment of a proportion of the feu-duty and duplicand thereof ;—found, in reference to two of the vassals in non-entry, (notwithstanding the superior had accepted payment of their proportion of the feu for a long period, and had also granted charters to the other vassals for payment only of their proportions of the original feu-duty,) that said party, as superior, was entitled to insist on said vassals taking charters containing an obligation for payment of the whole cumulo feu, but not of the relief on the entry of the heirs ; but that said vassals were entitled to have inserted in said charters an obligation by the superiors to grant to them, whenever required, at the vassal's expense, an assignation, to the effect of enabling them to recover from the co-feuars whatever sum or sums might at any time be exacted from them beyond their own just proportion of the said cumulo feu-duty and relief, and also a declaration, that the demand for such relief should not exceed the proportion thereof corresponding to the proportions of the whole feu in non-entry at the time.*

IN 1786, William Archibald feued from John M'Gill and Andrew Cowan an area or piece of ground, situated in St Patrick Square, Edinburgh, for the purpose of building thereon. A feu-contract and disposition was then granted in favour of Mr Archibald, as the feuar, and on which he was duly infeft. By this feu-contract, the vassal was taken bound to make payment to the superiors of a yearly feu-duty of L.19 : 11 : 3, being the feu-duty for the whole area, and L.39 : 2 : 6, or a duplication of the said feu-duty, on the entry of each heir to the whole subjects. Mr Archibald and Mr James Aikman, builder in Edinburgh, (supposed to have been a partner of Mr Archibald in the speculation,) built three large tenements on the above feu, each divided into separate houses or flats. Archibald afterwards conveyed the said tenements to Aikman in

26 Jan. 1836. 1792, who was then infeft. In May 1800, Mr Kilpatrick Williamson Burnet purchased from Aikman a flat of one of the tenements, and got a disposition from Aikman, declaring that the house was to be held of the original superiors, for payment of L.1, 6s. yearly, as a proportion of the cumulo feu-duty payable for the whole original area, and doubling the said feu-duty of L.1, 6s. on the entry of each heir to the said flat. Burnet sold the above flat to Mr Ralph Hardie, baker in Edinburgh, in 1808. A disposition was then taken by Hardie in favour of himself in liferent, and the defender, Mrs Isabella Thomson, his daughter, in fee, and upon which the defender and her father were duly infeft. This disposition contained the same manner of holding as had been inserted in the disposition to Burnet, that is to say, of the original superiors; and the stipulated feu-duty and composition were also the same, L.1, 6s. of feu-duty, with a duplication on the entry of each heir. Hardie died about fifteen years ago, and the defender, Mrs Thomson, became the proprietor of the said flat, in virtue of the above titles. The remainder of these tenements were, in the mean time, sold and disposed in separate flats to different individuals, each flat being burdened by the first disposition from Aikman with a suitable proportion of cumulo feu-duty.

Wemyss and
Cowan v.
Thomson and
Duncan.

Narrative.

Several of the proprietors of these other flats, from time to time, obtained charters from the superiors, Messrs Wemyss and Cowan, containing special clauses, whereby the feu-duty payable to the superiors was restricted to the proportion of feu-duty contained in the sub-titles, with merely a duplication of these divided feu-duties on the entry of heirs. In March 1810, the pursuer, Mr Wemyss, together with Mr Andrew Cowan and his trustee, the immediate authors of the pursuer, Mr Richard Cowan, granted a charter in favour of Mr David Kemp, merchant in Kirkcaldy, of a part of the said property, and took him only bound to pay a feu-duty of L.1, 10s. as his own proportion of the original cumulo feu-duty, with a duplication of the restricted feu-duty on the entry of each heir. In November 1824, the present pursuers, Wemyss and Cowan, granted another charter of the same portion of the above subjects to Mr John Greig, bookseller in Edinburgh, containing similar clauses, and restricting the feu-duty to L.1, 10s., with a duplication on the entry of heirs. The defender and her predecessors have all along paid nothing more than the feu-duty of L.1, 6s. contained in her titles; and she has paid that feu-duty to the present pursuers for a period of at least fifteen years. In the year 1824, the pursuers, as superiors, called upon the defender to take a charter of her house. She furnished her titles to the pursuer, Mr Cowan, in order that he might prepare the scroll of the necessary charter. Cowan

prepared a draft of the proposed charter, which he transmitted to the agent of the defender, for revisal, in May 1824. 26 Jan. 1836.

But this draft, in place of limiting the feu-duty to the proportion effeiring to the defender's house, as had been done in the case of the other charters, took the defender bound for payment of the whole original cumulo feu-duty of L.19:11:3; and farther, (in the words of this draft,) 'paying the sum of L.39:2:6 sterling, or double of the foresaid yearly feu-duty, for the first year of the entry of each heir to the said dwelling-house, and others above confirmed, with one-fifth part more of the said sum of penalty,' &c., with a general reservation of the defender's right to seek relief against the proprietors of the other portions of the property of the proportions of feu-duty and composition effeiring to these portions.

Wemyss and
Cowan v.
Thomson and
Duncan.

Narrative.

The defender's agent objected to the draft, in so far as it made the defender liable for the whole cumulo feu-duty, and still more particularly as stipulating for payment of a duplication of the cumulo feu-duty on the entry of each heir to the defender's house. It was then particularly pointed out to the pursuer by the agent of the defender, 1st, That the pursuers had lost their right to claim the whole cumulo feu-duty from the defender, because they had, by their own charters, discharged the co-vassals of the defender, and thereby prevented the defender from operating any relief against them, at least to the extent of the feu-duty so limited; and, 2d, That the pursuers could never be entitled to a duplication of their whole original feu-duty on the entry of each heir to the defender's house, such duplication being only due for an entry to the whole subjects originally feued; and farther, that the pursuers had, by their own charter, cut off the defender from all claim of relief against the co-feuars on account of the entry money.

The pursuers refused to make any alteration on the objectionable clauses in the charter.

The pursuers allowed the matter to lie over until August 1831. Mr Cowan then wrote to the defender, Mrs Thomson, tendering delivery of the charter, demanding immediate payment of the composition, with interest since 1824, and also the fees of the charter, and thereafter raised an action of declarator of non-entry.

The pursuers *pleaded*, in support of the action—1. A superior is entitled to have the whole of the feu-duty for which he has stipulated secured over every part of the subject feued. 2. Assuming, but not admitting, that where the feu has been subdivided, the superior is bound to give each of the sub-feuars a public holding; and supposing the entry of heirs and singular successors to be taxed by the original charter, he cannot be required to enter the succes-

Pursuers' Pleas.

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Pleas.

sors of the vassal in any part of the feu, except on receiving payment of the composition to which he has thereby consented. 3. The estimate which may have been put by the vassal and his sub-feuars on the annual value, and the casualties effeiring to the several subdivided portions of the feu, cannot affect the rights or interests of the superiors. 4. The circumstances founded on by the defenders do not import a departure, on the part of the pursuers, from any of their legal rights, in reference to the feu-subjects, or the defenders personally. 5. The payments of feu-duties made by the purchasers unentered must be regarded as partial payments made on account of the original vassals, and in fulfilment of the obligations of the latter, under the original contracts. 6. The pursuers having offered a reservation of a right of relief against the other sub-feuars, and done nothing by which that equitable right of relief, as among the sub-feuars, could be at all affected, and having farther offered to concede to the defenders all that they were entitled to demand, the defenders, who are bound to hold of the pursuers, in terms of the original feu-contracts, have had no good ground for lying out unentered, and the pursuers are therefore entitled to obtain declarator of non-entry and decree for the bygone duties, up to the date of citation, and the full rents thereafter, as concluded for in the summons.

Mrs Thom-
son's Pleas.

It was *pleaded* in defence for Mrs Thomson—1. The pursuers were not entitled to institute and insist in the present action, seeing that the defender was all along ready to enter, and had made fair and proper proposals to the pursuers for adjusting the terms of the charter. 2. The pursuers are barred by their own acts, and terms of their present libel, from now founding upon the alleged invalidity of the titles under which the defender acquired the property, and are therefore bound to confirm these titles. 3. The proportion of feu-duty payable by the defender must be held as fixed in a question with the pursuers, both in consequence of the nature of the original grant, recognition of the sub-feus by the pursuers and their predecessors, and long-continued acceptance of the particular proportions of feu-duty from the different vassals. 4. The charter tendered is erroneous, in so far as it takes the defender bound for payment of any thing more than her own proportion of the original feu-duty, in respect that the pursuers have already, by a charter or charters to the other sub-feuars, cut off the defender's relief against the other vassals. 5. At all events, the pursuers are not entitled to insert in the charter an obligation on the defender to pay a duplication of the whole cumulo feu-duty on the entry of every heir to the defender's house; such a claim being contrary to the terms

of the titles, and the defender's recourse against the other sub-vassals being likewise excluded by the terms of the charter or charters already granted by the pursuers. 6. The pursuers are in no view entitled to bygone non-entry duties or full rents as libelled, there having been no refusal to enter, or improper delay on the part of the defender.

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Pleaded for Duncan, the defender—1. The pursuers are not entitled to decree in this action, as it is imputable to themselves alone that the defender's subjects are in non-entry. 2. They cannot be permitted to found on the prohibition against sub-feuing in the charter to Philp, after recognising, for a course of years, the subaltern right of Mr Duncan, and after calling on his heir, even in this action, to enter, as the only party 'entitled to be entered.' 3. It is incompetent for the pursuers to object to the amount of the feu-duty as fixed by the disposition from Mr Philp to Mr Duncan, seeing that they have recognised and sanctioned it for a period of years, by taking payment of it directly from Mr Duncan, as his feu-duty, and by giving receipts accordingly. 4. The feu-duty being thus fixed at 14s., the relief, on the entry of heirs, must be a duplicando of that sum; and there is no relevancy (in a question with the defender) in the statement, that Philp's heirs entering, not to the defender's subjects, but to the whole area, must have paid a duplicando of the L.15 : 3 : 9. 5. The defender being entitled to a charter, subjecting heirs to a duplicando of 14s., was under no obligation to accept of one binding them to pay a duplicando of L.15 : 3 : 9, with a reserved right of relief against their co-vassals, as the reservation would not avail them, unless all the subjects fell in non-entry at once. 6. Moreover, it was incumbent on the pursuers, proposing such a clause of relief, to shew that they had taken care to secure it to the defender and his heirs, in the charters which they had granted to others; which they failed to do. At all events, as such of those charters as have been got at do not subject the vassals in them to relieve the defender and his heirs to a certain extent, the pursuer's right to a duplicando of the L.15, 3s. 9d. must be held to be cut off. 7. The pursuers, after drawing the feu-duties, have no right to demand 'the bygone duties' from the period of Philp's death up to the date of citation. Neither have they any right to ask 'the full rents' since, when the defender was willing and anxious to enter on reasonable and proper terms. It is, besides, conclusive against both these claims, that the pursuers are not entitled to, and will not obtain, decree of declarator of non-entry; and that the charter of confirmation, which they have agreed

Henry Dun-
can's Plea.

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Lord Ordinary's Note.

The Lord Ordinary (Medwyn) ordered cases, issuing at the same time this note :

Note.—‘ The Lord Ordinary has bestowed a great deal of consideration on this case, without being able to form an opinion which is at all satisfactory to himself. In the vigour of the feudal law, and in the case of a rural subject, he could have little doubt that where the subject was divided among various feuars without the act of the superior, he would not have been bound to divide the feu-duty or duplicand, as contended for by the vassal in this case, but that he might levy the whole feu-duty by pointing any part of the ground, leaving the vassal to obtain proportional relief from the other vassals. At the same time, considering our relaxed notions on the matter of feudal casualties, and on the relative character of superior and vassal, and considering, further, the nature of the subject here, a building feu, where, it may be presumed, it was contemplated on both sides that, when built upon, portions of the building would be sold to different proprietors, and where the feu-duty bears so large a proportion to the value of the subject conveyed, making the burden of the whole feu-duty a very heavy burden upon each individual portion of the subject, while the superior's means of recovery are pretty ample, it may well be doubted whether the pleas of the vassal do not find sufficient support to defend against the superior's claim.

‘ The parties may look into two cases which have some analogy with the present. No doubt, in was in the case of lordships of erection; Viscount of Stormonth, Jan. 1682, *Brown's Supplement*, vol. ii. p. 13; Creditors of Eyemouth, 8th Feb. 1757, *Supplement*, vol. v. p. 856.

‘ Even if the Lord Ordinary had decided the cause himself, the Court would probably have ordered cases, as there is not any recent precedent (if any) for the decision of it. So that, though that there has been some delay from the difficulty he has had in forming any opinion, the additional expense of cases would probably have been incurred at any rate.’

The cause having come before Lord Jeffrey, as Ordinary, his Lordship made avisandum to the Lords of the Second Division, issuing the following note :

Note.

Note.—‘ The cases having been ordered by the former Lord Ordinary with a view to a decision by the Court, the present Lord Ordinary has thought it right to report without a judgment; and

' certainly, if there is not enough in the specialties to warrant a de-
 ' cision, the question is fitter for the consideration of the Court than
 ' of an individual judge. To the present Lord Ordinary the spe-
 ' cialties appear very important; and, even upon the larger view of
 ' the argument, he has a strong impression that the permission to
 ' subdivide the subject, or, in other words, to create out of it a num-
 ' ber of smaller and separate feus, to be held of the original superior,
 ' is, in a great measure, exclusive of and inconsistent with the right
 ' to make each of those separate feuars liable for the undivided
 ' prestations of the original contract, and rather implies that there
 ' was to be a separate and independent right in each such feuar,
 ' with a separate and definite liability, the practical extent of which
 ' was not to vary with the performance or failure of others. The
 ' natural and proper way of arranging this would have been by such
 ' a provision in the original feu as occurs in those on the estate of
 ' Blythswood. But as this has not been done, the Lord Ordinary
 ' inclines to think that the terms of the charters may be fixed by
 ' the Court, *secundum æquum et bonum*, with a view to the two
 ' objects, of securing not less than his original rights to the supe-
 ' rior, and apportioning to each vassal his just share of the original
 ' burden. If there be room for this view as to the annual feu-duty,
 ' it applies with double force to the composition on the entry of
 ' heirs and the form of the present action, which is a declarator of
 ' non-entry. It is quite plain that there is no room for such a de-
 ' clarator as to the subject of the original feu. The fee is confess-
 ' edly full as to the greater part of that subject, or rather is full in
 ' each of the parts of that subject, which have since been erected
 ' into separate feus. The defenders are entitled and are required
 ' to enter only to that part of the original subject which has been
 ' separately disposed to them. If they refuse to enter, and no com-
 ' position is agreed upon, the superior might take the rents, but of
 ' that portion only. The composition is what may be agreed to be
 ' taken in place of the rents. But it is not easy to see upon what
 ' principle a composition or equivalent for the rents of the whole
 ' subject should be held the only proper equivalent for the rents of
 ' a small part of it. If there be no *feudal* principle which requires
 ' this, the claim seems to derive little aid from the cases of obliga-
 ' tion at common law, which have been referred to. The several
 ' feuars are not bound *singuli in solidum*. In fact, they have no
 ' connection with each other, either feudal or conventional, but each
 ' holds (or is to hold) a separate and independent right. That of
 ' the defenders is still but inchoate, but the superior is bound to
 ' complete it; and the only question is, on what conditions is he
 ' entitled to insist? To assume that he is entitled to bind the whole

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' co-vassals singuli in solidum, is plainly to assume the whole matter in debate. The case of separate purchasers of parts of a property, over the whole of which a catholic creditor held a previous security, is equally inapplicable. The creditor in such a case stands in no terms of relation to the purchasers; he is not bound to know of their existence, and they have no claim upon him. But in this case the superior has stipulated that feuars of parts of the subject first disposed shall all hold of him; and he is therefore confessedly bound to receive them as separate vassals. In point of fact he is now suing them for an entry.

' It is plain that the terms of the charters prepared by the superior do not, in any degree, provide or secure to the vassals what, in his case, he admits they are entitled to. To effect this, they should have declared that they should each be liable primarily for no more than the feu-duty and duplicand specified in their dispositions respectively, and subsidarie, for what was due and unpaid of such sums by their co-vassals, upon being assigned into the superior's right of recovery. But it is far from being clear that they are liable even in this subsidiary obligation.'

Upon advising the cases, the Court pronounced the following interlocutor:

Judgment.

' The Lords, on the report of Lord Jeffrey, Ordinary, having advised the process, with the cases for the parties, and heard counsel thereon, find, that the pursuers, as superiors, are entitled to insist upon the defenders taking charters containing an obligation for payment of the whole cumulo feu-duty, and of the relief on the entry of heirs; but that the defenders, as vassals, are entitled to have inserted in said charters an obligation by the superiors to grant to them, whenever required, at the defenders' expense, an assignation to the effect of enabling the defenders to recover from the co-feuars whatever sum or sums may, at any time, be exacted from them beyond their own just proportion of the said cumulo feu-duty and relief; and also a declaration, that the demand for such relief shall not exceed the proportion thereof corresponding to the portions of the whole feu in non-entry at the time; remit to the Lord Ordinary, in order to carry these findings into effect, and find neither party entitled to the expenses hitherto incurred in this process.'

Lords Ordinary, *Medwyn, Jeffrey.*

(*Hope,*) *Rutherford, G. Bell, Coventry.*

S.S.C. *Robert Wilson, Agents.*

Act. *Keay, Pyper.*

R. Cowan, W. S. David Mitchell,

F. Clerk.

Alt. *Dean of Fac.*

R.

FIRST DIVISION.

No. LXVII.

28th January 1836.

BRODIE AND SPOUSE
against
 BLAIR.

PROCESS.—(JURY-TRIAL).—EXPENSES.—*Expenses given to a wife who had obtained a verdict in her favour, in an action in which her husband was also pursuer along with her, upon a separate ground, but was unsuccessful.*

MR and Mrs Brodie brought an action of damages for defamatory expressions alleged to have been uttered by the defender against both of the pursuers. The cause was tried in March 1833, by a Jury; and a verdict returned for the pursuer, Mrs Brodie, with L.200 damages. On a motion being made for expenses to Mrs Brodie, it was objected, that to give expenses to the wife was in fact to give them to the husband, who had been unsuccessful, and to whom damages had been refused by the Jury. To this it was answered, that the husband could not have prevented his wife from bringing this action, and that she was therefore, independently of him, entitled to expenses.

The Court unanimously gave expenses to Mrs Brodie.

Narrative.
 Judgment.

Act. Dean of Fac. (Hops.) Neaves. Bowie & Campbell, W. S. Agents. Alt.
 Rutherford. M'Lean & Giffen, W. S. Agents.

C. R.

FIRST DIVISION.

No. LXVIII.

28th January 1836.

MRS BLANE OR DEANE AND OTHERS
against
 DUNCAN PATERSON AND OTHERS.

TRUST.—(INTROMISSION).—CLAUSE.—*Circumstances in which trustees were held as intromitters, by uplifting funds on a joint discharge, and were found liable for the loss occasioned by allowing funds so uplifted to remain in the hands of a co-trustee unsecured, notwithstanding*

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ing a clause of exemption, 'for neglect, omissions or diligence of any kind,' and declaring that they should be liable 'each only for his own personal intromissions.'

PROCESS.—*In an action of count and reckoning, calling on trustees to account for their intromissions and management under the trust, but containing no declaratory conclusion, that the trustees had, by their conduct, forfeited the protection of the clause of exemption;—found, that the pursuer might, in such an action, demand payment of all the trust-funds vested in the trustees, in regard to which they cannot shew that their liability to account has been discharged.*

Narrative.

By trust-deed and settlement, executed on the 1st March 1819, the late John Blair of Rothsay disposed in trust his whole estate, heritable and moveable, that should belong to him at the time of his death, to certain trustees; to be held in trust for his daughter, Mrs Deane, the pursuer, in liferent, and her children in fee. Mrs Deane's liferent was declared alimentary, and the jus mariti of her husband was entirely excluded.

By said deed it was declared, that the trustees 'shall not be liable for neglect, omissions or diligence of any kind, nor shall they be liable singuli in solidum, but each only for his own personal intromissions.' Three trustees were declared a quorum; and a power of assuming other trustees given 'to the said trustees, or their quorum, or the survivor of them.'

Of the trustees nominated, the following gentlemen accepted the office, on the truster's death, which took place on the 11th day of February 1820, viz. the defenders, Messrs Duncan Paterson and George Campbell, the deceased Mr Quinten Leitch, (whom the defender, Mr James Leitch, represents,) and Dr M'Lea. In the course of the year 1824, Mr Paterson made a proposal to his co-trustees, and to Mr and Mrs Deane, for a loan to himself of L.1200 of the trust-funds, then lying in the Renfrewshire Bank, offering heritable security. To this proposal Mr and Mrs Deane added this doquet: 'London, 13th October 1824.—As the above proposal, when carried into effect, will be advantageous to us, by a higher rate of interest than is allowed by the bank, and that we approve of the security offered, we consent and authorise the same.' The trustees, Leitch, Campbell and Paterson, subsequently signed a joint order on the Renfrewshire Bank for L.500 of the trust-fund, in favour of Paterson, their co-trustee. This sum he accordingly obtained, without giving the trustees any security. In the beginning of 1826, Leitch retired from the trust in consequence of bad health, and M'Lea died; and in June of the same year, Mr John Bell was assumed a co-trustee by the remaining trustees, Campbell

and Paterson. Shortly afterwards, the remainder of the trust-funds in the bank, to the amount of L.704, was drawn by Paterson, on the joint receipt of Messrs Campbell, Paterson and Bell.

In October of the same year, Mr Dunlop, one of the partners of the Renfrewshire Bank, and one of the trustees originally nominated by the trust-deed, accepted, and, along with Messrs Paterson and Campbell, executed a ratification of the assumption of Bell, the validity of which had been doubted, as being granted by two trustees only, which was not a quorum.

Almost the whole trust-fund remaining, invested partly on heritable, partly on personal security, was, during 1826-27, uplifted, to the amount of L.1876, on joint receipts or discharges granted by Messrs Campbell, Bell and Paterson, and allowed to remain unsecured in the hands of the latter. Mr and Mrs Blair, who resided in England with their family, all minors, became alarmed, in 1830, at the suspicious answers made by Paterson to their inquiries in regard to the trust-funds, and at his delaying to reinvest them on good security; and they ultimately raised the present action of count and reckoning, directed against the whole trustees. Decree of consignment, to the extent of his intromissions, was at an early stage obtained against Paterson, and was prosecuted to ultimate diligence without effect, in consequence of his insolvency. Cases were ordered by the Lord Ordinary, and avisandum made to the Inner-House.

The pursuers *pleaded* generally, that they were entitled to prosecute the conclusions of the action, not only against Mr Paterson, by whom the trust-funds were admitted to have been appropriated, but also against his co-trustees and their representatives, as having, in consequence of the procedure under the trust, become liable to make good these funds to the pursuers.

In regard to Campbell, they *pleaded*—That the full extent of responsibility attachable to Paterson himself, attached also to Campbell: inasmuch as the whole funds appropriated by Paterson, had been uplifted by him jointly with Campbell, the name of the latter appearing as a joint receiver of the funds; the legal effect of which was, to charge Mr Campbell with the amount, as an intromitter in his capacity of trustee: That this laid on him the obligation of discharging himself of the sum, by shewing that he did the reasonable duty of a trustee in regard to it: That this he had failed to do: That he had not inquired, before signing the documents, the reasons for uplifting the trust-funds, although all the debts and expenses had been already paid; nor had he afterwards taken any steps for securing the sums he had thus authorised to be uplifted:—

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conduct so grossly and criminally negligent, that it could not be brought under the protection of the clause of exemption: That it was in fact culpa lata or dole, which must plainly infer reparation of the damage thereby occasioned; *Donaldson v. Donaldson's Trustees*, 18th June 1833, *F. C.*; *Moffat v. Robertson*, 31st Jan. 1834, 11. *S. and D.* 369; Lord Redesdale's remarks on *Doyle v. Blackie*, 2. *Schrales's and Lefroy's Reports*, 242; and in *Toy v. Campbell*, 1. 341; *Willis on Trustees*, p. 193.

That Leitch was, on the above principles, clearly liable for the L.500 which was drawn on his joint order and discharge, and never reinvested: That being trustee for minors, he could not retire; and that having once acted, he was bound afterwards to take a charge of the affairs; and that but for his gross neglect of this duty, the loss of the remainder of the funds might have been avoided, for which therefore he had also incurred equal liability with Paterson.

In regard to Dunlop, the pursuer *pleaded*—That his interposition, by his deed of ratification, to render valid the previous discharge given to the bank by Messrs Paterson, Campbell and Bell, for L.700, involved the inference that he must be held a party to that discharge, as much as if he had signed it; and that, after this act of interference, being just as culpably negligent as the other trustees, he must, on the same principles, be equally liable with them for the ultimate loss occasioned by his intromission: That his being a partner in the bank might have contributed to the facility with which he engaged in the transaction. But farther, that as Dunlop did grossly and culpably, by his act and deed, assume Mr Bell, as trustee, at the sole request of Mr Paterson, without making reasonable inquiries as to his fitness for the office, either in circumstances or character, and did thus furnish Paterson with an associate in his schemes; and did then himself, according to his own admission, take no further charge,—he thus made Bell his substitute, and must be held liable for all the losses which happened subsequent to that substitution, through the acts or by means of the concurrence of Bell.

That the pursuers, Mrs Deane and her children, were not barred, by any conduct of theirs, from prosecuting the whole defenders; as they had consented to the loan to Paterson, only on condition of heritable security.

That the form of the action cannot now be objected to, the record being closed; but that the objection was in itself unfounded. The action is not merely petitory, but is one of accounting for management; and under such an action, a pursuer is entitled to demand payment not only of sums actually received, but of all or any part of the funds vested in trustees by the trust-disposition, in regard to

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For the defenders it was *answered*, by Campbell—That the mere subscription of a document under which another is to uplift funds, does not constitute intromission on the part of the subscriber. It is the trustee, factor, or other person who receives the money, who alone is deemed the intromitter. But even assuming this to be *prima facie* evidence of intromission, or constructive intromission, it may be rebutted by contrary proof. Now, here, it is admitted that the defender did not intromit with one farthing of the funds, Mr Paterson confessedly having received the whole. Besides, supposing constructive intromission established, that is distinct from 'personal intromission,' for which alone, by the clause of exemption, the trustees are liable; *Earl of Traquair's Trustees v. Anstruther's Trustees*, 13. *Shaw*, 417, note 420.

Further, assuming that the defender has charged himself with the amount by intromission,—the loss, on the pursuer's own shewing, arises from the failure on the part of the trustees to take proper security from Mr Paterson for the funds which he received. But this omission is covered by the clause, which declares, that trustees shall not be liable for 'neglect, omissions or diligence of any kind;' as the defender's conduct, which resulted exclusively from overconfidence in the other trustees, must be held to fall under one or other of these heads; *Graham v. Hunter's Trustees*, 9. *S. and D.* 543; *Anstruther's Trustees*, 13. *S. and D.* 421. In the case of *Donaldson*, the clause in the deed did not protect against acts of negligence. The case of *Moffat* is confessedly a special case of tutory, as appears from the speech of Lord Corehouse in *Earl Traquair's Trustees v. Henderson's Trustees*, 6th Feb. 1835, 13. *S. and D.* 421. That to say the defender's conduct amounted to fraud, as being *culpa lata*, was absurd, and arose from a misapplication of the maxim; for there is a great distinction between *dolus* and *culpa lata*, as is pointed out by *Stair*, i. 9. 11. Besides, in the question of culpa, the conduct of Mr and Mrs Deane is very material. They misled the defender. Indeed, their acquiescence was almost the direct cause of the funds passing into Mrs Paterson's hands. The action, moreover, is incompetent in point of form. It is merely a summons of count and reckoning. It contains no declaratory conclusions, not even to the effect that the trustees have done any thing to forfeit the protection of the clause of exemption; whilst the record consists almost entirely of averments of gross negligence, to support the plea that they have thereby lost the benefit of the said clause; *Carruthers v. Hall*, 9. *S. and D.* 66.

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Mr Leitch, besides pleading the foresaid clause of exemption, also *maintained*—That his liability was likewise excluded by the provision of the deed, that trustees shall not be liable for the acts of any factor habit and repute solvent at the time of his appointment: seeing that Mr Irvine, who acted as factor during the whole period of his brother's continuance in office, and whose duty it was to see to the secure investment of the funds, was and is perfectly solvent: that he was in no view responsible for acts done subsequent to his brother's retirement. But supposing him otherwise liable to any extent, that he was relieved by the sanction of the Deanes, for themselves and children, to the loan to Paterson.

Mr Dunlop's
Pleas.

Dunlop *pleaded*—That he could never be held generally liable nor indeed responsible even for the particular sum of L.700, as he did not sign the discharge, but only the ratification of the deed of assumption. Besides, this act was unnecessary: for, by the terms of the deed, a quorum or the survivor might assume trustees: That at the time of signing the ratification he was not aware of the transaction with the bank: That this single act could never be construed into an intromission; and that he was entitled to consider Mr Bell a fit person for the office, as he had been selected by two of the trustees, then of undoubted character.

The case was this day advised.

Opinion of
Court.

Lord Balgray.—Nothing can be stronger than the clause of exemption in this trust. And if a truster chooses to give great powers to his trustees, he is at liberty to do so, and his heirs have no right to complain, either of his conferring such powers, or of his trustees acting on them. But in this case money is given by the trustees to one of their own number in a most loose way. Their lifting the money on a joint receipt was a personal intromission on the part of those trustees; and they ought to have taken security from the person who got it, particularly when it was so specially pointed out to them that they were to do so. Still more ought they, after such a proceeding, to have made inquiries at the person whom they had authorised to receive the money, how it was secured. But they never made any such inquiries. By such conduct Leitch is liable for the L.500, and Campbell for the whole.

As to Dunlop, he cannot possibly be subjected, merely on account of his nominating Mr Bell.

Lord President concurred. Trustees cannot diminish their liability by adopting such a *brevi manu* manner of proceeding by joint receipts or drafts. The money drawn on the joint receipt or discharge must be presumed to have been drawn for themselves; for

they got the ipsum corpus into their possession, and might dispose of it as they chose. They accordingly gave it to one of their own number,—a proceeding which only made it doubly necessary that they should see it well secured, which they did not. With regard to Leitch, I conceive that his liability cannot go beyond the L.500.

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Lord Gillies.—In this difficult and important case, I concur in the views which have been stated by your Lordships. It is true, that, by the trust-deed, each trustee was liable for his own intrusions only. But drawing the money on their joint receipt was an actual intrussion by these trustees. The principle which rules such points in England is clearly expressed by Lord Redesdale, in the cases quoted by the parties. He says, ‘The true consideration in a question of this kind is, whether the executor who merely joins in the receipt had a control; and his joining in that receipt is evidence of that control, although the money was actually received by the other.’ And again, ‘The distinction seems to be this, with respect to mere signing, that if a receipt be given for mere purpose of form, then the signing will not charge the party not receiving. But if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors.’ Now, these remarks of Lord Redesdale are most applicable to the case in point, because the money was under the control of both these trustees.

Besides this, the special terms of this trust are to be looked to. The trustees were bound to have inquired at Paterson whether he had secured it properly. If he had answered, Yes: That, though no doubt a gross fraud on his part, might have liberated the trustees. But they never made a single inquiry; and Paterson was allowed to go on unchecked, till he ruined himself and the trust. They were therefore liable for the consequences. In regard to Dunlop, though certainly it is to be taken into consideration that he was a partner of the bank from which the money was drawn, yet as the ratification founded on was his sole act, I do not consider him liable.

Lord Mackenzie.—The objection made to the form of the action, even though it were a good one, comes too late; but the action is correct, because it regards the management of the whole trust-estate; and is competent against any of the parties to the extent to which he may be liable. In regard to Campbell, certainly the deed contains a strong clause of exemption. But the trust, it must be observed, is for a permanent purpose. The liferent is given to the parents, the fee to the children. The trustees, therefore, were

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bound to see that the funds were safely and permanently invested. Now, how does this trustee act? He uplifts the money when it was in safe hands, and takes it into his own disposal. This intromission deprives him of the protection of the clause of exemption. Next, instead of lending it out safely, he immediately proceeds to give authority to hand it to Mr Paterson, without inquiry. And this is not all; for the thing is done under very suspicious circumstances. If it had been Campbell's own money, would he have thus given it over to Paterson? I cannot think so. But in addition, after having given it away, without security, to Paterson under very suspicious circumstances, he never attends to it more, nor ever watches the conduct of Paterson. And what is his apology for all this? That he trusted Paterson entirely, and signed papers, &c. just as he desired him. Such an excuse cannot be received. If a trustee intromits, he must be liable in some diligence. A trustee cannot be allowed to draw money, and then leave it on the street. Some degree of diligence is indispensable; and here we have none at all; on the contrary, the grossest negligence. He is guilty of culpa lata, and must of consequence be liable.

With regard to the plea, that he cannot be held answerable to Deane and his wife because they approved of the transaction,—the answer is, that Deane and his wife approved only on condition of heritable security being taken, so that there is no personal objection against their claim, such as to relieve from liability as to their interests.

Leitch was in the same situation, and is equally liable to the extent of L.500, but no farther; for the plea that he could not retire cannot, I think, be sustained.

As to Dunlop, no nomination of another as trustee, whether right or wrong, can be looked on as an actual intromission, so as to infer liability.

Lord President.—It would have been a different thing if Leitch had been in mala fide in retiring; but so far from this, his taking that step arose from his bad health, which prevented him from attending to the duties of the trust; and he soon after died.

The Court unanimously pronounced the following interlocutor:

Judgment.

‘ The Lords having advised the cases for the parties, and heard
‘ counsel, find the defenders, Duncan Paterson, George Campbell
‘ and James Leitch, liable, conjunctly and severally, for the sum of
‘ L.500, drawn from the Renfrewshire Bank on the 17th February
‘ 1825; and decern against the said defenders, in favour of the
‘ pursuers and their mandatary, for the said sum of L.500, with in-
‘ terest from the date hereof, till payment: Quoad ultra, assoilzie the
‘ said James Leitch from the conclusions of the action: Find the

‘defenders, Duncan Paterson, George Campbell and John Bell, 28 Jan. 1836.
 ‘conjunctly and severally, liable for the sum of L.2310 : 2 : 10, as
 ‘the balance unaccounted for of the sums of L.704 : 14 : 8 drawn Blane or
 ‘from the Renfrewshire Bank, L.816 : 15 : 4 contained in the Deane and
 ‘bond by Lamont of Lamont, and L.1060 : 13 : 8 contained in the Others v.
 ‘bond over Ascog; and decern in favour of the pursuers and their Paterson and
 ‘mandatary against the said defenders for the said sum of L.2310, Others.
 ‘2s. 10d., with interest from the date hereof till payment, reserving Judgment.
 ‘to the pursuers all their claims for past interest, so far as not paid,
 ‘against the said Duncan Paterson: Further, find and declare that
 ‘the whole said sums, when recovered, shall be invested and secured,
 ‘so as to give the liferent thereof to the pursuer, Mrs Deane, and
 ‘the fee thereof to her children, in terms of the trust-deed libelled:
 ‘Find the above-mentioned defenders liable, jointly and severally,
 ‘to the pursuers, in the expenses of process, but declaring that the
 ‘said James Leitch’s share of said expenses shall be restricted to
 ‘the proportion which the said sum of L.500 bears to the sum of
 ‘L.2810 : 2 : 10; assoilzie the defender, Alexander Dunlop, from
 ‘the conclusions of the libel, but find him not entitled to expenses,
 ‘and decern; remit the account of expenses, when lodged, to the
 ‘Auditor of Court to tax the same, and settle the proportions, for
 ‘which the said defenders, Duncan Paterson, George Campbell,
 ‘James Leitch and John Bell, shall be held liable, and to report.’

For Leitch, *Keay, Penney.**Leven & Alison*, W. S. Agents.

For Dunlop,

*Rutherford.**Graham & Anderson*, W. S.For Campbell, *Graham Bell.**Mackenzie & Macfarlane*, W. S.*S. Clerk.*

C. R.

FIRST DIVISION.

No. LXIX.

28th January 1836.

LOCALITY OF REDGORTON.

TENOR.—*Found incompetent to prove the tenor of a decree of valuation of teinds incidentally in a locality.*

IN this locality the common agent, in his interim scheme, held the Narrative.
 teinds of certain lands as unvalued. The proprietor of the lands,
 Lord Lyndoch, lodged objections, in which he condescended upon
 various facts, and referred to different adminicles produced, pleading

28 Jan. 1836.

Locality of
Redgorton.

Narrative.

that these amounted to proof of valuation of the lands in question, of which the decree was extracted, and to which valuation effect had been given in all the preceding localities: That the extract decree of the High Commission having been lost, it was not necessary, in the present case, to bring an action of proving the tenor to found a defence; Moderator of the Synod of Merse *v.* Scott and others, 21st Nov. 1753, *Morr.* 15,823; *Darling*, vol. ii. p. 514.

Mr Liston, the minister, *answered*—The existence and contents of the alleged decree can be competently proved only in an action of proving the tenor; and the objector who seeks to establish a right by means of the decree, must bring such action, and obtain decree therein, before using the right sought to be established.

The Lord Ordinary repelled the objections, for the reasons given in the following note:

Lord Ordinary's Note.

'The Lord Ordinary is of opinion, that as no decree of valuation is produced or extant, the objector's lands must be held unvalued, and that however available the adminicles and circumstances referred to by them may be, in a process of proving the tenor, they are not sufficient to establish a valuation in this locality. The case of the Moderator of the Synod of Merse, 21st Nov. 1753, *Morrison*, p. 15,823, is plainly inapplicable. All that was allowed to be proven there, by adminicles and circumstances, was the *fact*, that a parish had been suppressed, and this only in *defence*. Here the objectors are the pursuers or claimers of an exemption or privilege, of which there can be no proof but a decree; and they wish to substitute the evidence of the former existence of this decree, for the instrument itself, and for the action of proving the tenor, which is the legitimate remedy for the alleged loss of the original.'

Judgment.

Lord Lyndoch *reclaimed*; but the Court unanimously *adhered*.

Lord Ordinary, Cockburn.

For Lord Lyndoch, *A. Murray senior.**Dundas &**Wilson.*For Rev. Mr Liston, *Rutherford, Patton.**George Rutherford.**Teind, Clerk.*

C. R.

FIRST DIVISION.

No. LXX.

29th January 1836.

SIR JAMES BOSWELL

against

MATHEW MONTGOMERIE.

PROCESS.—An interlocutor, remitting a cause to the Jury Roll, on a question of fact as to intromission, depending on documentary evidence more than on parole proof,—recalled, and the case sent back to the Lord Ordinary, with power to grant a further diligence, or to grant a commission for proof.

SIR ALEXANDER BOSWELL, at his death in 1822, was possessed Narrative. of the entailed estate of Auchinleck, as well as of some unentailed lands and personal property. The unentailed lands were burdened with various heritable securities, and there were a number of personal creditors, amongst whom was Mr Alexander Boswell, W. S.

Mr Hamilton Douglas Boswell was directed to confirm as executor, for behoof of the whole creditors; which he accordingly did, and he was also appointed factor on the unentailed property. On his death, a title was made up in the person of his widow, as executrix qua relict; and Mr Thomas Gibson succeeded to him as factor for the creditors on the unentailed lands. As the rents of these fell short of the interests of the heritable debts, Lady Boswell agreed to pay L.800 per annum, on the creditors consenting to postpone the sale until her son's majority.

On Sir James Boswell coming of age, in 1828, he made an arrangement with almost all the personal creditors except Mr Alexander Boswell; whereby, on paying a certain composition, he obtained assignations to their debts.

Mr Gibson, factor for the creditors, was also the private agent of Sir James.

Mr Montgomerie, a creditor of Mr A. Boswell's, used arrestments in the hands of Sir James, and subsequently raised this action of multiplepoinding in his name, in which the Lord Ordinary pronounced the following interlocutor: ' The Lord Ordinary finds, that ' the question mainly in dispute between the parties is the question ' of fact, whether or not the nominal raiser of the multiplepoinding ' and defender in the forthcoming, Sir James Boswell, intromitted ' with the unentailed property and effects of his late father, Sir

29 Jan. 1836.

Boswell v.
Montgomerie.

Narrative.

‘ Alexander Boswell: Finds, that Mr Montgomerie, the real raiser
 ‘ and the pursuer of the forthcoming, declines to confine himself
 ‘ to the evidence in support of his case, already recovered under the
 ‘ diligence formerly granted: Finds, that no sufficient ground has
 ‘ been stated for departing, in this case, from the usual course for
 ‘ ascertaining disputed questions of fact; and therefore remits the
 ‘ case to the Jury Roll.’

Pursuer's
Pleas.

Sir James Boswell *reclaimed*, and *pleaded*—That if the process was sent to the Jury Clerks under this interlocutor, they would make out a general issue to exhaust the whole cause: That the Court had a discretionary power, and were by no means bound to send every case to a Jury, wherein there arose a question of fact; see opinion in case in House of Lords, *Hunter v. George's Trustees*, Part 2. of Shaw's Supplement, p. 130, being a Supplement of Cases in House of Lords for 1834: That the present was not a case of vitious intromission, but rested principally on the proof of intromission with the rents of the unentailed property: That the same factor acted both for Sir James Boswell and the creditors; and the only parole proof that could be requisite would be the testimony of this factor to establish, whether the sums drawn from the unentailed estate had been appropriated to the purposes of Sir James Boswell or not: That the intromissions of Sir James Boswell with the moveable estate were in virtue of the assignations granted to him by the creditors: That certain points might be fit for a Jury, but not the whole cause.

Defender's
Pleas.

Mr Montgomerie *pleaded*—That without disputing the discretionary power of the Court, the general rule certainly was to send questions of fact to a Jury; and that this was not a case of so special a nature as to take it out of that general rule: That the fact of the rents having been collected was admitted, but that he offered to prove that the collector had acted for Sir James Boswell, and not for the creditors: That this was a case of facts and circumstances, and a fit one to be sent to a Jury: That as the sums collected from the unentailed property and moveable estate had been appropriated to paying the composition with the creditors, he was entitled either to receive the composition effeiring to Mr A. Boswell's debt, or to hold Sir James Boswell as a vitious intromitter: That in a late case relating to vitious intromission, a general issue on that point had been given.

The Court expressed an opinion, that there could not here be any question of vitious intromission, as there was an executor

creditor, and that the main point was one to be established more by documentary evidence than parole proof. They therefore pronounced the following interlocutor: 'The Lords having advised this reclaiming note, and heard counsel for the parties, recall the interlocutor of the Lord Ordinary, and remit to his Lordship to grant diligence to the parties, or to grant a commission for proof; or to proceed otherwise in the cause as to him shall seem just.'

29 Jan. 1836.

Boswell v.
Montgomerie.

Judgment.

Lord Ordinary, Fullerton. Act. Dean of Fac. (Hope,) J. A. Maconochie. William Bowie Campbell, W. S. Agent. Alt. Keay, Penney. John Court, S. S. C. Agent. S. Clerk.

C. R.

No. LXXI. SECOND DIVISION, 29th January 1836.

THOMAS SPROT against WILLIAM MUIR, (Bell and Stevenson's Trustee.)

TRUST.—HERITABLE CREDITOR.—Circumstantial case in regard to the powers of a trustee, upon the construction of a trust-deed, where the Lord Ordinary found, that neither by the trust-deed, nor deed of accession, any power was given to trustees to borrow money, or make advances on the personal responsibility of the acceding creditors, either for the purpose of furnishing the houses constituting the greater part of the trust-estate, or for payment of the interest due to the heritable creditor, or the feu-duties exigible by the superior. There were two other points here, viz. (1.) That as the agent of the heritable creditor was the trustee, the advances were presumed to be for his benefit; and, (2.) That as the accession of all the creditors was stipulated for and not obtained, the trust truly had not been constituted. The pursuer reclaimed, but the Court adhered. (See papers.)

Lord Ordinary, Jeffrey. Act. M'Neill, Anderson. Alt. Dean of Fac. (Hope,) J. S. More. Party and Wm. Alexander, W. S. Agents. F. Clerk.

R.

No. LXXII. SECOND DIVISION, 2d February 1836.

WILLIAM BAIRD against HUGH ROBERTSON.

CLAUSE.—PROPERTY.—Case relative to the construction of a charter of the lands of Lochwood, 'with the lochs and fishings of the same,' where the Lord Ordinary found, 'that the pursuer had sufficiently established his right to the exclusive property of the loch, called Bishop's loch, including not only the water and fishings, but also the alveus or solum usually covered by the said water.' The defender reclaimed, but the Court adhered, reserving question of expenses. (See papers.)

Lord Ordinary, Jeffrey. Act. Sol.-Gen. (Cunninghame,) Whigham. Alt. J. S. More, A. S. Cook. T. & T. Darling, W. S. Waller Cook, W. S. R. Clerk.

R.

SECOND DIVISION.

No. LXXIII.

2d February 1836.

ANDREW THOMSON
against
MONKLAND STEEL COMPANY.

CONTRACT.—PROOF.—*A party agreed, by a writing unstamped, to furnish goods at a certain rate, payable at certain stated periods ; he afterwards agreed, by parole, to lessen the rate ; after accepting payment at the reduced rate at the stated periods, he sued for the balance, contending that a parole proof could not vary the written agreement ;—found, that, in the circumstances, a parole proof of said variation was admissible, and distinction taken between the present and the case of Law v. Gibsone, 3d February 1835.*

Narrative.

IN July 1825, the pursuer, Thomson, undertook, by an offer in writing, to furnish the Monkland Steel Company with 3000 tons of ironstone, at 8s. per ton ; which offer was accepted of in writing by John Bultery, in behalf of the defenders. The missives of offer and acceptance were unstamped. After the agreement was made the price of iron fell ; and when the first 1500 tons had been put out of the pits, Thomson agreed verbally with the defenders to furnish the remaining 1500 tons at 7s. 6d. per ton, in place of 8s., as originally agreed on. A pass-book was kept, in which was entered the quantity of ironstone put out. The pursuer got payments every fortnight, and these payments were made at the rate of 7s. 6d. per ton after the verbal agreement was entered into, and were so entered in the pass-book for the years 1825, 1826 and 1827.

After this bargain had been implemented, and the whole 3000 tons of ironstone furnished, and the pursuer had received payment at the rate of 8s. per ton for the first 1500 tons, and 7s. 6d. for the remainder, a verbal agreement was entered into by the same parties, whereby the pursuer undertook to furnish 2000 tons ironstone at the rate of 6s. 6d. per ton.

The pursuer raised an action before the Sheriff, in which, after stating the terms of the original bargain and acceptance, and admitting the bargain as to the 2000 tons at 6s. 6d., and the receipt of L.1741 : 5 : 5, concluded for L.51 : 18 : 9½, being the difference on the price of the 1500 tons charged at 8s. instead of 7s. 6d., as paid for by the defenders.

The defenders, founding upon the verbal bargain reducing the price of the 1500 tons to 7s. 6d., the terms and rate of payment and consequent settlement, and the other verbal bargain to furnish 2000 tons at 6s. 6d., resisted payment. 2 Feb. 1838.

Thomson v.
Monkland
Steel Co.

Narrative.

The Sheriff allowed a proof, to which the pursuer objected, and craved leave to advocate, which was refused, on the ground that the defenders had averred, that 'after the contract was entered into, the pursuer agreed verbally to execute a part of the work at a lower rate, which the pursuer has denied. It is this verbal agreement which the defenders offer to prove. The pursuer, if he came to that agreement, was legally bound by it, writing not being essential to its constitution. Hence proof by witnesses is competent.'

The parole proof having proceeded, the verbal agreement, and rate of payment and settlement were established, and the defenders assolizied.

The pursuer *advocated*, and the Lord Ordinary pronounced this interlocutor and note :

'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and having granted warrant for transmission of the pay-list referred to by the parties, and having thereafter made *avisandum* with the process, In respect that, by the terms of the contract libelled on, as consisting of the offer set forth in the summons, and admitted by the defender to be correct, and the letter of acceptance produced, being No. 11. of process, it was expressly provided, that the work was 'to be paid every fourteen days,' and in respect that it appears, both from the pass-book in process, and the pay-list now transmitted, so far as it comes down, that payments were regularly made throughout the years 1825, 1826 and 1827, every fourteen days, which payments are, by the nature of the action, admitted to have taken place, finds, that it was not incompetent for the defender, in explanation of the payments so made and accepted of, to prove, by parole evidence, that, at a certain period of the contract, the pursuer did verbally agree to modify the rate of payment originally expressed in the written missives; and finds it distinctly proved that the pursuer did make such an agreement, at the same time that the other workmen and contractors consented to a similar abatement.'

Lord Ordinary's
Interlocutor.

Note.—'This case does not appear to be affected by the principle of the case of *Law v. Gibsone*. That case stood on a regular deed of lease, without which there would have been no binding contract. This is a case of a mere undertaking for work, the terms being expressed in unstamped missives. But the mode in which that

Note.

2 Feb. 1836.

Thomson v.
Monkland
Steel Co.

Note.

‘ contract was executed on either side appears distinctly from the
‘ course of dealing proved by the pass-book and the pay-list, so far
‘ as it goes. The pay-list does not come down to the most mate-
‘ rial period. But the pass-book is distinct down to the very expiry
‘ of the contract, and beyond it; and it appears that, almost with-
‘ out any exception, the payments were made constantly every
‘ fourteen days, and, at the end, the sums due for 3000 tons were
‘ drawn out, one-half at 8s. per ton, and the other half at 7s. 6d.
‘ It is only in corroboration of this real and written evidence of set-
‘ tlement, in conformity to the rule of the contract, that the parole
‘ proof has been taken. The Lord Ordinary has therefore no
‘ doubt on this part of the case.

‘ With regard to the other claim, the Lord Ordinary thinks that
‘ the respondent should have put in another minute of reference, if
‘ he meant, as his counsel argued, his reference to be of resting owing
‘ in its full extent, as the Sheriff’s note pointed out the defect very
‘ distinctly. But still he ought not to be taken so sharply as to be
‘ prevented from explaining or amending the reference. The Lord
‘ Ordinary would, at once, either allow such a minute, or remit to
‘ the Sheriff to receive it; but he thinks it better to leave it to the
‘ consideration of the parties which course should be taken.

‘ Expenses must be found due. But perhaps the reference had
‘ better be first exhausted, or at least the mode of disposing of that
‘ point settled.

‘ There surely should be a continuation of the pay-list.’

The advocator *reclaimed*.

Opinion of
Court.

Lord Glenlee.—If the defenders had attempted to change the contract, without any allegation that a new and separate verbal agreement as to the price had been entered into, there might have been a difficulty in allowing them to control or change the written contract, by any attempt at parole proof. But here there is a distinct allegation, and certainly complete proof, that the pursuer at once went into this agreement to furnish, at the reduced price of 7s. 6d. the remaining 1500 tons; that he received payment at that rate at the stated periods; and that these payments are duly entered in the pass-books, which must have been accessible to him. Besides, after the contract had been at an end for several years, the pursuer entered upon another agreement, to furnish at the still lower rate of 6s. 6d. In short, this man, after furnishing the work, and getting the money at the rate agreed on with the defenders, goes into another bargain, and after all comes and says, that the work, so paid for at the reduced rate, must be raised to the original contract price. I am for adhering.

Lord Meadowbank concurred.

Lord Justice-Clerk.—I have no doubt about the soundness of the interlocutor.

Lord Medwyn.—This case is different from that of *Law v. Gibsone*. There, nothing was alleged to have been done to shew that there had been a new contract, altering the written formal contract of lease entered into by the parties. There was simply an allegation of a verbal promise to diminish the rent, and an offer to establish this by a parole proof of facts and circumstances. If the party here had come forward, and said that the defenders had proposed to pay at a reduced rate, that he had not entertained that proposal, and, that he never did accept of payment at the rate of 7s. 6d. per ton, then this case might have resembled that of *Law*. But here he admits having received payment at the reduced rate, nay entered into a subsequent contract at a still further reduced rate; and in truth there can be no doubt that the work was done as on the footing of a new contract.

Further, this is a contract which may be constituted without writ, and in this respect differs from a lease for a term of years. Here the contract was in writing, but informal. To instruct that the rate of payment was reduced by parole proof, in corroboration of the actual receipt of the whole sum exigible, as vouched by the pass-book, appears to be no encroachment upon the principles settled in the case referred to.

The Court adhered, and found additional expenses.

2 Feb. 1836.

Thomson v.
Monkland
Steel Co.

Opinion of
Court.

Judgment.

Lord Ordinary, *Moncreiff*.

Act. *Rutherford, Turnbull*.

Alt. Dean of Fac.

(*Hope*,) *Ivory*.

Woltherspoon & Mack, W. S. and J. *Marshall*, S. S. C. Agents.

R. Clerk.

R.

FIRST DIVISION.

No. LXXIV.

3d February 1836.

NATIONAL BANK OF SCOTLAND against WILLIAM ROBERTSON.

GUARANTEE.—A party who had guaranteed the ‘regular acceptance’ of certain drafts, payable at sixty days, found liable in payment of

3 Feb. 1836.

The National
Bank of Scot-
land v. Ro-
bertson.

Narrative.

them, though not presented for acceptance till due, when they were presented at once for acceptance and payment, and dishonoured.

JOHN MILNE, merchant in Aberdeen, was in the custom of consigning goods to Richard Hughes and Son, Deptford, of drawing upon them in respect of each consignment as it was made, and of discounting the bills so drawn with Mr Chivas, agent for the National Bank at Aberdeen. The Bank, however, refused to discount the drafts, until they were instructed by their agent in London that they had been accepted by Messrs Hughes, unless a guarantee was given for their regular acceptance.

On 1st September 1834, the defender granted a guarantee to the Bank for 'the regular acceptance' of one of those drafts, for L.40, payable at sixty days. This draft was transmitted to the correspondents of the Bank in London; but in consequence of an arrangement between the Bank and Hughes and Son, said by the Bank to have been made at Milne's request, but of which the defender denied all knowledge, it was not presented for acceptance till its maturity, on the 3d November, when it was at once presented for acceptance and payment, previous to which, however, Milne had become bankrupt.

On the 11th and 27th September, the defender granted guarantees, in similar terms, of drafts for L.48 and L.60 respectively, payable at sixty days.

The first notice of refusal to accept by Hughes and Son was received by the defender on 7th November, when it was intimated to him, that the first bill had been returned under protest for non-acceptance and non-payment. He afterwards received intimation that the other bills, which had not been presented till maturity, had been returned in a similar situation. In these circumstances the Bank raised the present action, and *pleaded*—1. The defender having granted a guarantee, that the drafts in question should be regularly accepted, and Hughes and Son having refused to accept or pay them, the defender is liable for payment thereof to the Bank. 2. Even assuming that the defender was ignorant of the arrangement which had taken place between the Bank and Hughes and Son, at the suggestion of Milne, yet as he had not stipulated that the draft should be presented immediately, and must therefore have granted his guarantee in reliance merely on the usual practice of bankers in London being followed, he has no right to complain that the drafts were not presented for acceptance till they fell due, as it is the general practice of the London bankers to present at once for acceptance and payment, unless orders are given to the contrary. Mr Justice Park, in the late case of *Philpott v. Bryant*, 3. Car-

Pleas for Bank.

rington and Payne, 245, remarked, 'I should destroy half the trade of the city of London, if I were to hold, that bills made payable so many days after *date* must be presented for acceptance as well as for payment. If they are made payable after *sight*, it will be otherwise.'

3 Feb. 1836.
The National Bank of Scotland v. Robertson.

The defender *pleaded*—1. The guarantees granted by the defender being limited to the regular acceptance of the drafts libelled on, the pursuers' agent was bound, according to the usage of trade and custom of bankers, immediately to forward and present the same for acceptance, and to give notice to the defender in due course, if acceptance was refused.

Defender's Pleas.

2. The defender, as a party liable for the bills under the letter of guarantee, was entitled to rely on the Bank acting according to the usual practice of bankers in general, as well as their own usual practice, by due presentation of the drafts, and notice of non-acceptance, unless a special agreement on his part to dispense with this implied obligation could be averred and proved by the Bank.

3. The respondent cannot be affected by any arrangement entered into with Milne himself, and intended to alter or supersede the usual course of negotiation; no intimation being made to him of any such private arrangement, and he being *de facto* entirely ignorant of any such agreement, if it existed.

4. The defender, in particular, was induced to grant the second and third letters of guarantee, solely on the understanding and belief that the first and second drafts guaranteed by him had been accepted, as no intimation had been received to the contrary; and having been in this way misled by the Bank, no claim at their instance can lie on the letters of guarantee.

5. The presumption *juris et de jure* is, that if the drafts had been presented in due course, they would have been accepted, and the liability of the defender thereby put an end to; the more so, as other drafts presented at and after the period when the drafts libelled ought to have been presented, were accepted by the drawees.

The Lord Ordinary decerned against the defender, with expenses. On his reclaiming, this judgment was *adhered* to by the Court, who were of opinion, that, in the eye of the law, presentment for acceptance at the same time as for payment was a legal presentment for acceptance: that as the drafts were not then accepted, the defender was liable under his guarantee, as there had been no stipulation that they should be presented immediately on being received.

Lord Ordinary, *Corehouse*.

Act. *Mure*.

Alt. Dean of Fac. (*Hope*), *Moir*.

Goldie & Ponton, W. S. and *H. Inglis & Donald*, W. S. Agents.

S. Clerk.

C. R.

SECOND DIVISION.

No. LXXV.

3d February 1836.

JAMES THOMAS MURRAY

against

JOHN MONCUR, MATHEW NEIL AND OTHERS.

BANKRUPT.—COMPOSITION.—CAUTIONER FOR ANNUALRENT.—

A party became bound to pay the annual interests on a sum of L.700 secured on heritage, belonging to another party, the borrower, as well as the interest on a sum of L.1400, preferably secured thereon, and also the feu-duty thereof. This obligant afterwards became bankrupt, and was sequestered and discharged on a composition. In a question between the said obligant and cautioner for the composition, and the party in right of said sum of L.700, as to the nature of the composition effeiring to said obligation, (1.) Found, that the defenders were liable in payment of a composition on the successive interests of the L.700 due and unpaid, and a like composition on future interests till the bond for the L.700 was paid and extinguished; farther, that they were liable in a like composition on the interests of the L.1400, and on the feu-duties until a sale of the heritage. (2.) A finding by the Lord Ordinary, that in the event of a sale said composition should be converted into a perpetual annuity, superseded hoc statu.

PROCESS.—*Question as to the proper form of summons under such circumstances.*

Narrative.

IN 1830, Mr Murray lent to Mathew Neil L.700, upon heritable security over subjects belonging to Neil in Broughton Street. These subjects already stood burdened with a preferable security for L.1400. Murray obtained a bond of corroboration, for the regular payment of the interest on his debt, from John Moncur and three others, who bound themselves to make payment to Murray, 'and his heirs, &c. of the due and legal interest of the said principal sum of L.700, half-yearly, termly and continually, during 'the not payment of the said principal sum, at two terms in the 'year, Whitsunday and Martinmas, by equal portions, beginning 'the first payment,' &c.; and it was declared, 'that so long as any 'part of the principal sum shall remain unpaid, these presents shall 'continue in full force for the regular and punctual payment of the 'interest on the balance, whatever it may be,' &c.

The parties to the bond of corroboration also became bound to pay all interests that might arise on the preferable bond for L.1400, and report discharges thereof to Murray, and pay the annual feu-duty of L.44 : 5 : 6, exigible out of the subjects, and report discharges.

3 Feb. 1838.

Murray v.
Moncur, Neil
and Others.

—
Narrative.

Neil, the granter of the security, was soon after sequestrated; the creditors in the prior bond for L.1400 entered into possession, and appropriated the rents of the subjects, so that Murray received no interest on his L.700 since Martinmas 1832, and could not put a value upon the personal security of Neil, or on the heritable security. In January 1832, John Moncur, one of the corroborating obligants, and who was also trustee on Neil's estate, was sequestrated. A composition of 2s. 6d. per pound on Moncur's debts having been offered, and accepted by his creditors, a bond of caution for its payment was entered into by Moncur as principal, and other parties, the defenders, as cautioners, and Moncur was discharged.

Murray raised an action against Moncur and his cautioners, setting forth, that in virtue of the bond of corroboration, the pursuer was, at the date of the said sequestration, and still is, a creditor for the full value of the obligations and prestations undertaken in that bond, and was entitled to recover from him and the other defenders, his cautioners, the composition of 2s. 6d. per pound, effeiring to those obligations. The summons concludes, that the defender should make payment of ' L.87, 10s., being the composition of 2s. 6d. in the ' pound upon the foresaid principal sum of L.700 sterling, or of such ' other sum, less or more, as may be found, in the course of this ' process, to be due by the said defenders, as the foresaid composition due to or exigible by the pursuer, for and on account of the ' bond, &c. granted for the payment of the legal interest on the ' amount of the foresaid bond and disposition in security, with the ' legal interest on said composition, from the dates at which the respective instalments thereof fell due, &c.: Item, To pay to the ' pursuer, not only the sum of L.4 : 7 : 6 half yearly, at the terms ' of Whitsunday and Martinmas, being the composition at the rate ' foresaid on the interest of the foresaid prior security of L.1400 ' sterling, the terms of payment of the said interest being always ' first come and bygone, but also the sum of L.5 : 10 : 8 at the term ' of Whitsunday yearly, being the foresaid composition on the annual feu-duty of L.44 : 5 : 6, the terms of payment thereof being ' first come and bygone, in order that the pursuer may apply the ' said last-mentioned sums in paying the interests upon the prior ' security and the feu-duties, unless discharges thereof be reported ' to the pursuer, at the terms respectively; or otherwise to set apart, ' consign and secure, at the pursuer's sight, and to his satisfaction,

3 Feb. 1836.

Murray v.
Moncur, Neil
and Others.

Narrative.

‘ the sum of L.285 : 13 : 9, being the composition upon the L.1400, and of L.885, 10s., being the value at the date of twenty years’ purchase, of the foresaid feu-duty, or of such other sum or sums, less or more, as the pursuer may be found entitled to rank for upon Moncur’s estate, in respect of his obligation to pay the interest and feu-duty, with legal interest on said composition, from the dates at which the instalments became due, until payment or consignation.’

Defences.

In defence it was pleaded—1. Against the regularity of the conclusions of the summons, that the defenders’ sole obligation, in reference to the L.700, is for the regular payment of the interest, as it might fall due, on the whole or any balance of the principal remaining due ; but there was no conclusion for implement of any such obligation, the conclusion being for the composition on the whole principal sum of L.700, or such other sum, (but still a principal sum,) ‘ less or more,’ as shall be ascertained in the course of the process. There was thus a conclusion for implement of an obligation never undertaken, and no conclusion for implement of the obligation actually undertaken. 2. The other conclusions are inconsistent with the first. Besides, the pursuer set forth, that the subjects are inadequate to pay any part of his debt, principal and interest, and that he can attach no value whatever to that security. He has therefore no interest to require that the defenders shall report discharges of the interest on the preferable bond, or of the feu-duties, seeing, that though these were all paid, nothing would emerge out of the security for the benefit of the pursuer.

The Lord Ordinary reserved the defence applicable to the form of the conclusions of the summons, to be disposed of along with the defences on the merits, and ordered a condescendence.

The pursuer, in his condescendence, (Art. 8,) explained more fully the grounds of his demand. In the first subdivision of the article applicable to the L.700, it is stated, that ‘ at the date of Moncur’s sequestration, the pursuer was creditor upon his estate to the following extent and effect ;’ (1.) In reference to the L.700 bond, ‘ for payment to the pursuer of L.35 per annum, being the legal interest of the debt above mentioned of L.700 in all future time, so long as that debt itself should remain unpaid,’ with the penalty. ‘ The value of the above annual payment, exclusive of the penalty incurred through failure, extended at twenty years’ purchase, amounted precisely to the same sum of L.700. A composition at the rate of 2s. 6d. per pound upon L.700 amounts to L.87, 10s., and a composition at that rate upon the annual payments themselves would be L.4 : 7 : 6 per annum.’ And similar explanations

and calculations are stated as to the composition on the interest of 3 Feb. 1836. the L.1400, and on the feu-duties.

Murray v.
Moncur, Neil
and Others.

Pursuer's
Pleas.

The pursuer *pleaded*—1. In respect that John Moncur, at the date of his sequestration, was bound to pay all the interests to become due upon Neil's debt of L.700, the interests upon the prior debt of L.1400, and likewise the annual feu-duty of the subject of the security, and that the defenders were bound to pay a composition of 2s. 6d. per pound upon all debts then contracted by Moncur, the pursuer is entitled to claim that composition in the manner concluded for, upon all sums for which he would have been entitled to be ranked as a creditor upon Moncur's sequestrated estate: 2. The pursuer was entitled to be ranked upon Moncur's estate for payment of the value of the future annual payments for which the latter was liable, and to have dividends thereupon paid to or set apart for him, in terms of the conclusions of the libel to that effect, in respect that, in the circumstances stated in the condescendence, the pursuer was legally entitled to be so ranked as a creditor upon the divisible funds. At all events, the sums which the defenders were bound to pay, at the terms of payment of the composition, amounted to 2s. 6d. per pound upon all sums for which Moncur had then become bound. 3. At all events, the pursuer is entitled to have a composition paid annually upon the amount of these annual payments, in terms of the alternatives to that effect in the conclusions of the libel. 4. A sequestrated bankrupt, who obtains a discharge under a composition-contract in terms of the statute, is not liberated from debts, his liability for which was contracted prior to the sequestration, although the terms of payment thereof are posterior to the recall of the sequestration, or even although the debts be contingent.

Defenders'
Pleas.

The defenders *pleaded*—1. According to the nature, conception, and express terms of the bond granted by the defender, Moncur, for the regular payment of the interest on Neil's loan, the obligation thereby incurred, aye and until each successive term of payment should be first come and bygone, was strictly a conditional obligation, depending upon the contingency that the principal debt should, at each successive term, remain still undischarged by the primary obligant, or unrecovered out of the heritable security, so as that the interest might then accrue; and if the interest should accrue, then the defender's obligation being farther dependent upon the fact, that the interest so accruing should not be duly discharged by the primary and proper debtor. 2. As there not only was no debt due by the defender under the said obligation at the date of

3 Feb. 1836.

*Murray v.
Moncur, Neil
and Others.*

Lord Ordinary's Interlocutor.

“ may be exigible under the defenders’ bond for the interest of the
 “ L.700’ borrowed by Neil; and may therefore be held to cover a
 “ demand, either for a composition on the past and future interests,
 “ brought to a capital or present value, or for a composition on each
 “ successive term’s interest as it falls due, and consequently to render
 “ competent any decret as to this part of the summons, which would
 “ have been competent if such conclusion had been distinctly set
 “ forth *alternatively*, in the same way as it is set forth as to the other
 “ matters embraced in this action; and therefore ordains the de-
 “ fenders instanter to make payment to the pursuer of the composi-
 “ tion on such of the said interests on the L.700 bond as are past
 “ due and unpaid; and also to make payment of the like compo-
 “ sition on every sum of interest which may hereafter become due
 “ on the said bond, the terms of payment being always first come
 “ and bygone, and that aye and until the property over which the
 “ said L.700 is secured shall be sold, and the price thereof applied
 “ in payment or diminution thereof; and immediately upon such
 “ sale and payment, appoints an account to be taken of the then
 “ present value of a perpetual annuity equal to the composition on
 “ the annual interests payable upon whatever may remain unsatis-
 “ fied of the said principal sum of L.700; and ordains the defenders
 “ then to make payment to the pursuer of the capital sum so ascer-
 “ tained, as the present value of an annuity equal to the composi-
 “ tion on such interests: farther, ordains the defenders either to
 “ make payment to the pursuer of the composition on any interests
 “ that may now be due and unpaid on the bond for L.1400 in the
 “ proceedings mentioned, and of any feu-duties which may now be
 “ due and remain unpaid, for the lands over which both the said
 “ debts are secured, or to report and exhibit to the pursuer receipts
 “ and discharges for the said bygone interests and feu-duties from
 “ the proper creditors therein; and, in like manner, ordains the de-
 “ fenders either to pay compositions or exhibit discharges, as above;
 “ for any future sum of interest on the said bond for L.1400, or feu-
 “ duties for the said lands, which may become due and remain un-
 “ paid after their respective terms of payment, and that aye and un-
 “ til the lands over which the said debt is secured, and for which
 “ the said duties are payable, shall be sold, and the price thereof
 “ applied, in manner aforesaid; and immediately upon such sale,
 “ (the claim for future feu-duties pressing of course against the pur-
 “ chaser,) and such application of the price, ordains an account to
 “ be taken of the then present value of a perpetual annuity equal to
 “ the composition on the annual interests which may be due upon
 “ such part (if any) of the said principal sum of his L.1400 as may
 “ still remain unsatisfied; and ordains the defenders then either to

‘report and exhibit the receipt and discharge of the creditors in 3 Feb. 1836.
 ‘the said L.1400, for the then present value, so ascertained, of the
 ‘said annual composition, or to pay over the same to the pursuer, *Murray v.*
 ‘that he may satisfy and settle with such creditors; and decerns *Moncur, Neil*
 ‘ad interim accordingly.’ *and Others.*

Note.—‘This is a very perplexing case, if it be assumed (as the *Note.*
 ‘Lord Ordinary thinks it must be) that the defenders (who are
 ‘truly the cautioners for Moncur’s composition) are in no event
 ‘to be burdened with the payment of a *perpetual* annuity from ge-
 ‘neration to generation of their representatives; and that their ob-
 ‘ligation must be liquidated, and put in a way of *final* extinction
 ‘as soon as possible. Considering that it is impossible to say *when*
 ‘the lands over which the security extends may be sold, and *what*
 ‘part of the L.700 may be paid off from the produce of the sale,
 ‘it seems altogether impracticable to bring the amount of their ob-
 ‘ligation to a present value, as things now stand; and it therefore
 ‘appeared unavoidable to subject them in the termly payments, as
 ‘the interests fell due, till a sale should be effected. By that event,
 ‘(the obligation for the feu-duties necessarily terminating as to
 ‘them,) some part of the L.700 would probably be paid off; and
 ‘the interest subsequently exigible would suffer a proportional
 ‘abatement. But as no farther payment of the principal would
 ‘then be possible, the obligation for the interest (whatever was its
 ‘amount) would become a *perpetual* obligation, and be capable,
 ‘of course, of being liquidated, and brought to a capital, and so
 ‘finally settled. This accordingly is the principle of the interlo-
 ‘cutor; and the Lord Ordinary does not see what better could be
 ‘made of it. At the same time, it is liable to some obvious ob-
 ‘jections. If the lands are sold next year, and half the L.700 paid
 ‘off from the price, the defenders will settle by paying the com-
 ‘position on *one* year’s interest, and on the conversion of a *perpe-*
 ‘tual annuity equal to half that amount. But if the lands are not
 ‘sold for *ten* years, they will pay the composition for ten years,
 ‘and yet have the same conversion to settle for at last,—a result
 ‘which may more than double their burden. This may no doubt
 ‘be hard; but it does not occur in what way it could be remedied,
 ‘or how a solvent obligant in Moncur’s situation, not having him-
 ‘self a power to force on a sale, could have avoided it.

‘The Lord Ordinary has also doubted whether he should have
 ‘made any order as to bringing to a capital any possible remaining
 ‘interest on the prior bond for L.1400, after the lands are sold;
 ‘seeing that the subsistence of the defender’s obligation depends
 ‘only on the non-payment of the subsequent bond for L.700; to
 ‘the condition of which alone it may therefore be thought that

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and Others.

Note.

‘ parties were to look, when the period for final liquidation arrived.
‘ This may probably be the justice of the case. But the words of
‘ Moncur’s obligation seem to give a *jus quæsitum* to the creditors
‘ in the L.1400 bond also; under which, if the price of the lands
‘ should leave any part, even of that preferable sum, unsatisfied,
‘ the defenders would be liable for a *perpetual* payment of the inte-
‘ rest on such remaining part, to be dealt with in the same way as
‘ that accruing on what was unpaid of the L.700.’

The defenders *reclaimed*, craving their Lordships ‘ to find, with
‘ reference to the first conclusion of the libel, that, in respect the
‘ pursuer there concludes solely for a composition on a principal
‘ sum, with interest thereon from the dates when the composition
‘ became payable under the defenders’ composition-contract, there
‘ are no grounds, either under the composition-contract or under
‘ the conclusions of the action, for subjecting the defenders in pay-
‘ ment of a composition on bygone and future interests, resolving into
‘ an annuity of perpetual or indefinite duration, in the manner which
‘ is done by the interlocutor complained of; and that the said con-
‘ clusion for a composition on a principal sum, which is contained
‘ in the summons, is not warranted by the terms of the bond of cor-
‘ roboracion libelled on; or at least is not relevantly and legally de-
‘ duced therefrom by the pursuer; and, with reference to the ré-
‘ maining and subsidiary conclusions of the libel, to find that, in ré-
‘ spect the pursuer sets forth and avers that he can put no value
‘ whatever on the heritable security to which these conclusions ré-
‘ late, he has, in such circumstances, no interest to insist against
‘ the defenders for implement of the obligations there libelled upon,
‘ and has no title to enforce these obligations for the benefit of a
‘ third party, as to whom the obligations undertaken by the defend-
‘ ers were entirely *res inter alios*.’

Reclaimers’
Pleas.

Rutherford, for reclaimers,—*objected* to the regularity of the sum-
mons. There was a demand on the defenders to pay up feu-duty,
though explicitly admitted the pursuer could put no value upon the
security. This would be converting an obligation intended for the
pursuer’s benefit to the benefit of the preferable creditor. He de-
mands instalments on composition effeiring to L.700, thus claiming
not merely a composition on the interests, but a composition on the
principal sums, as to which the obligation did not extend, and insist-
ed that the sums of interest to which he might be entitled were
convertible into a principal sum. The conclusions were differently
stated in regard to the L.1400. He might have claimed a compo-
sition on the interests past due, or as they shall fall due; but he gives

the defenders no option to pay the interests as they successively fall due. He had done right as to the conclusions applicable to the L.1400, coupled with the alternative conclusions; but not so as to the L.700.

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Then, as to the question how far the pursuer was entitled to ask the Court to convert such a security and contingent liability: The defenders denied that the sequestration statutes gave any authority for commuting annuities, or adjusting compositions. The payments might in all probability cease, or at least vary. These could not form matter of calculation as payments in perpetuity. The subjects must soon be sold; and if there be a reversion after paying the preferable creditor, however small that reversion, it would make the perpetuity so much less. 1st, There was no authority for the valuation or method of conversion adopted by the Lord Ordinary; and, 2dly, There were no termini habiles upon which it could hoc statu proceed.

Reclaimers'
Pleas.

M'Neill, for respondents.—1. As to the form of the summons, the pursuer can assign no present value to the security, or conclude for any definite sum; but these obligants can do so, and the pursuer has an interest to have the present state of uncertainty removed. The first conclusion of the summons, coupled with the 8th article of the condescendence, was sufficient to bring out the demand. The Lord Ordinary, in the first part of his interlocutor, had ordered payment of the composition on the interests past due.

Respondents'
Pleas.

Rutherford.—You were entitled to that, if you had concluded for it.

M'Neill.—I go on the supposition that the Court is satisfied with the summons. Upon the other branch of the interlocutor there is an equitable exercise of power by the Lord Ordinary, and the defenders cannot be prejudiced, as an assignation will be granted.

Rutherford.—There is no power in law or equity to convert this security, and force me to pay a composition upon the valuation. It is not a present debt, and, therefore, is not convertible.

Lord Medwyn.—I am satisfied that all that has been found in regard to converting the security into a certain value, and also what is found respecting the feu-duties, is premature, until we see what the other parties can pay. It will depend much on what is recovered from other obligants, whether the pursuer will have occasion to insist on any such conclusions as those which have been introduced into the libel. The summons should have contained nothing about value in the security.

Opinion of
Court.

Lord Justice-Clerk.—The form of the first conclusion of the sum-

3 Feb. 1836. *Murray v. Moncur, Neil and Others.* mons is certainly startling; and but for the statement in Article 8. of the condescendence, we should have been bound to hold it incomplete. The conclusion as to the L.1400 is properly put. I agree that the subsequent findings in the interlocutor, as to putting a value upon the security, and authorising payment of a composition thereon, are premature. We ought, therefore, merely to affirm that part of the interlocutor which ordains payment of the interests past due and unpaid.

Opinion of Court.

The *other Judges* concurred, and this interlocutor was pronounced:

Judgment.

‘ The Lords having advised the cause, and heard counsel for the parties, adhere to the interlocutor of the Lord Ordinary, pronounced on the 2d of December last, and submitted to review, repelling the defences founded upon the alleged irrelevancy and inconsistency of the summons, and to this extent refuse the desire of the reclaiming note, and decern; but recall the interlocutor of the 16th of December last, and decern against the defenders to make payment to the pursuer of the composition on the successive interests of the bond for L.700, in so far as these are due and unpaid; and, farther, for payment of the said composition on the future interests which shall become due on said bond, or the value thereof, the said interests being first come and bygone, and that aye and until the said bond be fully paid and extinguished: Farther, ordain the defenders either to pay the said composition on the interests of the bond for L.1400 sterling, which may be now due and unpaid, and also the composition on the feu-duties now due, and payable for the subjects over which the said security extends, and to continue said payments or interest and feu-duties aye and until the said subjects shall have been brought to sale for payment of the sums secured thereon, or to report regularly to the pursuer valid discharges of the same, and supersede, *hoc statu*, consideration of any other points in the cause, and remit the cause to the Lord Ordinary: Further, allow this decree to go out and be extracted ad interim, and decern.’

Lord Ordinary, *Jeffrey.* Act. *M'Neill and Marshall.* Alt. *Rutherford and Jo. Hamilton.* Thos. *Ranken,* S.S.C. John *Gardiner,* S.S.C. Agents. F. Clerk. R.

FIRST DIVISION.

No. LXXVI.

4th February 1836.

MRS JANE WATSON OR STUART
against
 ALEXANDER MACONOCHIE'S EXECUTORS.

PRESUMPTION.—IMPLIED DISCHARGE.—*Circumstances in which a mandatory was presumed to have accounted to the mandant for sums uplifted under the mandate.*

THE facts of this case are fully detailed in the following note, added by the Lord Ordinary to his interlocutor of the 11th March 1834, ordering the record to be opened: Narrative.

‘ This is an action of count and reckoning. But after hearing the question argued, and looking into the documents in process, the Lord Ordinary thinks it essential that there should be some more distinct explanation in regard to various matters of fact, than that afforded by the record as it stands. The action is brought to obtain an account of the intromissions of the deceased Alexander Maconochie with the succession of James Stuart. Alexander Maconochie, a shoemaker in Aberdeen, and the late Helen Maconochie, wife of William Johnston, were the next of kin, and executors of James Stuart; and the same Alexander Maconochie and John Cameron were Stuart’s heirs-portioners. Stuart had died in the year 1815; and in 1816 a written agreement was entered into between Alexander Maconochie and Helen Maconochie, by which they consented to share the benefit respectively accruing to them as heir-portioner and joint executor; and in the same deed, Helen Maconochie granted to Alexander a power of attorney to uplift her share of the executry, as joint executrix with Cameron.

‘ It appears that Messrs Hutcheon and Donaldson, writers in Aberdeen, were employed by Cameron and Alexander Maconochie to realise the succession of Stuart; and there are documents in process which prove that Donaldson did pay to Alexander Maconochie part of Helen Maconochie’s share of the moveable succession. In particular, L.41 : 16 : 6 appears to have been paid to him in July 1816, and L.500 in May 1818; for the half of which sums he, by his agreement with Helen Maconochie, was bound to account to her.

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—
Narrative.

' In the year 1821, Helen Maconochie recalled the power of attorney granted to Alexander, and substituted the pursuer, the widow of Stuart, in his place. But the deed contains no statement that Alexander Maconochie had not accounted for his prior intromissions, and it gives no power to pursue for such intromissions. The recital bears merely that Alexander Maconochie had been empowered to recover Helen's share of Stuart's executry, and that considerable funds have not yet been recovered by his executors; and it gives a power to recover these funds, ' in so far as not already recovered by me, (Helen,) or by my attorney or co-executor.' This conveyance was merely in trust, and bound the pursuer to account to the granter for all sums which might be recovered under it. It is averred by the pursuer, that this deed, recalling Alexander Maconochie's, was intimated to Alexander Maconochie; but this is denied on the other side. One thing is certain, that notwithstanding such recall, Alexander Maconochie did proceed, without any objection on the part of the pursuer, the new attorney, to recover funds due to Helen; for, in the year 1824, he raised an action against the representatives of Donaldson; and ultimately, in the year 1827, drew a dividend of L.120 from Donaldson's executor, being a dividend on the debt due by Donaldson on account of his intromissions as agent with the moveable estate of James Stuart. By this time Helen Maconochie was dead, although the period of her decease is not specified in the record; and Alexander Maconochie also died in the end of the year 1827. Shortly after his death, the pursuer obtained a second deed, dated in December 1827, from John Johnstone and Helen Johnstone, the son and daughter of Helen Maconochie, setting forth the original power of attorney to Maconochie,—the deed 1821, recalling that power,—and, in particular, that, notwithstanding that recall, Alexander Maconochie had continued to intromit with the executry, and had drawn the dividend on Donaldson's estate. It then sets forth, that ' the said Mrs Jean Watson, otherwise Stuart, has made payment to us of a certain sum of money in full of our right of reversion, under the deed of assignation, conveyance and trust herein before narrated, and in consideration of our granting these presents.' And upon that recital the granters renounce the right of reversion competent to them under the deed 1821, discharge the grantee, the pursuer, and convey to her their right to call the representatives of Alexander Maconochie to account. There is no averment upon the record as to the precise date of the first demand made against the defenders; the representatives of Alexander Maconochie, under this deed; but in the year 1831, the present action of accounting was brought

‘ against them, the summons being laid exclusively on the first deed 4 Feb. 1834
 ‘ by Helen Maconochie in 1821. This summons was afterwards
 ‘ amended by an addition founded on the deed 1827, and in this
 ‘ action a record was afterwards made up in the usual form.

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‘ From the documents produced, the charge against Alexander
 ‘ Maconochie appears to be pretty clearly established. In parti-
 ‘ cular, it seems to be established, by the books of Donaldson and
 ‘ Maconochie's receipts, that the above-mentioned sums of L.41,
 ‘ 16s. 6d. and L.500 were received by him to account of Stuart's
 ‘ executry. Some of the articles of discharge are admitted; but the
 ‘ more important of them are denied, and, in particular, a payment
 ‘ to Helen Maconochie of L.250 in June 1818, being the half of
 ‘ the L.500 drawn by Maconochie. Papers bearing to be receipts
 ‘ for that and other payments have been produced by the defend-
 ‘ ers, which papers are said to be signed by the son and daughter
 ‘ of Helen Maconochie, who, it is admitted, could not write. The
 ‘ authenticity of these signatures is denied by the pursuer; but all
 ‘ question upon this point is superseded by the consideration that
 ‘ they are unstamped, and consequently cannot be received.

Narrative.

‘ Independently of these documents, however, it appears to the
 ‘ Lord Ordinary that the case of the pursuer still may require some
 ‘ farther explanation. Alexander Maconochie, whose intromissions
 ‘ are now to be accounted for, was a shoemaker in Aberdeen, against
 ‘ whom no very unfavourable presumption can arise from the mere
 ‘ circumstance of his failure to keep regular accounts and to take
 ‘ regular vouchers. Helen Maconochie was confessedly unable to
 ‘ write, and was as confessedly in circumstances not likely to dis-
 ‘ pose her to leave her money unaccounted for in the hands of her
 ‘ attorney. In so far as the Lord Ordinary can judge from the do-
 ‘ cuments produced, the amount of his intromissions must have been
 ‘ a matter of notoriety, or at least easily attainable, as he could in-
 ‘ tromit only in conjunction with Cameron, the other executor, and
 ‘ did, as it appears, intromit only through the medium of Donaldson.
 ‘ The sums chiefly in dispute are sums drawn by him prior to or in
 ‘ the year 1818. The first assignation by Helen Maconochie to
 ‘ the pursuer in 1821 affords a strong presumption that Helen, the
 ‘ granter, did not then consider Maconochie to have any money of
 ‘ hers in his hands; and though she survived that deed several years,
 ‘ (the precise time is not mentioned in the record,) it is not averred
 ‘ by the pursuer that she, during her lifetime, made any demand on
 ‘ Maconochie for his intromissions. Even in the deed 1827, granted
 ‘ after her death by the son and daughter of Helen Maconochie,
 ‘ the only intromissions specified are those said to have been had
 ‘ by Maconochie subsequently to the deed 1821, and, in particular,

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' the dividend drawn from Donaldson's estate; and, last of all, the
' pursuer has declined, when called upon, to state what was the
' consideration she gave for the last-mentioned deed. Under all
' these circumstances, the Lord Ordinary thinks this claim of ac-
' counting is to be received with some suspicion, and certainly with
' great caution. The intromissions mainly in dispute were had as
' far back as the year 1818, by a person, from his situation and
' habits of life, presumably ignorant of all the precautions of regular
' accounting. The action was raised in 1831, after a lapse of thir-
' teen years, and long after the death both of the intromitter and
' his constituent. There is no evidence, nor even any averment,
' that while they lived any claim had been made by the latter against
' the former; and there is an implication, or something nearly
' amounting to it, from the deeds in process, that no such claim was
' understood to exist by the parties interested. The Lordordi-
' nary does not say that these considerations are conclusive against
' the pursuer; but he thinks they fairly warrant the demand for
' some further explanation; and upon this ground he has pronounced
' the prefixed order, for which, as being somewhat unusual, he has
' thought it right to assign his reasons.'

The parties having revised their papers, it appeared that Helen Maconochie died in February 1824, and that the pursuer paid L.35 to her representatives for the purchase of her rights. It appeared also, from the correspondence produced, that the pursuer had been led to believe that Alexander Maconochie had died in involved circumstances. She averred that it was not until 1830 that she discovered this information to be incorrect; and alleged, that from this circumstance, and the great difficulty she found in obtaining possession of the documents connected with Mr Stuart's succession, which were only delivered in 1831, in consequence of judicial proceedings, she had been unable sooner to institute the present proceedings.

The Lord Ordinary pronounced the following interlocutor:

Lordordi-
nary's Inter-
locutor.

' The Lord Ordinary having heard parties' procurators, and con-
' sidered the closed record and process, finds, that the articles of
' charge insisted in by the pursuer, as now in right of the late
' Helen Maconochie, against the defenders, as the executors of the
' late Alexander Maconochie, are, 1st, The sum of L.41 : 16 : 6,
' received by Alexander Maconochie, in April 1816; 2^{dly}, The
' sum of L.500, received by him on the 11th day of May 1818;
' and, 3^{dly}, The sum of L.120 : 0 : 9, received by him on the 12th
' of June 1827; for the half of which sums the said Alexander
' Maconochie was bound to account to the said Helen: In regard

‘ to the two first articles of charge, finds, that in respect of the whole circumstances of this case, as admitted or established in the record, particularly the situation in life, and the relationship of the parties,—the long silence on the subject of those claims,—a silence continuing unbroken until the death of both the parties principally concerned, and having the best means of knowledge on the subject,—the terms of the deeds of assignation, forming the title of the present pursuer, and the trifling amount of the consideration given by the pursuer to the representatives of Helen Maconochie for the purchase of her rights,—that there are sufficient grounds for the presumption, that the said sums were accounted for by the said Alexander to the said Helen Maconochie, in terms of their agreement; and therefore, to that extent, sustains the defences, assoilzies the defenders, and decerns: Further, and in regard to the third sum, finds, that it has not been accounted for by the said Alexander Maconochie, or his representatives, and therefore decerns against the said defenders for one-half of the amount thereof, being L.60 : 0 : 4½ sterling, with interest thereon from the said 12th day of June 1827, and until payment; finds the defenders entitled to expenses, subject to modification, and allows an account thereof to be given in, and to be taxed by the Auditor.’

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Note.—‘ The opinion of the Lord Ordinary rests mainly upon the considerations mentioned in the note subjoined to his interlocutor of the 11th of March 1834, opening up the record as originally closed; and without entering into any detailed repetition, he has only to add, that, in his opinion, those considerations are materially strengthened by the record, as now finally adjusted, and fairly warrant the application of the principle adopted in the interlocutor, a principle sanctioned by the authority of the Court, under circumstances even less favourable, in the case of Wilson against Wilson, 26th Nov. 1783, *Morr.* 11,646.’

Note.

The pursuer having reclaimed, the Court adhered.

Judgment.

Lord Ordinary, Fullerton. Act. Whigham. Alt. Rutherford, Moir. James
Martin, S.S.C. H. Inglis & Donald, W. S. Agents. D. Clerk.

C. R.

SECOND DIVISION.

No. LXXVII.

4th February 1886.

CHRISTIAN STEWART AND CHILDREN
against
 JOHN MENZIES.

MARRIAGE, (INSUFFICIENT CONSTITUTION OF.)—PACTUM ILLICITUM.—PROOF.—*A party had given to a female, with whom he previously held illicit intercourse, a letter purporting a declaration of marriage, but made conditional on the birth of a child: (1.) Found, that said letter, (independently of its terms,) in respect there was sufficient evidence of its having been delivered and accepted for the purpose of imposing upon third parties, was not a legal instrument to constitute a marriage. (2.) Opinion by Lord Ordinary, adhered to by the Court, that where a declaration or acknowledgment of marriage is conditional on the birth of a child, and where it is certain that there has been a great deal of personal intercourse before the letter is delivered, the mere delivery of that letter, with proof that the intercourse was afterwards continued, is not sufficient to constitute a marriage according to the law of Scotland.*

PROOF.—*A holograph memorandum by an unprofessional party deceased, of a conversation with a female who had consulted him before raising an action of declarator of marriage, in which she admitted that a letter, on which she purposed to found, was given to her in order to deceive a third party, received as evidence for the defender in derogation of its legal effect, in conjunction with other evidence in the cause.*

Continuation of case in vol. ix. F. C. p. 125, and vol. x. p. 232.

Narrative.

THE pursuer, while in the service of the defender, allowed him to have intercourse with her, on the faith, as she alleged, of a promise of marriage, and two children were the fruits of this connection. A declarator of marriage was raised by Stewart and children against Menzies, concluding alternatively for damages. In support of the action the pursuer produced the following letter: ‘*Duneaves, 25th March 1826.—CHRISTY, You and I having lived together as man and wife, I hereby declare you to be my lawful wife, in the event of a child being born, in consequence of the present connection betwixt us, and am yours truly,*’ (Signed) ‘*JOHN MENZIES of Chesthill.*’ (Addressed) ‘*To Christian Stewart, Duneaves House.*’

The defender gave the following explanation respecting this letter: In the course of the year 1827, he became acquainted with a young lady whom he engaged to marry. He afterwards, however, became desirous of breaking off the engagement; but being unwilling to assign any reason for doing so, which would not prove offensive to the feelings of the lady or her relations, he falsely pretended that he was under a previous engagement to marry the pursuer. He accordingly instructed the pursuer to make a similar statement, in case any questions were put to her by the friends of the lady; and with the view of supporting her statements, he wrote the letter in question, and delivered it to her, accompanied with the explanation, that he had no intention of thereby making her his wife; and the letter was accordingly received by the pursuer upon that understanding.

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The Lord Ordinary (Medwyn) remitted to the Commissaries to take the proof of the allegations of the parties; and the pursuer having reclaimed, the Court, after ordering and advising cases, held the defender's offer of proof, of the purpose for which the letter was granted, to be competent, before answer. Their Lordships accordingly remitted to the Commissaries, before answer, to take proof. (See *F. C.* vol. ix. p. 125, 6th Dec. 1833.)

The pursuer, in the course of her proof of the constitution of the marriage, adduced, among other witnesses, her brother, sister and other near relatives, to establish the allegations in Art. 6. of the condescendence, viz. that although the defender acknowledged the marriage, yet with a view to the feelings of his relations, the pursuer did not publicly assume the rank of his wife; and that 'the defender not only made these acknowledgments to the pursuer, which were communicated by her to her relations, but in the presence of these relations he uniformly spoke of the pursuer as his wife, and so addressed her in their presence.' The admissibility of these witnesses having been objected to, the Commissary made avisandum to the Lord Ordinary, who sustained the objection. The pursuers having reclaimed, the Court, 'in respect that no sufficient reasons have been stated for admitting the proposed proof on the part of the pursuer, in support of the 6th article of her condescendence generally, adhere,' &c. (See *F. C.* vol. x. p. 232, 5th Feb. 1835.)

In the course of his proof the defender called, as a haver as well as a witness, the widow of Stewart of Crossmount, a gentleman unconnected with the legal profession, who produced a 'memorandum note of a conversation with Christy Stewart,' (the pursuer,) '1831,' holograph of her late husband, in which it was stated that the pursuer had called upon Crossmount, 'as the only gentleman

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‘ she knew, and could consult and advise with,’ as to what course she should take in regard to the defender. The memorandum imported, *inter alia*, that during the interview therein narrated, Crossmount referred to a letter which he had heard of the defender having given to the pursuer; whereupon the pursuer ‘ expressly told ’ him, that the defender’s object in giving her the letter was, that it might be shewn to the brother of a lady to whom the defender was engaged, but which engagement he was anxious to break off; that the defender never promised, or proposed, or even mentioned marriage to the pursuer; that the pursuer was a willing partner in the criminal intercourse, but that she did not see why she might not use the letter in order to legitimise her children; and that the defender had not asked the letter from her after it had served its purpose, or he might have got it. It was after he began to neglect her he sent for it, and she refused to give it up. It was proved by the widow (witness 15,) and another witness, (witness 13,) that the late Crossmount repeated this conversation about the letter on the day on which it took place.

No objection to the admissibility of the memorandum was taken before the Commissary; but the pursuer, at the debate on the concluded proof, objected to it as being an improper disclosure of admissions, made confidentially by her when consulting another with a view to an impending law-suit; but this objection was overruled by the Lord Ordinary, on the ground more fully explained in the following note, that the objection of confidentiality has not hitherto been extended beyond the professional limits of agent and client. And the pursuer was allowed, and afterwards examined her brother, who was present at the interview with Mr Stewart of Crossmount, to disprove the statements in the memorandum.

The Lord Ordinary, on afterwards considering the concluded proof and whole cause, pronounced the following interlocutor :

Lord Ordinary’s Interlocutor.

‘ The Lord Ordinary having heard parties fully on the concluded proof, and whole cause, and made *avisandum*, sustains the defences proponed against the declaratory conclusions of the libel for marriage and legitimacy; assoilzies the defender from the whole of those conclusions, and decerns; and, before further answer, appoints the cause to be enrolled, that the pursuer may state whether, and to what effect, she means to proceed with the other or alternative conclusion of her libel.’

Note.

Note.—‘ The pursuer has evidently no case in the declarator without the letter of 25th March 1826; the separate proof of verbal acknowledgments or open marital cohabitation having altogether failed. If the letter, though delivered for the purpose it

‘ expresses, (with the continued intercourse *after* its date,) does not 4 Feb. 1836.
 ‘ constitute a marriage without the other proof, it will not mate-
 ‘ rially supply the defects of such proof. If it was delivered *and* Stewart and
 ‘ *accepted* for quite another purpose, it makes the case worse for the Children v.
 ‘ pursuer than if it had never existed. Mensies.

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 Note.

‘ The Lord Ordinary thinks there is, on the whole, sufficient
 ‘ evidence that it was delivered and accepted for such a special and
 ‘ improper purpose; and he *rests* his judgment on this. But he is
 ‘ also of opinion that, in the circumstances of this case, where the
 ‘ declaration or acknowledgment of marriage *is conditioned* on the
 ‘ birth of a child, and where it is certain that there had been a great
 ‘ deal of personal intercourse before the letter was delivered, the
 ‘ mere delivery of that letter, with proof that the intercourse was
 ‘ afterwards continued, are not sufficient to constitute a marriage
 ‘ according to the law of Scotland. If any reliance, indeed, is to
 ‘ be placed on the report of the opinions delivered when the re-
 ‘ claiming note for the pursuer was refused, on 6th December 1833,
 ‘ (12. *Shaw*, 179,) this point was then deliberately decided by the
 ‘ Court; and though the proof was, no doubt, declared to be *be-*
 ‘ *fore answer*, and the relevancy may therefore, in point of form, be
 ‘ still open for argument, the Lord Ordinary feels that it would be
 ‘ improper for any single Judge, even if he had scruples as to the
 ‘ merits, to go against this determination in a more advanced stage
 ‘ of the same cause. He must say, however, that, looking at the
 ‘ whole course of decisions since the case of *Moir and M’Innes*, and
 ‘ with reference especially to that of *M’Dowal*, he cannot but con-
 ‘ cur in the principles of that determination, though he is fully
 ‘ aware of the qualifications it may be thought to have received
 ‘ from some of the opinions expressed in *Sim v. Miles*, 20th Nov.
 ‘ 1829, *F. C.*, and 8. *Shaw*, 89.

‘ But these are truly points which never can be raised in the case,
 ‘ if the Lord Ordinary is right in holding it sufficiently proved that
 ‘ the letter in question never was delivered or accepted for the pur-
 ‘ pose of constituting or proving an actual marriage, but for a very
 ‘ different purpose, of imposing upon third parties by a false pretence.
 ‘ That this is sufficiently proved, it is supposed would scarcely be dis-
 ‘ puted, if the evidence of Mr Stewart of Crossmount was allowed
 ‘ to be competent. But a strong effort was made, at the debate, to
 ‘ have his evidence set aside, as being in substance an improper dis-
 ‘ closure of admissions made *confidentially* by a party when consult-
 ‘ ing and seeking advice from another, with a view to an impend-
 ‘ ing law-suit. But though it is quite true that Mr Stewart was so
 ‘ consulted, and that his situation *approaches* in principle to that of
 ‘ a law agent, where advice is sought in similar circumstances, still

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‘ the Lord Ordinary can find no authority for extending this dis-
 ‘ qualification beyond the *professional* limits within which he con-
 ‘ ceives it has hitherto been confined : And this is less to be re-
 ‘ gretted, as the admission of this evidence only tends to confirm,
 ‘ beyond all question, what was already legally established by the
 ‘ uncontradicted testimony of the two Stewarts, (uncle and aunt of
 ‘ the pursuer,) and rendered morally certain by almost all that ap-
 ‘ pears, and that *does not appear* on the face of the proof. There is
 ‘ first of all the admission that the letter, though bearing date in
 ‘ March 1826, was not delivered till some time in 1828. Next,
 ‘ there is the clear proof by the defender’s letter to the pursuer’s
 ‘ brother, (Appendix to Reclaiming Note of 8th July (*January*)
 ‘ 1834, p. 4,) and by the depositions of Captain M’Dougall and
 ‘ his brother, that the letter was really prepared and delivered with
 ‘ a view to impose upon these gentlemen ; and, finally, there is the
 ‘ conclusive circumstance, that, from beginning to the end of her
 ‘ proof, and during the whole period of her connection with the
 ‘ defender, there is not a vestige of evidence of her ever having
 ‘ directly claimed the title or rights of a wife, or even hinted to her
 ‘ confidants and relations that such was truly her condition. She
 ‘ has brought forward two witnesses to swear that the defender
 ‘ sometimes called her by a name which, though it properly signi-
 ‘ fied nothing more than *woman*, was yet often used (they say) as
 ‘ equivalent to that of *wife*. But neither these nor any other wit-
 ‘ nesses say they ever heard *her* address the defender, or speak of
 ‘ him as her *husband*, though of the two she was evidently the most
 ‘ likely to indulge in such epithets, and to hazard, in this way, the
 ‘ occasional breach of a not very intelligible scheme of concealment.
 ‘ There are many circumstances, also, independent of her acquies-
 ‘ cence in the baptism of the children as bastards, and in their uni-
 ‘ versal repute as such, which afford irresistible evidence of her con-
 ‘ sciousness of her true state and condition.

‘ But though the case is not attended with much difficulty, when
 ‘ it is considered that the pursuer was bound to make out her alle-
 ‘ gations by legal evidence, it is impossible not to feel that there
 ‘ are parts of it still enveloped in a painful obscurity, and which
 ‘ present but an awkward aspect for the defender. The Lord Or-
 ‘ dinary alludes particularly to the evidence about the letter from
 ‘ Hamilton, to the *private* letter from the defender himself to his
 ‘ agent, of 24th August 1828, (Appendix, p. 3,) to the proof, (p. 3,
 ‘ &c.) of his having said that he *durst* not marry, and that there
 ‘ were people about him who *prevented* him from marrying ; and to
 ‘ the singular tone of deep feeling and despondency in his letter to
 ‘ the clergyman of 15th June 1827, which is much more like that

‘ of a man committed to an unsuitable and disreputable marriage, 4 Feb. 1836.
 ‘ than of a young Highland officer who finds himself the father of
 ‘ an illegitimate child. It is plainly impossible, however, to hold
 ‘ these as proofs of an actual marriage; and the indications of kind- Stewart and
 ‘ ness to her relations, which were quite as likely to flow from the Children v.
 ‘ influence of a favourite mistress, as of an humble wife, are of still Mensies.
 ‘ less importance. Note.

‘ The Lord Ordinary scarcely supposes that the pursuer means
 ‘ to insist in her claim of damages, as for seduction.’

The pursuer having *reclaimed*, counsel were fully heard.

Lord Medwyn.—On allowing a proof when this cause was before me, as Ordinary, in 1833, I did not think it necessary to make any express finding, to shew that I had considered the plea raised in regard to the letter of 25th March 1826 as directly constitutive of a marriage. I held it competent to take into view the allegations, as to the period and the purpose for which the letter was delivered; as affecting its import and effect in a question with the pursuer; and to ascertain these among the other allegations of the parties a proof was allowed. I am quite satisfied that the defender’s account of the letter, and the purpose for which it was granted, antedated, and put into the hands of the pursuer, have been satisfactorily established in the course of the proof. I do not say this was at all a justifiable object; but the pursuer being participant in it, at least cognisant of it, cannot make a different use of this letter. It would not be of much consequence to the result of the proof, although the memorandum of Crossmount were rejected; for without it there is sufficient proof, out of the mouth of the pursuer to her own relations, of her knowledge of the defender’s purpose. It is quite plain that she was aware of her condition, and of that of her children. She has all along remained under church scandal, absenting herself from the proper parish church, and frequenting only the church of Glenlyon, eight miles off. At the same time, if it were necessary for the case, I see no ground for rejecting the testimony of Mr Stewart of Crossmount: it was quite natural to apply to him. The pursuer had been born on his estate. The landlord is just the person to whom a tenant’s or cottar’s daughter would look to for advice, or rather, as it would appear in this case, for pecuniary assistance, in a matter of this kind. She tells him every thing. There was no confidence here, and therefore no confidence betrayed. He had heard the rumour about the letter, and naturally directed his inquiry to ascertain how the fact really stood; and she told him exactly what the object had been in delivering the letter to her, and the use which she intended to make of it.

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It is quite impossible to doubt that this was, from the first, and throughout, an illicit connection, and that there is not even a pretence for alleging, if the letter does not constitute marriage, that the pursuer has established any facts and circumstances, in the most remote degree, approaching to the proof of a marriage by our law.

Lord Justice-Clerk.—I have no difficulty in saying, that the interlocutor ought to be adhered to. There is certainly no proof of verbal acknowledgment or cohabitation as man and wife. It was merely concubinage. Then, as to the letter of 25th March 1826, the statements of the parties differed. The pursuer had said it contained a direct and explicit acknowledgment of marriage. The defender again had distinctly averred, that it had been granted for another and very different purpose. We allowed a proof before answer; and now, on looking to the result, it is proved beyond the possibility of doubt that the letter was granted for the purpose of imposing on a third party, and thereby getting quit of an engagement which the defender was desirous to break off, and that the pursuer lent her aid to this scheme of deception; so that not only was the letter never meant to constitute a marriage, but the pursuer knew this, and acted accordingly, till she determined to raise this action.

Lord Glenlee entirely concurred.

Lord Meadowbank.—As I thought it probable that counsel might desire to be heard before us upon this proof, I endeavoured, in perusing the evidence, to keep my mind from forming any opinion upon its import; but it was certainly difficult to go over it without being satisfied that the pursuer had failed to establish her case. I never saw a clearer case.

Judgment.

The Court adhered.

Lords Ordinary, *Medwyn, Jeffrey.* Act. Sol.-Gen. (*Cuninghame*,) *Patton.* Alt.
Dean of Fac. (Hope,) *Keay, Whigham.* *Greig & Morton, W. S. James Fer-*
guson, W. S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. LXXVIII.

4th February 1836.

THOMAS AITCHISON AND OTHERS, BURGESSES AND
TOWN-COUNCILLORS OF THE BURGH OF DUNBAR,
against
THE MAGISTRATES OF DUNBAR, AND SIMON SAWERS
OF NEWHOUSES, AND OTHERS.

BURGH ROYAL.—JURISDICTION.—TITLE TO PURSUE.—STAT. 3.
GEO. IV. c. 91.—*Burgesses, forming the minority of a Town-Council, found entitled to challenge, by reduction and declarator in the Court of Session, an act of mal-administration by the majority of the Town-Council.*

IN 1778, Grieve Wilson was proprietor of a park of a few acres, Narrative.
part of a much larger piece of ground in the vicinity of Dunbar, parcelled out among several individuals, and which, from its flatness, was subject to accumulation of water. Between the ground and the sea-shore there lay a stripe of land, called the Kirkhill, belonging to the town of Dunbar. Wilson applied to the Magistrates, setting forth, that he ‘intended to drain the water from off the park’ belonging to him, by means of a sunk cut or drain, but that ‘the Kirkhill of Dunbar, part of the unfeued property of the burgh, is now the only property which lies between his drain and the sea,’ and praying the Magistrates to allow him ‘to carry his drain through the Kirkhill, he being willing to keep the town free of all consequential damage.’ The Magistrates ‘granted the desire thereof, reserving liberty to the Magistrates and Council, and their successors, to deepen the cut to be made in virtue thereof, whenever they shall think proper, to such a depth as they shall see necessary; and declaring, that the petitioner and his heirs shall not be at liberty to communicate the benefit of this grant to any other heritor, without the consent of the Magistrates and Council for the time, obtained on the person’s application to them who wants to have that benefit communicated to them;’ ‘as also, that the Magistrates and Council shall have liberty to make stoppages upon the petitioner’s ground, to prevent the water of any other heritor from coming by the cut above mentioned.’ The drain or cut was made through the Kirkhill, in terms of the order or grant; and for upwards of fifty years, it proved sufficient for carrying off the super-

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abundant water. John Sawers, residing in Dunbar, having afterwards acquired the park which had belonged to Wilson, and the rest of the flat piece of ground of which it formed part, and since known by the general name of Newhouses, he, in 1825, applied to the Magistrates for leave to deepen the foresaid drain through the Kirkhill, for the purpose, as he represented in his application to the Magistrates, of effectually draining the whole of the said ground. The Magistrates having refused to grant the permission craved, except on payment of L.100, for behoof of the common good of the burgh, John Sawers presented a petition to the Sheriff of the county of Haddington, praying him 'to find that the petitioner is entitled to deepen the drain 'leading from his lands to the Kirkhill, and this either by opening the 'ground from the surface, or by means of a cut under the present 'drain, as shall be deemed most advisable, and to prohibit and discharge the Town-Council and all others from interrupting his operations.' The Magistrates having appeared and pleaded the incompetency of the said petition or application to the Sheriff, as involving a declarator of an heritable right, various steps of procedure took place, when the Magistrates, for the purpose of having the question determined in a competent shape, brought an action of declarator before the Court of Session, concluding to have it found and declared that Sawers had no right to cause the water collecting upon his lands, other than the said park, which had belonged to Grieve Wilson, to be carried off by the said drain through the Kirkhill; that he had no right to enter on the lands of Kirkhill to alter or deepen the drain for the purpose of taking off water which might accumulate on his lands, other than the said park; and that his right was limited to opening and clearing out the drain, when it should be so obstructed as to prevent the water from being carried off and run away from the said park alone. An advocacy of the process before the Sheriff was brought ob contingentiam of the action of declarator; and these two cases having been conjoined, and a record completed, the Lord Ordinary, (Cringletie,) preparatory to pronouncing decree in favour of the Magistrates of Dunbar, issued the following note: '18th November 1826.—The Lord Ordinary has advised this cause, and must express his surprise that 'there should arise out of the liberty given by the town of Dunbar to Mr Grieve Wilson in 1778, any question of law. That 'gentleman got leave to make a drain through Kirkhill for draining the ground then belonging to him, no matter what was its extent: but it was specially stipulated, that no other heritor should 'have the benefit of that drain without the consent of the Magistrates, and they positively reserved a power to erect stoppages on 'Mr Wilson's ground, to prevent the water from contiguous pro-

' perty being thrown on Mr Wilson's, and carried off through the
 ' drain. The defender has acquired that contiguous ground, but
 ' surely he has not acquired any other right than belonged to it;
 ' and if he thinks proper to lead the water off it into that which, in
 ' 1778, was Mr Wilson's, it appears to the Lord Ordinary clear,
 ' beyond a doubt, that he cannot have even the shadow of a pre-
 ' tence to lead off that foreign water, as it may be called, by the
 ' drain permitted to be made in 1778, far less to open and deepen
 ' that drain, to discharge that water by it. That he intends to do
 ' so, is proved by his own application to the Council of Dunbar,
 ' (No. 5. of process in inferior court); and it is quite improper in him
 ' to pretend, in this process, that his object is merely to drain the
 ' ground which once belonged to Grieve Wilson. His object may
 ' be to drain it indeed, but it is of the water which he has thrown
 ' on it from his contiguous property, and which water the town of
 ' Dunbar is entitled to stop from reaching the drain in question.
 ' The Lord Ordinary repeats his surprise, that there can be any
 ' dispute on a matter which is equally a right of the town, as that
 ' the defender's property belongs to him.' The Lord Ordinary af-
 ' terwards pronounced an interlocutor, finding the action before the
 ' Sheriff was of a declaratory nature and incompetent, and therefore
 ' he advocated the cause, and assoilzied the Magistrates; and in the
 ' declarator he decerned in terms of the libel, with expenses; and the
 ' Lords of the Second Division, upon the 28th May 1829, adhered
 ' to the Lord Ordinary's judgment, with expenses. Some time af-
 ' terwards a petition was presented to the Magistrates of Dunbar, by
 ' Simon Sawers, then of Newhouses, defender, stating, that the ' pe-
 ' titioner, finding it necessary, for the effectual draining and im-
 ' provement of his lands at Newhouses, to have a pipe, of from a
 ' foot to eighteen inches in diameter, passed from the water reser-
 ' voir under the post road and through the Kirkhill to the flat be-
 ' tween the foot of the hill and the sea beach, requests to be allow-
 ' ed to perforate the Kirkhill by a small tunnel for that purpose;
 ' and, if need be, to sink a shaft or well on the north side of the
 ' post road, to facilitate the tunnelling under the road; which tun-
 ' nel and well will be again filled up when the perforation under
 ' the road is completed: That as the laying of a pipe, as above pro-
 ' posed, will be of great advantage to the town of Dunbar, by af-
 ' fording a constant supply of fresh water in aid of the supply
 ' brought from Spott, your petitioner humbly conceives that such a
 ' constant supply of water, which is much needed at present for
 ' many useful purposes, will be a full compensation to the town for
 ' the indulgence which he prays for, as the tunnel will do no injury
 ' whatever to the surface of the Church-hill; but, should your Lord-

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‘ ship and the Council think the same not sufficient, your petitioner
‘ will give any farther moderate and reasonable consideration for
‘ the indulgence prayed for.’ ‘ The Magistrates and Council, upon
‘ 12th October 1830, having considered this petition, are disposed
‘ to entertain the same on proper terms, and agree to meet Mr
‘ Sawers on the ground.’ The Magistrates accordingly met Mr
Sawers on the ground, when they were disposed to grant the
permission craved, upon those conditions, which are contained
in the minute of Council, dated 13th October 1830: ‘ (1st,)
‘ That the remuneration to be received by the town for this pri-
‘ vilege shall be fixed by arbiters mutually chosen, with power to
‘ name an oversman, but the arbiters shall be acceptable to both
‘ parties; (2d,) The remuneration shall not be estimated by the
‘ injury done to the town’s property, but by the advantage which
‘ Mr Sawers shall derive; (3d,) While the Magistrates and Council
‘ have no objection that Mr Sawers lay a pipe at the mouth of the
‘ tunnel, to facilitate the procurement of water therefrom, they can-
‘ not admit that this shall be set forth as an advantage to the town
‘ in bar of remuneration, because, although it may be of benefit to
‘ the people in the town in case of a scarcity, it will be of much more
‘ benefit to the inhabitants of Newhouses and to the stocking kept
‘ there; for, in so far as the meeting know, it is from this place that
‘ they are at present generally supplied with water; (4th,) Mr Sawers
‘ shall be bound to level and sow out the lands encroached on, after
‘ his operations, and should he find it necessary to open up the ground,
‘ he must secure it from damage to the public; and, (5th,) As the
‘ grant is for the benefit of Mr Sawers, he must pay the whole ex-
‘ penses which may be incurred on the part of the town.’ The mi-
nute of Council having been communicated to Sawers, a letter and
memorandum, written by him in answer thereto, were received by
the Magistrates, who, at the meeting, 21st October 1830, ‘ agreed
‘ to substitute the following clause instead of the second article in the
‘ former minute, viz. That in estimating the remuneration to the
‘ town for the privilege to be granted to Mr Sawers, the arbiters
‘ shall have in view the advantage which Mr Sawers’ property will
‘ derive from the operation of the tunnel. Farther, if it shall be
‘ necessary to advertise the grant, in terms of the act 3. Geo. IV.
‘ cap. 91, that this must also be done. The Magistrates and Coun-
cil direct the clerk to send a copy hereof to Mr Sawers, and to
‘ state that this is the final resolution of the Council.’ The minute
having been communicated to Sawers, he accepted of the grant
contained in the minutes or acts of 13th and 21st October 1830,
subject to the conditions set forth therein, and agreed to pay the
price or remuneration, and perform the operations stipulated.

In terms of the conditions or agreement, and in order to fix the price or remuneration to be paid, Mr Sawers made choice of David Buist, factor at Tynningham, and the Magistrates of David Low, then land-surveyor in Edinburgh, now professor of agriculture in the university there, as the arbiters. The parties entered into a deed of submission, proceeding upon a narrative of the fore-said conditions, and they submitted and referred the 'remuneration and whole stipulations contained in the conditions or agreement before recited' to the said arbiters; and in case of difference of opinion between them, to any oversman to be appointed by them, with all the usual powers. The arbiters, on 2d July 1831, visited the ground, with the view of fixing the amount of the price or remuneration to be paid. Professor Low was of opinion that L.200 would be a fair sum to award against Sawers; but Mr Buist having differed in opinion, they appointed Adam Bogue of Woodhall as oversman. Mr Bogue visited the ground, and desired that, in the mean time, Sawers should be allowed to commence his operations for opening the cut below the Kirkhill, upon the understanding that he, the said oversman, should afterwards fix the price or remuneration to be paid by Mr Sawers; and the Magistrates and Council, by their minute, dated 25th August 1831, agreed 'to this being done, without prejudice to their claims.' Upon the faith of Sawers paying the price or remuneration so to be awarded, he was allowed to form the cut he required through the Kirkhill, by making a large drain for carrying off the water from his whole grounds, and completed the operations permitted by the grant of the Magistrates under the special conditions. Applications were subsequently made, on the part of the Magistrates, to the oversman to determine the matters submitted to him, and to fix the price or remuneration to be paid by Sawers. He delayed doing so, and allowed the submission to expire; and it was only on 5th August 1833, after the submission had expired, and after the clerk to the submission was threatened with an action of damages, that the papers in the submission were recovered from the oversman. The Magistrates and Council, upon the 25th day of September 1833, offered to 're-submit the subject to other arbiters,' or to 'hear terms of compromise;' intimating, that in case of neither of these proposals being agreed to, they must, in discharge of their duty, raise an action against Sawers for implement of his agreement; but both proposals were rejected by Sawers, who would only agree to a renewal of the submission to the said oversman. The Magistrates and Council, on the 14th October 1833, 'having considered Sawers' refusal, and the meeting reflecting that the former arbiters, or their oversman, having had the claims before them for nearly the

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 Aitchison and 'urged to do so, they would not be justified in re-submitting the
 Others v. The 'claims to them; and therefore desire the clerk to write to Mr
 Magistrates of 'Sawers, that however anxious they are to have an amicable set-
 Dunbar, &c. 'tlement, they feel that they have no alternative but to raise an
 Narrative. 'action, now that he declines their liberal offers; and failing his
 'receiving an answer from Mr Sawers within three days, agreeing
 'to one or other of the terms already proposed, they instruct the
 'clerk to raise an action for implement before the Sheriff.' An
 action was brought before the Sheriff of Haddingtonshire against
 Sawers, proceeding upon a narrative of the facts, and concluding for
 payment of L.200, or such other sum as should be ascertained to
 be a fair and adequate remuneration for the privilege conferred on
 him; and also concluding for the expenses. The summons was
 executed against Sawers on 24th October 1833⁴, and on 31st of
 the month, defences were ordered to be given in within fourteen
 days. In the end of the year 1833, a new election of Magistrates
 for Dunbar took place under the recent Burgh Act, when the
 said Simon Sawers obtained, and was elected to the office of Pro-
 vost; and after that event no proceedings took place in the action
 at the instance of the Provost, Magistrates and Council against
 him, until the 30th October 1834, when the order for defences
 was renewed, to be lodged within fourteen days from that date.
 About four days after the renewed order for defences, a majority
 of the Magistrates and Councillors, at a meeting held on the
 3d November 1834, 'resolve to abandon all claim against Mr
 'Sawers, and to withdraw the submission entered into with him,
 'and the process raised against him before the Sheriff.' The mi-
 nute or act of meeting of the Magistrates and Council is in these
 terms: 'Thereafter, with reference to the cut through the Kirkhill,
 'Councillor Kelly, in conformity to notice of motion contained in
 'last minute, moved, that it is the duty of Magistrates and Council
 'on all occasions to encourage any improvement that is not preju-
 'dicial to the town's property; and considering that the deepening
 'of the drain by Mr Sawers, from the Newhouse lands through the
 'Kirkhill, which was a grant from the Magistrates and Council to
 'the former proprietor of Newhouse, has done no injury to the
 'town's property, but, on the contrary, has afforded an additional
 'supply of water for the town's cattle, and that the opposition to
 'this measure has cost Mr Sawers a much greater sum of money
 'than all the benefit derived from it, the Magistrates and Council
 'resolve to abandon all claim against Mr Sawers, and to withdraw
 'the submission entered into with him, and the process raised
 'against him before the Sheriff—which motion was seconded by

‘ Councillor Brook. The Provost thereupon left the chair. After 4 Feb. 1836.
 ‘ considerable discussion, Councillor Middlemas moved that the de- Aitchison and
 ‘ cision be delayed till next meeting, which was seconded by Coun- Others v. The
 ‘ cillor David France, when nine voted proceed, and five delay. It Magistrates of
 ‘ was then moved by Councillor Bell, that the whole proceedings Dunbar, &c.
 ‘ should be remitted again to arbiters, in terms of Mr Sawers’ pe- Narrative.
 ‘ tition in 1830, which was seconded by Councillor David France,
 ‘ when the following voted for the original motion, viz. Bailies
 ‘ Kirkwood and Sked, and Councillors Denham, William Miller,
 ‘ Brook, Comb, Kelly, and Brown, and the following voted amend-
 ‘ ment, viz. William Bell, Rudiman France, Thomas Aitchison,
 ‘ and David France, and two declined voting, Councillor Sawers
 ‘ having left the room. The motion was declared to be carried ac-
 ‘ cordingly.’

The pursuers, who were present at the meeting in the capacity of Town-Councillors, opposed and voted against the resolution, and thereafter raised, against Provost Sawers and the Magistrates and Council of Dunbar, an action of reduction of the minute or act of 3d November 1834, on the ground, (1.) Of the illegality of disposing of burgh property without an adequate consideration; (2.) That Sawers had not paid the price, and the assumptions in the minute being false; (3.) That the minute was passed in favour of Sawers, then Provost, without any adequate consideration. The action farther concluded, that it ought to be found that the acts of Council of 13th and 21st October 1830 form the only right and title of Sawers to the privilege then conferred on him; that the Magistrates and Council had no right to discharge or pass from the conditions or sums of money stipulated in these minutes, but that they were bound to take proper steps for obtaining performance and payment; and concluding also against the majority of the Council as Councillors, and Sawers as an individual, for expenses.

Defences were given in for the Provost, Magistrates and Town-Council of Dunbar, in which they pleaded, *inter alia*, that the defenders, councillors, had not been regularly cited, in respect that the summons contains a petitory conclusion against them. They had been cited as individuals, and the summons contained no warrant for so citing them, and that Denham, a councillor, had not been cited edictally, though forth of the kingdom for more than forty days previous to citation.

Procedure was sisted, (9th July 1835,) till a supplementary action was raised upon the 12th September, when all parties were duly cited. In the new defences for the present Provost and Magistrates, and for Mr Sawers and the majority of the Council, it was stated that the defender, Mr Sawers, had lodged a minute

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Narrative.

with the Council, upon the 8th of June last, setting forth, that although he was prepared to maintain the legality, as well as the propriety and reasonableness of the act under reduction, and to shew that the town had already gained a decided advantage by the operations for which compensation was claimed, and the whole expense occasioned by which was to have been paid by himself, yet as the matter was of trifling importance, and as certain objections which had been stated to it had arisen out of personal hostility to himself, he was prepared to relinquish, without compulsion, what had been granted to him, without being asked; and thereafter craved, that 'the Council will immediately rescind their act of 3d November last, so far as it refers to the said claim; and he leaves it to them to decide on the course they should pursue, as to any claims which it might be supposed the town has against him.' A motion was accordingly made in the Council by Mr Sawers himself, in conformity with that minute, and was adopted by the Council. On the 9th June, the agent for the defenders wrote to the agents for the pursuers, intimating that the act of 3d November 1834 had been rescinded. In August and September 1835, a new submission was entered into betwixt the Magistrates and Mr Sawers, under which Mr Sawers was ordained to pay a small sum to the town. On 22d September 1835, after the execution of the submission, the supplementary summons was served on the defenders.

Defenders'
Pleas.

In the second defences, the defenders *pleaded*—1. That the pursuers had no title to insist in any of the conclusions, in respect that none of these conclusions relate to rights belonging to themselves; and they are not entitled to insist in an action relating merely to the alleged rights of others. 2. That before the action was instituted, the act of Council thereby challenged had been voluntarily annulled, and steps taken for enforcing the town's claims. 3. The action is incompetent, in respect that actions of this kind, at the instance of private parties, burgesses, or individual members of Council, against the Magistrates and Town-Council of a royal burgh, as to the management and disposal of its funds, are not within the jurisdiction of the Court of Session, but come under the provisions of 3. Geo. IV. c. 91, by which questions of accounting in regard to burgh property fall to be regulated in Exchequer.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's
Interlocutor.

'The Lord Ordinary having considered the summons, and supplementary summons and dilatory defences to both actions, conjoins the same; and having heard the counsel for the parties

‘thereon, repels these defences; and the defenders intimating their intention to reclaim, finds them liable in the expenses of this part of the discussion.’

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Note.

Note.—‘1. None of the authorities relied on by the defenders support the first defence; the pursuers being not mere burgesses, but a minority of the Town-Council. 2. The second defence overlooks that the pursuers do not merely seek to have the act of Council rescinded, but to have it declared *illegal*; without which it might be re-enacted at pleasure. 3. The 3. Geo. IV. cap. 91, applies to cases of *accounting* and of *alienation*, not to proceedings like the one now challenged.’

The defenders reclaimed.

Rutherford and *Marshall* founded on the case of the Magistrates of Inverury, 14th Dec. 1820, *Ersk.* i. 4. 23, and Magistrates of Lauder, 17th May 1821, to shew that private burgesses have no title to sue Magistrates for alleged acts of mal-administration of burgh property. They also pleaded that the Court of Exchequer was the proper court for a question of this kind.

Defenders’
Pleas.

Dean of Fac. for pursuers.—This was really not an action for re-funding money, but for declaring an act of Council illegal. The minority of the Council are entitled to try, by declarator in this Court, the validity of an act of the majority; just as much so as a majority is entitled to try the validity of an act of a previous Town-Council. In Magistrates of Selkirk, 11th June 1828, *F. C.*, this Court held it competent to set aside a charter granted to the prejudice of the burgh, and held an alienation of property to be reducible if no adequate consideration has been given. It is just the case of administrators calling other administrators to account.

Pursuers’
Pleas.

Lord Justice-Clerk.—I was very anxious to hear how these proceedings were to be defended. So far as we have yet gone, the Lord Ordinary has only sustained the title of the pursuer. The parties have yet to go on with the case as to the merits: every thing there is left behind. After hearing all that has been stated, I for one am of opinion that this action is well founded, and that the pursuers are entitled to be heard: that the title is good. In the first place, we have nothing to do with the rule of law in regard to the rights of individual burgesses. All the decisions and rules cited are apart from the present question, because this is an action at the instance of four constituent members of the Town-Council, who were in the minority at the time that act was passed; and they bring this action

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as against an illegal act, as against an act fundamentally null and void in its own nature; and they contend that they are entitled to have a decree reducing the act, and declaring it utterly illegal, null and void. The action is a complicated one. It is not merely for reduction, but also for a declarator. I am of opinion they were entitled to bring such an action. No doubt there is a petitory conclusion at the end; but there is first a reduction and then a declarator, and then this last conclusion follows from them, and certain proceedings are required to be adopted for the recovery of this money. I may say in passing, that ultimately this action may resolve into an action of accounting. Under the act, all actions of accounting are to be had in Exchequer. This is a point which will remain for consideration. I give no opinion at present on this matter, but I speak of this as a summons of reduction of an act as illegal, and of declarator to that effect. My opinion is, that this is the only competent tribunal before which to commence such an action. I deny the existence of any right in Exchequer to reduce by a formal decree of reduction; and I equally deny its right to declare acts illegal. Therefore the question is, whether this was an illegal act, and *ultra vires*? I conceive they had no right to make such an act, either as administrators of the burgh, or at common law; and if it is not competent to bring it under review of this Court, then there is a wrong without a remedy. These parties in the Town-Council were warned of the proceedings which have now taken place. They were told, By your lending yourselves to this act you are doing what is illegal. It is now stated that they rejected the protest; and thus the matter stood at the commencement of this action. In the summons it is stated that this proceeding operated to the great hurt and prejudice of the complainers; and this, I conceive, gives them a right and title to insist on its being declared illegal. It is just the case of certain members of a body being overruled by the majority, and they come here for redress.

An objection was taken to the mode of procedure, by which they bring parties into Court. A discussion took place on that. I give no opinion. I don't understand that the objection was sustained.

I do not think the circumstance, that *ex intervallo* these parties had retraced their steps, that they were soon convinced that a justification from them could not be listened to in a court of justice, and that they cancelled the act, is any thing to the purpose. These parties, the complainers, are still entitled to have the judgment of the Court, that the proceeding was *ab initio* null and void, for the purpose alone of deterring all magistrates and councillors from similar proceeding in time to come.

We have now a supplementary summons. Suppose the other thrown into the fire, we must now consider this question, and on that I hold them entitled to have it decided, and if illegal, entitled to a finding to that effect. I abstain from entering on the merits at all. Having a declaratory statute, declaring all matters of accounting shall proceed in a certain way, I would not rashly interfere; but I do not consider this case affected by that act. The reduction and declarator steers clear of the petitory conclusions as to how the money is to be disposed of. It is clear they have a good title; and it is the duty of the Court, since the passing of the Reform Act, to take care that they do not countenance any thing, which, if attempted under the old law, would not have received the slightest sanction.

Lord Glenlee.—I think the Lord Ordinary was right in repelling the objection to the title, and that is all he has done. Nor does it follow that the subsequent transaction will have any effect. The summons was in Court, but not in a state to have any thing done. I much fear, if, in their communication, they had signified that they were sensible of their error, and that the act was done away with, that this would not have availed them; but this is not the nature of the communication, for their right is strenuously maintained. They acknowledge nothing—their offer is made without prejudice—they maintain mordicus the propriety of what had been done, and put their offer on the ground of personal generosity alone. I do not know whether, in the course of discussing the cause, the evil being done away with may not have some effect on the petitory conclusions. I would not say how that may operate; but that is no bar to the discussion of the previous conclusions. The question is, whether the pursuers are not entitled to have the act declared illegal and void; and I rather think they are. I can't say I find it necessary to rest much on the pursuers being members of the Council. The ground they would pursue on in that character would be the illegality of making any gift of the property of the burgh; but I think if illegal, any burgess would have the right. I think it is carrying the fact of their being councillors too far. I have little doubt of the right of burgesses to come here, and to state that they insist on setting aside an act of Council as *ultra vires*. I, for my own share, instead of alluding to the new form of the act, instead of going on defect of title, think that there is the strongest evidence at common law, that we have an interest to look over matters of this kind. This has nothing to do with questions of revenue, and actions of count and reckoning, which, it is stated, pro-

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perly belong to Exchequer. The present question is altogether distinct from this.

Lord Meadowbank.—Lord Glenlee has expressed my opinion. With respect to the objection to citation, it does not appear, for it is not pleaded before the Lord Ordinary, and he does not advert to it at all. The act of conjunction repelled that objection. I agree in thinking there was no occasion whatever for this party being cited in the way required. He seems to have been out of the country at the time, and had abandoned his duty of member of Council. It is unnecessary, in bringing under the cognisance of this Court an act declared illegal, to bring forward the party not concerned in it. With respect to other points, I have nothing further to state, than what has been expressed by Lord Glenlee. I have no idea that if a burgess comes forward, calling to have an act declared illegal, he has not a right so to do. At all events, if one burgess had not the power, I certainly think the minority of the Town-Council had the power.

Lord Medwyn.—I considered this case attended with difficulty, and was anxious to hear counsel in support of the interlocutor; but I am free to admit that my difficulty has been removed. The question of title gave rise to the difficulty. On the merits there can be no difficulty, because we have the authority of the defenders themselves, admitting the act to be incorrect. This is not like a discussion arising out of the annual accounts. In a matter like this, I think the minority of the Council have an interest, and that it is competent for them to insist in the action. It is not a question of mal-administration of funds, but the reduction of an improper proceeding, to which the Court of Exchequer would not have been competent, even if the discussion could have occurred under the examination of the burgh accounts, which clearly it could, as it could not have entered into these accounts.

Judgment.

The *Lords adhered*, and found additional expenses.

Lord Ordinary. Cockburn.
Rutherford, Marshall.
Dalmahey, W. S.

Act. Dean of Fac. (Hope,) A. Anderson.
Gibson-Craigs, Wardlaw & Dalziel, W. S.
T. Clerk.

Alt.
Patrick

R.

No. LXXIX.

SECOND DIVISION.

5th February 1836.

DAVID MELVILLE against CARSTAIRS and OTHERS, (GEORGE TOD'S TRUSTEES.)

SETTLED ACCOUNT.—PRESUMPTION.—AGENT AND CLIENT.—COMMISSION.—PRESCRIPTION, (TRIENNIAL).—1. *Circumstances in which, after various accounts, extending over a long tract of time, had been rendered by a law-agent in town to his client in the country, and settled and docketed up to a certain date, a claim for commission on the cash transactions embraced in the accounts was found incompetent. 2. Found, separatim, that commission charges, as well as certain other charges in an account rendered by a man of business, fell under the triennial prescription.*

THE circumstances in which the above points were determined are sufficiently explained in the note which is appended to the following interlocutor by the Lord (Jeffrey) Ordinary:

'The Lord Ordinary having resumed consideration of the debate, with the closed record in the conjoined processes, productions for the parties, and whole processes, finds, that the terms and tenor of the various accounts which were rendered and regularly docketed, and the vouchers given up by the parties from 1799 to 1821, and of the several subsequent accounts, which were made out and rendered by the original pursuer, George Tod, now deceased, up to 1828, when the transactions between the parties substantially ceased, together with the letters written by the said George Tod, along with, or relative to, both the said sets of accounts, make it incompetent for the said George Tod or his trustees, (who have been regularly sisted as his representatives in both actions, to insist in the claim for commission on the cash transactions embraced in the forssaid accounts, which is now set forth in the action at his instance, or in the claims for certain average and apparently conjectural charges for stamps, postages, clerks and incidents, now proposed to be made, in addition to the specific charges of the same description which occur in the aforesaid docketed or rendered accounts: Finds, that in respect of the accounts and correspondence above mentioned, and of the taciturnity of the pursuer for so long a period, no claim can now be made by the said George Tod or his representatives for one-third part of the price of a newspaper said to have been sent by him to the late Alexander Melville, from 1808 to 1835: Finds, separatim, that the account now pursued for by the said George Tod has fallen under the triennial prescription—the latest entry in the said account, with the exception of that for the newspaper, and those for slump annual charges for additional stamps, postages, &c. (all now disallowed,) is dated in July 1830, and the action at his instance was not executed till February 1834; and therefore, and in respect of the whole circumstances of the case, sustains the defences stated against the action at the instance of the said George Tod; assolizies the defender from the conclusions of that action, and decerns: And in the counter action at the instance of David Melville, finds, that the accounting between him and the said George Tod and his representatives must proceed upon the footing of the whole previous accounts between the parties having been closed by the doquet mutually subscribed by them on the 5th of March 1821, and of the said George Tod being bound, by whatever appears on the face of the accounts subsequently made up and rendered by him to the deceased Alexander Melville; but that, before extracting any decree for the balance which may be ultimately found due to the said David Melville in these accounts, he, the said David Melville, must produce satisfac-

Lord Ordinary's Interlocutor.

5 Feb. 1836. *Melville v. Tod's Trustees.* ' tory evidence that the cautionary obligations which it is admitted that the late George Tod had entered into for the said David Melville and his father, have been completely sopped and discharged; and, before further answer, appoints the cause to be enrolled, that the pursuer, David Melville, may state in what way he proposes that the exact balance now alleged to be due to him should be ascertained.'

Note. ' The case of *Scott v. Gregory's Trustees*, 24th Feb. 1832, (10. *Shaw*, 375,) seems a precise authority for holding that commission charges for payment of money, in the account of a man of business, fall under the triennial prescription, as well as the other charges in such an account. And the Lord Ordinary is not of opinion that this defence is obviated by the circumstance, that the party pleading it is himself the pursuer of a counter action of count and reckoning, inasmuch as that action also was not raised till after the period of prescription had elapsed, and when the previously prescribed claims could not be pleaded even in compensation, and as a mere ground of defence. But the fact here is, that these claims are insisted in to the extent of near L.800, after extinguishing all the counter claims of the opposite party, and it is only as against the petitory conclusions for this sum of alleged balance that the defence of prescription is, by the form of the interlocutor, sustained.

' But, independently altogether of prescription, the claim for commission is disallowed, on the plain ground, that it is sufficiently evident, from the circumstances of this case, that it was never intended between the parties that it should be made, and that it was purposely omitted by the pursuer in the different accounts which he docketed and rendered for so long a course of time, and must now be held to have been substantially waived and abandoned by the terms of these accounts, and of his various letters in regard to them.

' If the charge had been one for an ordinary and clear debt, which could not have been remitted except from a purpose of pure donation, like a charge for commodities furnished, or interests confessedly due, its mere omission in a series of general accounts, however precise, would not perhaps afford sufficient grounds for presuming that it had been abandoned. But the charge for commission on money received and paid over is quite in a different situation; and, though legalised in modern practice, was neither a very common charge when the dealings of these parties began, nor is yet very explicable, upon the principles of risk, skill, or personal trouble. Being a percentage upon the sums passed through hands, the profits are as exorbitant where those sums are very large, as they are insignificant where they are very small. To cash a draft on a deposit account for L.10,000, and pay it into that of the Receiver-General, is an operation as easy and safe as doing the same with a draft for L.10, and may not only appear scarcely to justify a charge of L.200, but may even be conceived to be done gratuitously, without exciting the idea of any extraordinary generosity. It is far more easy, therefore, to understand that an old confidential agent, employed mostly to pass large sums of money, may have agreed to do a service of this kind for his employer without a charge of commission, than that he should have intended to forego his claims for interest on his bonds, or remuneration for his proper professional exertions. But there are two circumstances in this case which make this inference, from the total omission of any charge of this sort from the accounts of upwards of thirty years, irresistible.

' The first is, that these accounts did contain, nay, in point of fact, were chiefly made up of the details of these very many transactions, upon which, at this distance of time, and after the death of the alleged debtor, it is now for the first time attempted to charge commission. The whole of these payments and receipts, with the discounts and charges for stamps, where any appear to have been incurred, are minutely entered; and, along with the sums of the business accounts, brought carefully to a balance and docketed, (at least up to 1821,) with

' a distinct and unqualified acknowledgment (accompanied with a final delivery of 5 Feb. 1836. vouchers) that the party is indebted to his employer in that particular sum. It may be fairly said to be inconceivable that such a series of settlements should have been made in such terms, if a large charge of commission (now amounting to no less than L.3371) had been all along understood to be due on these very transactions to the party thus acknowledging himself the debtor. Melville v. Tod's Trustees.

Note.

' The second consideration, however, is of still more importance. From the series of accounts, it appears that Mr Tod was from first to last very largely indebted to Mr Melville, his employer, and was, in fact, allowed to retain at each settlement sums, varying from L.1500 to L.5000, of his client's money, for his own use and accommodation: and the correspondence shews that he was fully aware of the value of this indulgence, and duly grateful for it. It is not very wonderful, therefore, that he should have charged no commission for drawing L.3000 of his employer's money, when it appears that he generally kept half of it in his own hands, without any special warrant, or that he finally paid it into his account with the Receiver-General, without seeking any farther profit than he had already made, by having it for three or four months at his disposal. It is very true, that he always charges himself with interest for the sums so retained; but it would be quite absurd to hold that this discretionary power of retaining, without security or previous agreement, and just so much, and for so long as he needed it, and no longer, was not, to a man in business, and often pressed for money, a very valuable accommodation, and such as most men would gladly have purchased, by the small trouble of drawing and paying over a few large sums eight or ten times in a year.

' The correspondence, however, in the Lord Ordinary's apprehension, makes that clear and certain, which the tenor of the accounts and the circumstances now mentioned make so highly presumable. From first to last, the letters accompanying the accounts apologise for the magnitude of the balances which they shew against the writer, and frequently beg indulgence, and promise speedy remittances towards their liquidation. Take, for example, that remarkable letter of the 29th December 1827, accompanying one of the very last accounts so rendered by Mr Tod. After mentioning that the balance, brought down to 1st January 1828, amounts to L.1868 : 1 : 6 at his debit, he adds, ' I hope it will be convenient for you to allow this balance still to remain in my hands for some time longer, at five per cent. interest,' the ordinary rate for a shorter period being four per cent. The Lord Ordinary finds it quite impossible to believe, that the man who writes, and had been in the practice of writing in this manner for a period of more than thirty years, really understood and believed that his correspondent understood that he was all the time a creditor for large sums of commission, amounting, at the date last mentioned, to more than L.3000. The case of Young against the Phoenix Office, 5th June 1834, (12. Shaw, 680,) and that of Young v. Bell, decided by Lord Corehouse in December 1834, seem to have been far weaker cases than the present.

' The other articles, viz. the new charges for stamps, postages, &c. are somewhat in a different situation, in so far as there is no such reasonable presumption, that: though actually exigible when the accounts were rendered, it was still intended to remit or abandon them; and if they had consisted of specific items, vouched by regular entries in the parties' books at the time, there might be some equity at least in the claim for having the omission supplied, by still adding them to the former charges. Even then, however, the triennial prescription and thirty years' taciturnity would have afforded an insuperable legal defence. But as they are now prescribed, it is plainly impossible to look at them. They are slumped general charges of 5s. a-year for thirty-two years; for stamps, presumed omitted in the settled accounts; 10s. a-year for postages presumed omitted; and 10s.

5 Feb. 1836. 'a-year for incidents, which it is presumed might have been charged, if they had been thought of.

Melville v. Tod's Trustees. Note. 'The charge now brought forward for a share of the price of a newspaper, sent for twenty-one years and upwards, by one old friend to another, after it had been duly perused and stopped by him for a day, is very much in the same predicament. The nature of the benefit conferred, the admitted intimacy of the parties, the total silence of the accounts, and the absence of any demand till after the death of the party now said to have been a debtor, all concur to raise an irresistible presumption that this newspaper was never intended to be the subject of a pecuniary charge, and would not have been received a day after it had been intimated that it was sent upon that footing. If the Lord Ordinary were to allow such a charge as this on the part of Mr Tod, he should think it but just to let Mr Melville charge him in return with the value of the hares, blackcocks and partridges which he appears to have sent to him.'

Opinion of Court.

Tod's Trustees *reclaimed*, chiefly on the claim for commission.

Lord Medwyn.—There is no statute recognising claims for commission as betwixt agent and client. If there had been, we might, even where accounts had been docketed and settled under the express or implied *errors excepted*, have opened them up to receive such a claim. Such charges, indeed, are comparatively of modern introduction. Here it is impossible, after repeated settlements of accounts had taken place, to think of sustaining such a claim, where there was no hint given, in the course of the long intimacy and transactions in the way of business, of any intention to change the terms of dealing between the parties. Indeed, during the whole period of the accounts, there appears no indication of any intention in Mr Tod's mind to charge commission; and, looking especially to his letter of 29th November 1827, it is most unlikely that he then had any such intention.

Lord Justice-Clerk.—Mr Tod seems to have been quite satisfied with the benefit derived from sums so large being allowed to remain undisturbed in his hands.

The other Judges concurred.

Judgment.

Reclaiming note *refused*. Expenses reserved for consideration of Lord Ordinary.

Lord Ordinary, Jeffrey. Act Keay, Walker. Alt. McNeill. Walker,
Richardson & Melville, W. S. James Wright, W. S. F. Clerk.

R.

SECOND DIVISION.

No. LXXX.

5th February 1836.

FIFE BANKING COMPANY
against
ROBERT WALKER RANNIE.

CAUTIONER.—(NON-DISCUSSION OF PRINCIPAL).—*A and B, the acceptors of a bill for the balance of a cash-account to a bank, having*

become insolvent before the bill fell due, and the bank having threatened one of the cautioners for the credit with diligence, he granted an obligation, by which he bound himself to guarantee any deficiency which might remain due on the bill, after the bank had ranked and drawn dividends from the respective estates of A and B, on condition of receiving up the bond of caution and diligence thereon : The bank accepted the obligation, and delivered up the bond and diligence : Thereafter the bank ranked and drew dividends from the estate of A ; but used no means to recover payment from B, who paid a composition, under a private arrangement with his creditors :—Found that the bank, by neglecting to discuss B, or to use proper means to make their debt effectual against him, had lost their recourse against the cautioner.

5 Feb. 1836.



Fife Banking
Co. v. Rannie.

Question as to the effect of a letter written by the cautioner to the bank, offering to pay the balance due after receiving dividends from the estate of A.

IN 1816, the Fife Bank agreed to give a cash-credit for L.300 to Charles Greenhill, farmer at Easter Cash. Robert Walker Rannie and James Greenhill of Corden became cautioners in the bond which was granted on this occasion to the bank. In 1821, the bank called for payment of the balance due by Charles Greenhill upon his cash-account, and received a bill for L.197 : 5 : 6, accepted by him and his brother, James Greenhill, and indorsed by Rannie, in extinction of their claims under the bond. Before this bill fell due, Charles and James Greenhill, the acceptors, had both become insolvent, and the bank lost recourse against Rannie, the indorser, by failing to give notice of its dishonour. Narrative.

The Fife Bank, however, intimated to Rannie, that unless he agreed to become responsible for any deficiency which might be due on the bill, in the event of their failing to recover full payment from the estates of Charles and James Greenhill, diligence would be raised against him under the bond of credit, which the bank had retained in their possession. On 16th December 1823, Rannie accordingly addressed a letter to Mr Aitken, the cashier of the bank, containing an obligation in the following terms : ‘ Although recourse has been lost against me in the said acceptance, by the bank not intimating to me the dishonour of the same, yet to avoid legal measures being resorted to, I do hereby bind and oblige myself to guarantee to the bank payment of any balance that may remain due, after their ranking for the said sum of L.197 : 5 : 6, contained in the said bill, upon the estates of the said James and Charles Greenhill, and drawing the dividends effecting thereto from their funds ; the bank, in the meantime, delivering up to me the

5 Feb. 1836. 'registered copy of the said bond, with the diligence following there-
Fife Banking 'on.' The Fife Bank agreed to accept this obligation, and deliver-
Co. v. Rannie. ed up the bond to Rannie on the same day.

Narrative.

James Greenhill was sequestrated under the bankrupt act, and the bank ranked upon and drew dividends from his estate, which were imputed towards extinction of the debt. The bank, however, did not rank or draw dividends from the estate of Charles Greenhill. He was sequestrated by the landlord, who sold off his crop, stocking and effects, for payment of the rent and other preferable claims. A small reversion remained to Charles Greenhill, which consisted principally of the price of a small property in Fife, which he had sold for L.170. In the beginning of 1825, he agreed to pay his creditors a composition of 5s. in the pound upon their debts. A minute, accepting this composition, was drawn up in the following terms: '*Perth, 3d January 1825. We, subscribing creditors of Mr Charles Greenhill, late tenant of Easter Cash, hereby agree to accept of a composition of 5s. per pound of our respective debts, to be paid in four months from this date, and upon which payment being made, oblige ourselves to grant him a full and ample discharge.*' It was alleged that this agreement was subscribed by all the creditors of Charles Greenhill, with the exception of the Fife Bank, and a few individuals, whose claims were of trifling amount, and who were paid in full; and receipts for payments, to the extent of L.49 : 11 : 2, were recovered and produced.

On the other hand, the Fife Bank stated that the composition was only paid to some smaller creditors who were harassing Greenhill with diligence; that the bank were not aware of this arrangement, never having been applied to for their accession; and that had they been ranked nothing could have been paid.

In 1826, the Fife Bank applied to Rannie for payment of the balance due on the bill. In answer to this demand, he addressed the following letter to the cashier: 'I have just now received your letter, demanding payment of James and Charles Greenhill's bill, p. L.197 : 5 : 6. You will please observe that the bank lost recourse upon me for this debt, by not giving me regular intimation when the bill became due. However, as I did not wish to take advantage of this neglect on the part of the bank, I agreed to pay any deficiency that might ultimately be on this bill, provided the bank first ranked and drew the dividends on James Greenhill's estate, which I understand will nearly pay in full. This I expect they will still do, and then I shall most willingly pay the balance.' In this letter the name of Charles was omitted, but in the subsequent correspondence which passed between the parties this mistake was corrected.

Charles Greenhill, after obtaining a settlement with such of his creditors as had agreed to accept the composition offered by him, went to Ross-shire, where he took a lease of a farm, which he stocked and possessed for several years. He died in 1828, leaving his affairs in a very desperate state; and no measures were adopted by the bank to recover payment of their debt from him prior to his death.

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Co. v. Rannie.

Narrative.

On 4th September 1832, a final dividend of 3s. in the pound was received by the bank from the estate of James Greenhill; and the balance which then remained due on the bill amounted, with interest, to L.121 : 10 : 2½. For that sum the bank raised the present action against Rannie, libelling on the foregoing letters granted by him on 16th December 1823 and 10th July 1826.

The Lord Ordinary pronounced the following interlocutor and note:

'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, finds, that the pursuer, or his predecessors in office, have, by neglecting duly to discuss Charles Greenhill, or to use due means for rendering the debt effectual against him or his estate, have lost their recourse on the defender, in virtue of the letters libelled on, for the contents of the bill therein referred to: Finds, that no other ground of liability is set forth in the libel; therefore sustains the defences, assoilzies the defender, and decerns; finds expenses due.'

Lord Ordinary's
Interlocutor.

Note.—'1. The defender, when first applied to for payment of the bill, denied his liability, on the ground of no intimation of the dishonour having been given. The fact that no notice was given is admitted in this record.

'2. The defender, in his first letter, distinctly qualified his agreement to hold himself liable, by the condition, that the bank should first rank on the estates of 'James and Charles Greenhill,' by which was plainly meant, that they should use all competent means to recover payment from them.

'3. It is clear to the Lord Ordinary, that the second letter was meant to express a mere *renewal* of the obligation in the first, though the name of *Charles* was casually omitted. And this is clearly explained by the third letter, and the correspondence which followed on it.

'4. The Lord Ordinary is satisfied, on the facts disclosed on the record, and the letters of correspondence produced, that the pursuer, or those acting for the bank, did entirely omit to take any proper means for discussing Charles Greenhill or his estate. He

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Note.

' thinks it is shewn that they might have recovered something.
' But it being clear to him that they did not pursue the measures
' which were evidently competent, and naturally called for in the
' circumstances, he is of opinion that it is not now necessary to en-
' ter into any nice reckoning of the sum which they might or might
' not have recovered. They have failed to comply with the condi-
' tion on which alone the defender agreed to hold himself liable;
' and therefore the Lord Ordinary is of opinion that he is entirely
' liberated. The case of Fleming v. Thomson, in the House of
' Lords, May 23. 1826, appears to settle the principle which must
' regulate such a case.

' 5. It was evidently not incumbent on the defender to do any
' thing, or to give any notice to the pursuer regarding Charles
' Greenhill or his affairs.'

Pursuers'
Pleas.

The Fife Bank *reclaimed*, and *pleaded*—1. The original stipula-
tion in the letter of 16th December 1823, that the bank should
rank on Charles Greenhill's estate, referred only to the existing
sequestration of his effects, at the instance of the landlord, in which
nothing could be recovered by them; and the bank was not bound
thereafter to do strict diligence against Charles Greenhill.

2. The condition, that the bank should rank on the estate of
Charles Greenhill, fell by the circumstance of his effects turning
out insufficient to defray preferable claims, and by the state of his
affairs thereafter; and it was dispensed with by the defender's let-
ter of July 1826, written in the knowledge of the desperate condi-
tion of Charles Greenhill's circumstances.

Defender's
Pleas.

To this it was *answered*, on the part of the defender, Rannie—
1. By the terms of the agreement between him and the bank, they
were bound to rank on the estate of Charles Greenhill, when the
composition arrangement was entered into in 1825, and also to use
timeous diligence and all necessary means to recover payment from
him before making any demand upon the defender; and as they
neglected the condition in the guarantee, it has not been imple-
mented by them, and the defender is entirely liberated from his ob-
ligation.

2. Even had there been any obstacles to prevent the bank from
getting payment of a composition, or implementing the agreement
between the parties in any respect, they were bound to give im-
mediate notice to the defender, to enable him to operate his relief;
and having failed to do so, he is no longer liable for the debt.

Lord Justice-Clerk.—I am of opinion that there is here an ex-
press condition in the letter of guarantee, that the bank have not

complied with that condition, and consequently, that they are not entitled to recover. This departure from the terms of the guarantee, I apprehend, precludes all inquiry as to what the bank might or might not have recovered had they used the proper measures. In the present instance, it is not probable that they could have recovered much; but as they have failed in complying with the condition on which alone the defender agreed to hold himself liable, I concur with the Lord Ordinary in thinking that he is entirely liberated.

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Co. v. Rannie.Opinion of
Court.

Lords Meadowbank and Glenlee concurred.

Lord Medwyn.—I have no occasion to dispute the legal principle upon which the interlocutor proceeds; but I entertain doubts how far the principle applies in the particular circumstances of this case. I do not see that the defender, for whose brother-in-law his security was interposed, gave up any legal defence when he waived objecting to want of notification of dishonour, while his bond was still obligatory on him and in the hands of the bank, as little as any generosity was displayed in consenting not to plead prescription, at a time when the bill was not prescribed. Neither do I think that the bank undertook the obligation of discussing Charles Greenhill: they only undertook to rank on the estates of James and Charles. James was sequestrated under the bankrupt act, and the bank ranked on his estate. The landlord had sequestrated Charles, and it does not appear there was any portion of his funds which was not swept away by the landlord. There could be thus no proper or efficient ranking on his effects, and the defender admits he drew nothing at this time; and I do not think the obligation extended to rank on any future estate, or future funds, or obliged the bank to look after such; so that although a small dividend was paid to some of his creditors some years afterwards, evidently from the price of the property sold to Mr Bruce, the failure to draw this dividend does not vacate the defender's obligation. This is not similar to the case of magistrates allowing a prisoner for debt to escape, or a messenger failing to execute diligence duly, which make them, for neglect of official duty, liable for the debt, without considering whether it could have been recovered or not: it is properly a case of damage; and if nothing could have been recovered by ranking, the defender has suffered nothing more, especially as the bank exactly followed the example he set them at this time.

The Court adhered.

Judgment.

Lord Ordinary, *Moncreiff*. Act. *Robertson* and *Geo. Monro*. *Wm. Alexander*,
W. S. Agent. Alt. *Keay* and *T. Mackenzie*. *W. B. Campbell*, W. S. Agent.
R. Clerk.

R.

No. LXXXI.

SECOND DIVISION.

6th February 1836.

DAVID ANDERSON and DAVID MILLER against GEORGE KINLOCH.

ARBITRATION.—The Lord Ordinary on the Bills passed a bill of suspension of a charge on a decret-arbitral in respect of one objection to the decree, but refused it quoad ultra. The nature of the objection sustained, and those which were repelled will sufficiently appear in the following interlocutor and note:

Lord Ordinary's Interlocutor.

Nota.

'The Lord Ordinary having considered the bill, answers, and productions, 'passes the bill to the extent of L.100 sterling of penalty charged for, and refuses 'it quoad ultra: Finds the suspenders liable in expenses, subject to modification.'

Note.—'The suspenders have raised an action of reduction, under which they 'may hereafter obtain repetition, or any other redress they may be entitled to; but 'the Lord Ordinary does not think that they have as yet exhibited any such prima 'facie case as entitles them to have the decree-arbitral superseded summarily by 'suspension.

'1. The objection, that the submission does not in *direct terms* warrant an interim decree, is obviated by its authorising the registration 'of the interlocutory 'orders, *interim decrees*, and decree-arbitral, to follow hereon,' by the charger 'being received as a party to the submission on his father's death, by a minute on 'the deed of submission, by which he is bound 'to implement whatever decree or 'decrees arbitral shall be pronounced,' and by the minute of the suspenders, in- 'forming the arbiter that they left him 'to exhaust the submission by proceeding 'to the commutation, or to issue an interim decree, as he considered proper.'

'2. The objection, that the arbiter gave a wrong construction to the issues as to time, *even if this were the case*, would amount only to his having erred in judgment, exactly as the Court might have done if the case had been tried before it.

'3. The objection, that the arbiter has decreed for L.2: 4: 11 as the expense 'of recording the interim decree, is answered by the terms of the submission, 'which empower him to decide as to 'all expenses to be incurred.'

'4. The arbiter, on being informed that the suspenders meant to challenge the 'interim decree, pronounced an interlocutor, *sisting further proceedings for a 'month*; and it is objected that this operates as a sist of *diligence* under the decree 'already pronounced.

'5. The objection to the charge for the penalty for not fulfilling the decree is 'the only one which is doubtful, and therefore quoad this the bill has been passed. The ground of the doubt is, Whether this penalty be incurred by a party 'stating what he may have been advised were valid objections to a court of justice.'

The suspenders *reclaimed*, but chiefly as to the second position in the note. *Dean of Faculty* referred to the speech of Lord Brougham, (C.) in affirming the Don Fishing cause, where it is laid down, that a judge trying a case upon particular issues cannot competently travel from the issues, and inquire what the court which proponed the same for trial may have intended. Where there is a particular issue, but without restriction or limitation, it is not competent for a judge or arbiters to introduce limiting words, and thereby alter the terms of the issue. The Court, in the circumstances, *adhered*, and allowed expenses of opposing the note. (See papers.)

Judgment.

Lord Ordinary, Cockburn. Act. Dean of Fac. (Hope,) Buchanan. Alt. Keay,
Walker. Isaac Anderson, S.S.C. and P. Pearson, Agents. T. Clerk.

SECOND DIVISION.

No. LXXXII.

6th February 1836.

GEORGE SOMMERVILLE AND OTHERS, AND THEIR
FACTOR LOCO TUTORIS, PETITIONERS.

FACTOR LOCO TUTORIS.—NOBILE OFFICIUM.—*Authority granted to a factor loco tutoris, applying by summary petition, to borrow money, upon the security of the heritable estate of a pupil, to pay off heritable and personal debts affecting the same, or such sum as might pay off the whole personal debts to which the heritable estate might be made liable.*

Opinion expressed by Consulted Judges—That wherever it has been made to appear to the Court, that the power craved by a factor was either necessary to prevent serious loss to the estate, or expedient in order to procure evident and positive advantage, or where the interest of third parties connected with the estate, as, e. g. in relation of superior and vassal, &c. was affected, the Court has been in the constant practice of granting the powers necessary for accomplishing the object.

MR JOHN GOVAN was appointed factor loco tutoris for the children of the late James Sommerville of Airhouse. The value of the property under his management, exclusive of the mansion-house and garden, wood and lawn, was ascertained to be L.15,513 : 16 : 2½, while the debts and claims upon it, exclusive of the children and widow's provisions, were L.9859 : 13 : 7½. Of these debts part were heritable, constituted by a bond and disposition in security for L.5000, and now in the persons of two several creditors, for L.3000 and L.2000 respectively, over the property of Airhouse. The remaining debts were personal, one in particular amounting to L.3100, constituted by two several bonds of L.1500 and L.1600. The personal creditors having threatened to take measures, which one of them afterwards adopted, by a general charge and summons of constitution against the pupil, the factor was advised to apply to the Court for authority to grant an heritable bond to the creditors in the personal bonds, or to borrow money to pay off the same, founding upon the cases of Murray, 8th March 1834; Anderson, 28th Feb. 1821, 1. S. & D. 363; Bushby, 1st Feb. 1823, 2. S. & D. 176; Meikle, 7th March 1823, 2. S. & D. 274; Slade, 20th Dec. 1831, 10. S. D. & B. 167; Drummond, 21st Jan. 1832, 10. S. D.

Narrative.

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Sommerville
and Others,
Petitioners.

Narrative.

§ B. 216; and Borthwick, 7th June 1832, 10. S. D. & B. 620.

The factor prayed that the Court would 'authorise him to borrow, upon the security of his constituents' heritable property, either the sum of L.9000 or L.10,000, in one sum, so as to pay off the whole debts affecting the same, heritable and personal, or to borrow such a sum as may pay off the whole personal debts to which the heritable estate may be made liable, or any of those debts, ranking the personal debts thus to be heritably secured *pari passu* upon the estate, and to grant a bond or bonds therefor, containing all necessary clauses for constituting the same an heritable debt or debts thereon,' &c.

The Court remitted to the Lord Ordinary, who inquired and reported; and thereafter his Lordship, upon a second remit, obtained a report from Mr Macbean, W. S. as to the state of the debts affecting the property.

The Court, with a view to settle more authoritatively the nature and extent of its powers, appointed the proceedings to be laid before the other Judges, who returned this opinion:

Opinion of
Consulted
Judges.

Lord President, Lords Balgray, Gillies, Mackenzie, Corehouse, Fullerton, Moncreiff, Jeffrey and Cockburn.—We are of opinion that the prayer of this application may be, and ought to be granted, as absolutely necessary to save the estate of the pupils from being torn to pieces by the diligence of creditors, one of whom has already taken steps preparatory to leading an adjudication, and which would have the necessary effect of forcing other creditors to adopt similar measures.

The power of the Court to appoint persons, under the name of factors *loco tutoris*, to manage the estates of persons who, from various causes, are not capable to manage their own affairs, and have no proper tutors or mandataries for that purpose, seems to rest on consuetudinary law, now of very considerable standing.

There is a case in the books as far back as the 30th June 1708, Lin, in which such factor had applied to the Court for extraordinary powers, which, however, in that case, was refused, apparently from the nature of the application, because the authority prayed for fell under his ordinary powers.

And the Act of Sederunt 1730 proceeds on the narrative, 'That the Lords have been *often* applied to for appointing factors on the estates of different persons' not capable of managing their own affairs; so that the power of the Court to name such tutors is now firmly established; and the Act of Sederunt 1730 was passed, to regulate the *ordinary* duty and responsibility of such factors.

With regard to matters not falling under the ordinary duty of

such factors, but where it appeared to them that the interest of the estate under their management required that their powers should be enlarged by the Court, the form has been to apply by summary petition, setting forth the object in view, and praying the Court to grant authority for the desired purpose. On such petition the Court orders the petition to be intimated on the walls of the Court, and in many cases to be served on the nearest relations, that they may object if they see cause. In one case, the Court refused to grant the power craved, (of renouncing a lease,) on a summary petition, and superseded it till an action of declarator was brought; which being done, and a report by persons of skill having been obtained, the prayer of the original petition was granted; 7th July 1829, Carriek. But in general such a course has not been thought necessary, and any information which the Court thought requisite has been taken on the summary petition; see case of Meikle, 7th March 1823, which also related to renouncing a lease; and many other cases appear in the books, where the extraordinary powers craved were granted on the summary petition.

6 Feb. 1836.

Sommerville
and Others,
Petitioners.Opinion of
Consulted
Judges.

In short, wherever it has been made appear to the Court that the power craved was either necessary to prevent serious loss to the estate, or expedient in order to procure evident and positive advantage, or where the interest of third parties connected with the estate, as, *e. g.* in the relation of superior and vassal, &c. the Court has been in the constant practice of granting the power necessary for accomplishing the object set forth in the petition.

Even where only a contingent benefit was in view to the existing estate, and where there was no absolute necessity for the power, and no positive loss would have accrued from the refusal of it, the Court nevertheless granted the power craved. The factor loco tutoris on the Duke of Buccleugh's estate having applied for power to make a purchase of particular lands, it was granted; 10th Jan. 1758, Craigie, petitioner.

Therefore, as the power now craved will not only prevent loss to the estate, but must prove positively advantageous, by enabling the tutor to pay off a number of small debts, by means of the sum to be borrowed, we are of opinion that the prayer of the petition ought to be granted.

The Court, upon advising the proceedings, with the above opinion, *decerned* in terms of the prayer of the petition. Judgment.

For Petitioners, *Milne.**John Morison*, Solicitor.*T. Clerk.*

R.

FIRST DIVISION.

No. LXXXIII.

9th February 1836.

MRS MUNRO OR ROSS AND HUSBAND
against
 DRUMMONDS.

TAILZIE.—(REGISTRATION).—ST. 1685, c. 22.—ADJUDICATION.

—A decree of adjudication of an entailed estate, proceeding upon debts contracted by an heir in possession, and infest, under the fetters of a strict but unrecorded entail, found effectual to attach the estate, although not obtained until after decrees of forfeiture had been pronounced in a declarator of irritancy and contravention brought against the debtor, at the instance of a substitute heir, after the entail had been recorded.

Narrative.

THE facts of this case will be found in the former report, 11th June 1828, vol. iii. 990. The decision which was then given having been carried by appeal to the House of Lords, the following judgment was pronounced:

Judgment of
House of
Lords.

‘Die Martis, 30. Augusti 1831. After hearing counsel, &c. it is declared, by the Lords Spiritual and Temporal in Parliament assembled, That the registration of the deed of entail, prior to the date of the decrees of constitution and adjudication, does not in this case bar the claims of the creditors, in respect of debts contracted prior to such registration; and with this declaration it is ordered and adjudged, that the cause be remitted back to the First Division of the Court of Session in Scotland, to proceed therein as shall be just, and consistent with this declaration, it not being the intention of this House to give an opinion upon any other points arising between the said parties in this cause. (Signed) W. COURTENAY, Dep. Cler. Parliamentar.’

This judgment having been applied by the Court, a new record was framed, with a view of exhausting all the points remaining; from which it appeared, inter alia, that an action of wakening and transference of the action of declarator of irritancy had been raised, and was now in dependence.

The cause was reported by the Lord Ordinary, upon cases.

Pursuer's
pleas.

The pursuers *pleaded*—That a decree of irritancy or forfeiture carries the estate to the party obtainer, if not from the date of the

act of contravention, at least from the date of the decree itself; and in accordance with all the analogous cases of forfeiture, it frees the heir pursuing and the estate from the whole debts of the contravener; *Stair*, iv. 18. 6. and iv. 4. 27; *Ersk.* iii. 8. 32; *Mackenzie's Works*, ii. 488; Gordon of Carleton, 14th Nov. 1749, *Mor.* 15,384 :—That the defenders' decree of adjudication having been obtained after the pursuer had obtained decree of declarator of contravention and irritancy against Alexander Ross, that adjudication is null and ineffectual against the estate.

9 Feb. 1836.

Mrs Munro or
Ross and Hus-
band v. Drum-
monds.

Pursuers'
Pleas.

The defenders *pleaded*—That, in the circumstances, there was no subsisting decree of irritancy, (*Sundford on Entails*, p. 297); that the principle on which the judgment of the House of Lords in the present case stands, is, that before an entail is perfected by registration, the heir in possession is to be regarded as proprietor in fee-simple, and that his estate is as much attachable for his debts as if there had been no limitation or restriction in his titles. Therefore, even assuming that a valid decree of irritancy had been obtained before the debt was made real, an adjudication, following on a debt contracted by a person, who, in regard to third parties, is in the eye of the law unlimited fiar, can as little be reduced on the ground of a prior decree of irritancy, as on that of a subsequent registration of the entail; *Willison v. Creditors of Dorator*, *Mor.* 15,371; *Hall v. Cassie*, 17th Feb. 1726, *Mor.* 15,373; *Graham v. Executor of Graham*, 13th May 1795, *Mor.* 15,440; *Creditors of Smollet v. Smollet*, 14th May 1807, *Fac. Coll.*

Defenders'
Pleas.

The Court was of opinion that an entail not registered is of no force, in reference to any third party contracting with an heir who is in possession of the entailed estate: That the substitutes of entail have, in reference to such creditors, no rights whatever founded on the entail; and debts so contracted by such heirs are in the same situation as entailer's debts: That creditors in such debts cannot be affected by any subsequent registration of the entail, which, in reference to them, has no warrant; nor by any proceedings upon the entail, which, in reference to such creditors, are entirely ineffectual, and such as they are not bound to acknowledge, no matter to what extent these proceedings may have gone: That the principle of the decision in the case of *Smollet* went that length, since there, after the contraction of personal debt by an heir of entail, the entail was registered; and after the registration the estate was brought to judicial sale by the creditors, in spite of the fetters, on the principle that, in respect to the creditors, the entail was as if it never had existed, nor any thing been done upon it: That this

Opinion of
Court.

9 Feb. 1836.

*Mrs Munro or
Ross and Hus-
band v. Drum-
monds.*

Judgment.

principle must equally apply in the present case to the decree of forfeiture, or any other proceedings which did or could follow on the entail, in reference to creditors who contracted while the entail was still unregistered.

The *Court* pronounced the following interlocutor:

‘The Lords having advised the revised cases, find, that the dependence of the conjoined processes of declarator of irritancy and contravention against Alexander Ross, and the interlocutor or alleged decree founded on, do not bar the claims of the defenders against the entailed estate, in respect of debts contracted prior to the date of recording, in the Register of Tailzies, the entail of the estate of Cromarty, and do not affect the decrees of constitution and adjudication in favour of the defenders; therefore to that extent sustain the defences, and repel the reasons of reduction, and decern; and with this finding remit to the Lord Ordinary to proceed further in the case.’

Lord Ordinary, Fullerton.
Keay, A. Anderson.
D. Clerk.

Act. Dean of Fac. (*Hope,*) Graham Bell. Alt.
Horne & Rose, W. S. A. & C. Douglas, W. S. Agents.

C. R.

SECOND DIVISION.

No. LXXXIV.

9th February 1836.

Miss EUPHEMIA KERR

against

ALEXANDER COCHRAN AND OTHERS.

TAILZIE.—(OBLIGATION ON SUBSTITUTES FOR PROVISIONS BY ENTAILER.)—(*Sequel of the case, Ashkirk Entail; see vol. x. p. 423.*)—*Found, that Archibald Cochran, and all the heirs of entail substituted to him by the deeds of entail of the estates of Ashkirk, and other lands in their order, as they may successively succeed to, and obtain possession of the entailed estates, are bound, as a condition of their holding the entailed estates, and drawing and enjoying the rents and proceeds thereof, according to their respective rights and interests, or as an obligation consequent thereupon, to satisfy or pay the provisions made and granted by Archibald Cochran, the entailer, by his general settlements, with interest, in so far as not satisfied and paid before the succession of such heir.*

THE cause having been remitted to the Lord Ordinary, in terms of 9 Feb. 1836.
the interlocutor of 10th March 1835, (*F. C.* vol. x. p. 423,) his
Lordship pronounced the following interlocutor and note :

Kerr v. Cochran and Others.

Lord Ordinary's Interlocutor.

‘ The Lord Ordinary having considered the record as closed on
‘ the summons and defences, and the interlocutor of the Court, and
‘ having heard parties’ procurators on the remaining point in the
‘ cause, Finds and declares, that Archibald Cochran, and all the
‘ heirs of entail substituted to him by the deeds of entail of the estates
‘ of Ashkirk, and other lands in their order, as they may successively
‘ succeed to, and obtain possession of, the entailed estates, are bound
‘ and obliged, as a condition of their holding the said entailed estates,
‘ and drawing and enjoying the rents and proceeds thereof, accord-
‘ ing to their respective rights and interests, or as an obligation con-
‘ sequent thereupon, to satisfy and pay the provisions or bequests
‘ made and granted by Archibald Cochran the entailer, by his ge-
‘ neral settlements to and in favour of the pursuer, with the lawful
‘ interest due thereon, in so far as the same may not have been satis-
‘ fied and paid before the succession of such heir, and decerns ac-
‘ cordingly : But reserves all questions as to the effect and appli-
‘ cation of this finding and decerniture in regard to any individual
‘ heir-substitute who may succeed to the said estates when the right
‘ of succession may open to him or her : Finds no expenses due to
‘ any of the parties.’

Note.—‘ The Lord Ordinary can see no question remaining to *Note.*
‘ be determined upon this record, but the abstract question involved
‘ in the demand of a declaratory finding and decree, that, by the
‘ legal construction of the entailer’s settlements, an obligation is
‘ laid on all the heirs of entail successively to pay the pursuer’s pro-
‘ visions, in so far as they may not have been paid before the suc-
‘ cession of any heir ; and to that only he has directed his attention.

‘ The Court have decided that the provisions cannot be made the
‘ grounds of adjudications against the entailed estate. The Lord
‘ Ordinary takes that judgment, and the principles of it, as con-
‘ clusive against the first point in this declarator. But the question
‘ as to the personal liability of all the heirs in their order is left
‘ distinctly and expressly open. Neither is there the slightest in-
‘ consistency between the finding that the entailed estate cannot be
‘ affected, and the supposition that all the heirs may be successively
‘ liable. An example of this may be seen in this very deed of en-
‘ tail, (*Ap. 16.*) where it is declared, with regard to the provisions
‘ for wives and children, that the fee of the estate shall not be
‘ affected for them ; but at the same time, that one-third of the free
‘ rents, ‘ and the persons of the heirs or substitutes in fee or life-
‘ rent,’ &c. and all other estates belonging to them, shall be liable

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Note.

‘ to execution for such provisions. And a question precisely of
 ‘ this nature occurred in the case of *Erskines v. The Earl of Mar*,
 ‘ July 7. 1829.

‘ The question, then, is, whether, upon a sound construction of
 ‘ the settlements of Archibald Cochran, an obligation was laid on
 ‘ all the heirs of entail to pay the provisions made by those settle-
 ‘ ments in favour of the pursuer, and other persons similarly si-
 ‘ tuated? It is a clear principle, which was fully recognised by the
 ‘ Court in deciding the other question, that all the deeds of settle-
 ‘ ment made by the entailer must be considered together. Archi-
 ‘ bald Cochran had the unlimited command of all his property.
 ‘ He executed the three material deeds,—the deed of entail of Ash-
 ‘ kirk, &c., the entail of the lands in the county of Edinburgh, and
 ‘ the general settlement, on the same day, the 3d August 1809.
 ‘ These deeds bear express reference to one another; at least the
 ‘ general settlement proceeds upon the express narrative of the en-
 ‘ tail executed at the same time, and bears the most pointed refe-
 ‘ rence to it in many points. The entail, from the nature of such
 ‘ deeds, is made in a perfectly simple form, by disposing and oblig-
 ‘ ing the granter to resign the lands for new infestment to himself
 ‘ in liferent, and his son in fee, and to the heirs of entail meant to
 ‘ be called, under all the usual conditions of a strict entail, and with
 ‘ reserved powers to the heirs. But the entailer reserves to him-
 ‘ self full power to alter or revoke the settlement, or to sell, alienate
 ‘ or *burden*, &c. at his own pleasure. But though the entail is thus
 ‘ simple in form, there can be no doubt, in point of law, that it was
 ‘ perfectly competent for the entailer, by any deed expressive of
 ‘ his will, and more especially by a deed made at the same time, to
 ‘ lay upon all or any of the heirs of entail, called as his gratuitous
 ‘ donees, and that either primarily or subsidiarily, any obligations
 ‘ which he might think fit to impose; and that he could do this
 ‘ while the fee of the entailed estate was preserved entire, is equally
 ‘ clear.

‘ Archibald Cochran had other valuable estates and property, and
 ‘ he designed to provide for the payment of his own debts, and for
 ‘ the comfort of the younger members of his family. With this
 ‘ view, he executed the general deed of settlement, by which he
 ‘ conveys that property to his son, whom failing, to the other per-
 ‘ sons mentioned, under the burden of payment of his debts, and
 ‘ under the burden also of the provisions therein expressed, which
 ‘ were afterwards increased by the two codicils of later dates. It
 ‘ may be taken to be quite clear, as matter of intention, that the
 ‘ testator meant that these provisions should, in the first instance,
 ‘ be paid from the property conveyed by this general settlement,

‘and by the party who might obtain possession thereof. By the judgment of the Court, it must be taken as settled also, that he intended to preserve the fee of the estate untouched; and by some words which occur in the important clause on page *six*, it may be assumed that he believed the separate property to be *nearly* sufficient for answering all those burdens.

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 ———
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‘But the testator may be presumed to have foreseen that the provisions might not be paid by his immediate heir taking the whole property. By many accidents, the unentailed estate and effects might not at his death be sufficient, or even *nearly* sufficient. He might suffer losses, or he might have miscalculated the value of such property, as many other testators have done. His immediate heir might be of an improvident character, and the effects in his own hands might be spent or carried off by his own creditors, before his near relations, naturally more abstinent, could render their debts effectual; and he might die at an early period, leaving his affairs in embarrassment, and the other members of the family exposed to the utmost difficulty, or placed in an impossibility of recovering their provisions from his estate. However fixed, therefore, the testator’s intention and belief might be, that the provisions should be paid by his first heir, and that out of the separate funds conveyed, nothing can be more probable or rational than that he should not intend to leave his other children to depend absolutely on that probability, or that he should provide that the obligation for their provisions should attach to all the heirs of entail successively. The question is, whether he has expressed his intention to this effect or not.

‘This depends mainly on the clause on page *six* of the general settlement. The clause is preceded by the mention of a particular provision, and a restriction of it. But notwithstanding this, it is plainly substantive and declaratory as to all the provisions. It is out of all question for any court to hold so pointed a clause *pro non scripto*. It must receive effect according to the true meaning expressed in it, as well as the Court can find that meaning. And though there may be some confusion in the form of it, the Lord Ordinary is of opinion that it does explicitly declare the testator’s understanding and intention, that *every* heir of entail *accepting of the entailed estate*, whether succeeding to any other property or not, should be bound to satisfy *every* debt, obligation, *provision*, or *bequest created or contracted by the testator*, or *incumbent on him*, so that *the same should cease to exist*. It is introduced by a declaration, that whereas the fee-simple of the estate given to his son might be ‘*nearly adequate*’ to the special burdens, &c. as well as the restricted provision immediately before alluded to,

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‘therefore, &c. Now, it is justly argued that this expression, “nearly adequate,” necessarily implies that the testator had it in his mind that they *might not* be quite adequate. But if he was looking at that possibility, the conclusion is inevitable, if there are words following of sufficient force, that the very thing he intended by the clause was to declare a general and ultimate liability of all the heirs of entail, so as to secure the full payment of the provisions in all events; and if he intended this generally, it will be very difficult to limit the obligation.

‘Upon that narrative what does he declare? ‘Therefore my said son, by *accepting* hereof, OR *my entailed estates*, IN TERMS OF THE SETTLEMENTS THEREOF, AND THE HEIRS SUCCEEDING TO HIM THEREIN, stand pledged and engaged, as aforesaid, to *satisfy* and procure discharges and extinctions of every debt and obligation, *provision and bequest of every description, created or contracted by, or incumbent on me, and that in such habile, proper, and effectual manner as that the same shall hereafter cease to exist, or afford action and execution against my entailed estates.*’ From the last words, an implication was deduced, that he meant his entailed estates to be liable. But the Court have held that such an *implication* is not warranted or is not sufficient, there being no direct declaration that the entailed estates should be liable to be attached for the provisions, or for any thing but debts which by law affected them. But this is not the state of the question as to the liability of the *heirs* of entail. As to *them*, there is a direct declaration of an obligation imposed; and the Lord Ordinary cannot construe the clause otherwise than that they were all to be liable generally, *by their acceptance of the entailed estate*, for the provisions and bequests, as well as for debts. It is plainly said, that the testator’s son, *either* by ‘*accepting hereof*,’ or by accepting of ‘*my entailed estates* in terms of the settlements thereof,’ shall be so liable, the obligation being created by *either* fact. Then the words are added, ‘*and the heirs succeeding to him therein*,’ plainly designating the heirs succeeding to him in the entailed estate. And the clause bears, that *all these heirs* ‘stand pledged and engaged as aforesaid to *satisfy*,’ &c. The defender insists much on the words ‘as aforesaid,’ as if they so qualified the clause as to make it import no more than a repetition of the obligation previously laid on the disponees of the general settlement. But this will not do. Why introduce *the entailed estate*—the settlement of the *entailed estate*—“the heirs succeeding to him (A. Cochran) therein?” There must have been a definite meaning in this. They are declared to *stand pledged and engaged*; and this cannot be extinguished by the words ‘as aforesaid.’ The Lord Ordinary reads these words very differently. In so far as they may have been meant to have any

‘particular force, this seems to be the import: ‘*In the same manner as I have already declared, that the disponees in this settlement, by accepting thereof, shall be subject to the burdens, so I now declare that my son, either by accepting it, or by accepting the entailed estate, and also all the heirs succeeding to him, shall stand pledged and engaged,*’ &c. It is the declaration of what the testator meant and understood to be the *engagements of all his heirs*, whether under one deed or under another.

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—
Nota.

‘This is the view which the Lord Ordinary takes of the clause, and he sees nothing in any other part of the deed which can take away what appears to him to be the only construction of which the clause will admit, giving effect to every word of it. The testator probably thought that the *burden would be very light*, which may be the meaning of the narrative. But that will not alter the legal effect of the obligation expressly created. The Lord Ordinary will only further observe, that, though the case of Macdonald, May 29. 1832, may not be precisely of the same kind, the judgment which laid the provisions on the succeeding heirs of entail, *without relief* against the executors of the first heir, is in his opinion, much stronger than any thing that is called for in the present case.

‘The counsel of the defender urged very anxiously on the Lord Ordinary an argument to shew that the pursuer was barred from insisting in this action, in consequence of her not having duly proceeded against the unentailed estate, and discussed the estate of Archibald Cochran; and it was confidently stated that the provisions constituted real burdens on the unentailed estate, and that this was even admitted by the trustee in his defences in this cause. The Lord Ordinary has not neglected that argument; but he thinks that there is no such question before him, and that, so far as there are data on which he could judge, it is not sound to the effect which must be maintained, 1st, There is no such plea in this record, the *pleas* stated in the defences being confined to the construction of the deeds of settlement. 2d, The Lord Ordinary does not find that the Court decided on any such ground, when they found the estate not liable. 3d, The conclusion of the summons is merely declaratory, and is not at all affected by such a plea, which must first assume that the obligation was laid on all the heirs of entail. The *effect* of this otherwise is not within this declarator. 4th, So far as the Lord Ordinary can judge, it rather appears that the pursuer did claim a preference in the ranking with Archibald’s creditors, and that the claim was disallowed by a judgment of the Court. But the point not being raised in the record, and the facts not being distinctly brought out, he may be mistaken in this. But, 5th, If he were to judge of a question

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‘not raised, and which cannot be decided, he should be inclined to think, as at present advised, that the provisions were not made real burdens on the unentailed estates, and that what is supposed to be an admission of it is not an admission of any such thing. The estates were indeed conveyed *under the burden* of the debts and provisions, and the precept of sasine is also under the burden of them. But the question of *real burden* depends on other considerations. The trustee’s plea is upon mora simply. Yet even he does not state either this or the other point in the *pleas* subjoined to his defences. The reverse of the assumed admission seems to be stated in his *minute*.’

Archibald Cochran *reclaimed*, and *pleaded* an exemption of liability, on the ground of the pursuer’s mora in making her provisions effectual. Miss Kerr also *reclaimed*, craving expenses.

Opinion of Court.

The Court held, that, under the reservation in the interlocutor, it would be open for the defender and any other substitute heirs to plead all specific objections to their being held individually liable for these legacies.

Judgment.

Reclaiming note *refused*. No expenses found due.

Lord Ordinary, Moncreiff.
(Hope,) Milne.
Clerk.

Act. Rutherford, Ivory.

Alt. Dean of Fac.
W. S. Agents. R.

R.

FIRST DIVISION.

No. LXXXV.

11th February 1836.

CHARLES ELPHINSTON, PETITIONER.

POOR’S ROLL.—ACT OF SEDERUNT, 16TH JUNE 1619.—(CERTIFICATE OF POVERTY.)—*A certificate of poverty, signed by the Minister and Elders of a Relief Congregation, found insufficient.*

IN this case a petition was presented for the benefit of the Poor’s Roll, and a certificate of poverty was lodged, signed by the Minister and Elders of a Relief Congregation. The Court refused the petition as incompetent, on the ground that the act required a certificate under the hands of the minister and two elders of the parish where the petitioner resides.

S. Clerk.

C. R.

FIRST DIVISION.

No. LXXXVI.

12th February 1836.

JOHN CHRISTIE
against
 JOHN HARLEY.

PROOF.—(ONUS PROBANDI.)—BILL OF EXCHANGE.—*A party having charged on a bill to which he had acquired right from the suspender, upon a transaction in which he had retained more than the legal discount; and the charger alleging that he had retained the difference, as the price of certain articles which he had purchased for the suspender on his employment; whilst the suspender denied this statement, and alleged that the sum thus retained was a premium for guaranteeing the solvency of the acceptors of the bill;—found, that the onus of proving the cause of retention lay on the charger, and that the suspender was not bound to disprove the alleged cause of retention.*

In May 1833, John Christie, the suspender, applied to John Har- Narrative.
 ley, the charger, to discount two bills, one for L.80, and the other for L.90. The first of these was discounted by the charger at the usual rate; but from the second, L.8, 7s. was kept back, being L.6 : 19 : 10 more than the legal rate of discount.

The acceptors of the latter bill having become bankrupt, the charger, who had retired it, on its being protested by the National Bank, to which he had transferred it, gave the suspender a charge of horning for payment of the said bill, and subsequently advertised a sale of his effects.

The suspender thereupon brought a bill of suspension and interdiction, which was passed. In the reasons of suspension, he alleged that the charger was in the custom of guaranteeing, at a certain rate, the solvency of acceptors of bills; and pleaded, that as the sum retained out of the L.90 bill, over and above the legal discount, was retained on the understanding by both parties that it was a premium for guaranteeing the solvency of the acceptors, it was incompetent for the charger to claim payment of the bill from him, the suspender; and alternatively, if that arrangement was denied, then he pleaded that the bill could not be sued upon by the charger, in respect he obtained it by a usurious transaction.

The charger denied that he was in the custom of guaranteeing bills,

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Christie v.
Harley.

Narrative.

or that he guaranteed the solvency of the acceptors of the one in question, and alleged, that he advanced the money merely on the security of the bill; and that the sum retained above the legal discount was the price of some herrings, butter, and a pair of boots, which, at breakfast one day, the suspender had commissioned him to buy for him. In his answers, he relinquished his claim to the extent of L.6 : 9 : 4, and pleaded, that being a bona fide onerous holder of the bill charged on, the letters ought to be found orderly proceeded to the extent as thus restricted.

The Lord Ordinary pronounced the following interlocutor:—
 ‘ The Lord Ordinary having heard counsel for the parties, in respect it is denied by the suspender that the sum retained by the charger, over and above the legal rate of interest on the bill in question discounted by him, was retained for the purposes set forth in the record, allows the charger a proof of his allegations on that point, and to the suspender a conjunct probation; grants commission to to take depositions of the witnesses and havers, and grants diligence.’

Charger's
Plea.

The charger *reclaimed*, and *pleaded*—That this interlocutor was erroneous, in as much as it threw the onus of proof on him instead of the suspender: That he was ready to take payment of the bill, under deduction of the sum in dispute, and he had restricted his claim accordingly:—an offer to which the suspender would not accede, but refused to pay any thing, and called upon him, the charger, to prove his statement: That this was unreasonable; for after the charger had thus restricted his claim, it surely lay on the suspender to prove why he should not pay the rest of the bill: That it might be impossible to prove his, the charger's, alleged reason for the retention, as the order had been given in private.

Suspender's
Plea.

The suspender *answered*—That as the charger had discounted the bill, and admitted the retention of a sum greater than the legal discount, the onus probandi lay upon him; 1. *Bell's Com.* 310.

Judgment.

The Court adhered, with expenses.

Lord Ordinary, Corehouse. Act. Sol.-Gen. (Cunninghame,) D. Milne. Alt. Dean
 of Fac. (Hope,) A. M'Neill. James Marshall, S.S.C. and C. F. Davidson,
 W.S. Agents. B. Clerk.

C. R.

SECOND DIVISION.

No. LXXXVII.

13th February 1836.

JAMES FAIRLIE
against
 DANIEL M'GOWN.

ARBITRATION. — (JUDICIAL REFERENCE.) — PROCESS. — (EXPENSES.)—*The parties to an action having, on the day of trial, and in presence of the Court, by mutual minute signed by them, submitted 'the whole cause' to the determination of a third party; and the referee having decerned in the pursuer's favour for a certain sum, and also decerned generally for expenses, of which he appointed an account to be given in to the Auditor of Court, that he might report to the Court on the said expenses,—found, upon the objection of the defender, (1.) That this was a judicial reference of the whole cause, and that the Court was entitled to interpose its authority to the award of the referee. (2.) That the pursuer was entitled, under the reference and the award of the referee, confirmed by the Court, to the expenses of the reference, as well as those incurred previous to the date of the reference.*

PROCESS.—(COUNSEL'S FEES.)—*Question as to fees paid to counsel attending examination of havers previous to trial. Fee allowed in the present instance.*

THIS was an action at Mr Fairlie's instance, for himself and the other executors of the deceased John Fairlie, writer and accountant in Edinburgh, for payment of L.71, 10s., or such other sum as should be found to be a fair remuneration to the deceased as an accountant, for preparing a report or state of accounts, on the employment of the defender, for the purpose of being lodged in a process of count and reckoning, to which the defender, M'Gown, was a party. Narrative.

In defence against this action, the defender denied the employment of John Fairlie as an accountant doing business on his own account, and averred, that the state was prepared by the defender himself, who is a S. S. C., and that Fairlie had nothing to do with the preparation of the state, except as a temporary clerk of the defender.

The Lord Ordinary, after hearing parties on the closed record, appointed the cause to be tried before a Jury, on the following

13 Feb. 1836. issue: ' Whether, in the course of the year 1818, the defender employed the said John Fairlie as an accountant, upon his own account, to prepare and make out the state of accounts, No. 10. of process; and whether the said John Fairlie, acting as aforesaid, prepared or made out the said state; and whether the defender is indebted and resting owing to the pursuer in the sum of L.71, 10s., or any part thereof, with interest thereon, on account of the said business?'

Fairlie v.
M'Gown.

Narrative.

The cause was put down for trial, and the parties were in Court, ready to proceed on the day fixed, when they agreed, in consequence of the indisposition of the presiding Judge, to enter into a judicial reference, by the following minute, which was written by one of the counsel, and signed by the parties:

' The parties agree to refer the whole cause to Alexander Douglas, W. S. as judicial referee.

(Signed) ' JAMES FAIRLIE.
' DAN. M'GOWN.'

This took place in presence of the presiding Judge; but no interlocutor or order of Court was pronounced.

The reference was accepted by Mr Douglas, before whom a long proof was led, and counsel heard thereon, after which he pronounced the following award: '*Edinburgh, 13th November 1835.* I, Alexander Douglas, writer to the signet, having accepted of the above judicial reference, and having, in presence of the parties, their counsel and agents, taken proof viva voce on the part of the pursuer, and also on the part of the defender, and having considered the same, and documents produced by both parties in support of their respective averments, issue and whole process, and having heard counsel fully thereon, and having God and a good conscience before my eyes, find, that in the year 1818, the defender employed the late John Fairlie, the pursuer's brother, as an accountant, upon his own account, to prepare and make out the state of accounts, No. 10. of process, and that the said John Fairlie, acting as aforesaid, prepared and made out the said state, and that the defender, Daniel M'Gown, is indebted, and resting and owing the pursuer, James Fairlie, one of the nearest of kin of the said John Fairlie, and acting for the nearest of kin of the said John Fairlie, in the sum of L.40 sterling, with interest from the 13th day of November 1832, on account of the said business, the pursuer confirming before extract: Finds the defender, Daniel M'Gown, liable in expenses to the pursuer, James Fairlie, with exception of the expense incurred in consequence of the pursuer's title not having been originally produced; allows an account there-

‘ of to be given in, and when lodged, remits to the Auditor to tax
 ‘ the same, and thereafter to report to the Court, with these find-
 ‘ ings, so that decret may be interponed in terms hereof.

13 Feb. 1830.

Fairlie v.
M'Gown.

‘ ALEX. DOUGLAS.’

Under the remit contained in the referee's award, the Auditor proceeded to tax the account of expenses, in which the pursuer's agent included the expense incurred under the reference. At the auditing, the defender put in a written minute, objecting to the power of the referee to award expenses, at all events the expense incurred under the reference. This objection was reserved by the Auditor to be disposed of by the Court.

The Auditor's report having been moved in Court, and also a motion made, that the Court interpose its authority to the award of the judicial referee, to repel the reserved objection, and decern in terms of the Auditor's report on the whole expense,

Thomson, for defenders, objected to the powers of the referee to decern for that part of the expenses incurred during the proceedings in the reference. A reference of the whole cause might have entitled Mr Douglas to pronounce an award, and also to dispose of the question of expenses incurred previously to the reference, but not farther. But here he had decerned, not only for the expenses in the cause, but also those incurred in the submission or reference. The case of *Berry*, 15th Dec. 1827, 6. Sh. 256, was an authority in the pursuer's favour, that an arbiter has power to award expenses, without any special clause to that effect in the submission. But Lord Fullerton had lately pronounced a contrary decision, not carried to the Inner-House; and in an English case, *Firth v. Robinson*, in 1. *Barn. and Cress.* 277, this point occurred, an arbitrator appointed by the Court having awarded the expenses in the cause, as well as those in the arbitration, the Court of King's Bench refused to sanction the award. Therefore, (1.) The Court could not now interpose its authority, as the cause had been taken out of Court not by a judicial reference; and, (2.) Expenses of reference ought not to have been decerned for.

Defenders'
Pleas.

M'Neill.—As to the interponing of the authority of the Court, it is clear that this was a judicial reference, or a reference of the whole cause to a referee, made in presence of, and with the knowledge and sanction of the Court. While the proceedings were before Mr Douglas he was judicial referee, acting in place of the Court and Jury. As to expenses, a reference of the whole cause sanctioned the finding; and *Berry's* case was confessedly an authority, against which no case decided in this Court could be brought. As to the

Pursuer's
Pleas.

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McGown.

English case referred to, the law of arbitration was so different in England, that the Court here could scarcely venture to look upon the case as a precedent in favour of either party.

Opinion of
Court.

Lord Justice-Clerk.—I think it would be a dangerous precedent not to interpose the authority of the Court to this award; for, after this cause had been put down for trial, the cause called on, and parties ready to proceed, they agreed, in the presence of the Court, to refer the whole cause to Mr Douglas. The minute was written by the counsel for one of the parties, and signed in Court by the parties themselves. I am therefore for interposing the authority of the Court to what has been done under the sanction of a reference made in a cause depending before it.

As to the expenses, it is all one whether the referee or the Court awarded these. A sum has been found due, and it followed that the pursuer should also get the expenses fairly incurred in obtaining that decree. Mr Douglas has done his duty in pronouncing this award, and we should give effect to it.

Lord Glenlee.—There is in point of fact no decree for any sum of expenses by the referee: there is merely a finding of expenses, and a remit to the Auditor to report to the Court. There was here a reference to a party as judicial referee, one of the necessary conditions of which reference was, that the party found to be in the right should get his expenses. The object of the reference was to save trouble, and, if possible, delay and expense. The arbitrator, in plain obedience to the precise terms of the reference, instead of decerning for a particular sum of expense, remits to the Auditor to report to the Court. This is the true question.

Lord Meadowbank.—I think the fair intention of the parties was that this should be a judicial reference. As to the expenses, I also concur. There is another case in point, *Banks v. Smith*, 15th June 1830.

Lord Medwyn.—I agree. As to the law of arbitration in England, I am jealous of any reference to the law on that subject there. A judicial reference does not take the matter out of Court. As to the minute not being signed by the Judge, the Judge does not, by signing, interpose the authority of the Court; he merely verifies the fact of the reference. There is no doubt here of the reference. Mr Douglas himself views it as a judicial reference, for the award, sets out thus: ‘I, A. D. having accepted of the above ‘judicial reference,’ and goes on to find what verdict ought to have been pronounced, finds expenses due, and remits to the Auditor to report. The parties come before us to have these findings applied. I have no difficulty in holding that the Court must interpose its authority.

The Auditor having disallowed a fee to the pursuer's counsel for attending an examination of havers previous to the trial, in which he was occupied part of two days, besides arguing the matters in dispute before the Commissioner,

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M'Neill objected to the report. No stage of the process was more important, and the party had a material interest in being duly advised in this part of the proceedings.

Objection to
Counsel's Fee.

The Court thought the Auditor should report specially upon this point.

The following interlocutor was pronounced :

Edinburgh, 11th February 1836.—‘ The Lords having considered the award of Alexander Douglas, W. S. the judicial referee, interpose their authority thereto, and in terms thereof decern against Daniel M'Gown, defender, for payment to James Fairlie, pursuer, one of the nearest of kin of John Fairlie, deceased, and acting for the other nearest of kin of the said John Fairlie, of the sum of L.40 sterling, with interest from the 13th November 1832, the pursuer confirming before extract; supersede consideration of the Auditor's report on the account of expenses, until the Auditor reports specially to the Court on the objection stated by the pursuer against his taxing off the fee to counsel for attending at the examination of havers.’

In obedience to this remit, the Auditor returned the following report :

Edinburgh, 12th February 1836.—‘ In terms of the above interlocutor, the Auditor humbly reports, that the reason for taxing off the fee to counsel for attending at the examination of havers is, that, by the practice of the Court for a great many years, fees to counsel have not been allowed for attending the examination of havers, except in such cases as, from some particular circumstances, the presence of counsel may have been necessary. Few of such cases occur, and it did not appear to the Auditor, that, in the present instance, there was any ground for a departure from the ordinary rule.’

The report of the Auditor was this day moved, when the Court sustained the fee in this case, Lord Meadowbank at the same time being inclined to hold as a general rule, that the attendance of counsel being necessary at so important a stage in the preparation of the cause, fees for such attendance ought to be sanctioned.

Edinburgh, 13th February 1836.—‘ The Lords having resumed consideration of this account of expenses, with the Auditor's reports thereon, of 18th December last and of the 12th day February instant, In respect of the circumstances of the case, sustain the objection stated on the part of the pursuer, and decern for payment of the sum of L.227, 15s. with the expenses of ex- Judgment.

13 Feb. 1836. 'tract; find the pursuer entitled to the expenses incurred by him
 Fairlie v. 'in the discussion relative to this account of expenses, and appoint
 M'Gown. 'an account thereof to be lodged, and remit to the Auditor to tax
 'the same and report.'

Act. M'Neill and Wilson. Alt. Deas of Fac. (Hope,) and R. Thomson. Thos.
 Baillie, S.S.C. and W. Hunt, W.S. Agents. Mr Russell, Clerk.

R.

SECOND DIVISION.

No. LXXXVIII.

13th February 1836.

SAMUEL ASBURY

against

JOHN W. BELL.

JURISDICTION. — PROCESS-CRIMINAL. — STATUTE 4. GEO. IV.
 c. 34.—*Found, that proceedings under the above act are of criminal
 process, and not cognisable in the Court of Session.*

Narrative.

By the 4. Geo. IV. cap. 34, sect. 3, it is enacted, that if 'any
 'servant in husbandry, or any artificer, calico-printer, handcraft-
 'man, miner, collier, keelman, pitman, glassman, potter, labourer,
 'or other person, shall contract with any person or persons whom-
 'soever, to serve him, her, or them, for any time or times what-
 'soever, or in any other manner, and shall not enter into or com-
 'mence his or her service, according to his or her contract, such
 'contract being in writing, and signed by the contracting par-
 'ties, or having entered into such service, shall absent himself, or
 'herself, from his or her service, before the term of his or her
 'contract, whether such contract shall be in writing or not in writ-
 'ing, shall be completed, or neglect to fulfil the same, or be guilty
 'of any other misconduct or misdemeanour in the execution thereof,
 'or otherwise respecting the same, then, and in every such case,
 'it shall and may be lawful for any Justice of the Peace of the
 'county or place where such servant in husbandry, artificer,' &c.
 'shall have so contracted, or be employed, or be found, and such
 'Justice is hereby authorised and empowered, upon complaint
 'thereof, made upon oath, to him, by the person or persons, or any
 'of them, with whom such servant,' &c. 'shall have so contracted, or
 'by his, her, or their steward, manager, or agent, which oath such
 'Justice is hereby empowered to administer, to issue his warrant for
 'the apprehending every such servant,' &c. 'and to examine into the'

‘ nature of the complaint; and if it shall appear to such Justice that 13 Feb. 1836.
 ‘ any such servant,’ &c. ‘ shall not have fulfilled such contract, or
 ‘ hath been guilty of any other misconduct or misdemeanour, as afore-
 ‘ said, it shall and may be lawful for such Justice to commit every
 ‘ such person to the house of correction, there to remain, and be
 ‘ held to hard labour, for a reasonable time, not exceeding three
 ‘ months, and to abate a proportionable part of his or her wages, for
 ‘ and during such period as he or she shall be so confined in the
 ‘ house of correction, or, in lieu thereof, to punish the offender, by
 ‘ abating the whole or any part of his or her wages, or to discharge
 ‘ such servant,’ &c. ‘ from his or her contract, service or employ-
 ‘ ment, which discharge shall be given under the hand and seal of
 ‘ such Justice gratis.’

Asbury v. Bell.

Narrative.

In 1832, Samuel Asbury entered into a contract of service with John William Bell, flint glass manufacturer in the county of Lancaster, by which he became bound to serve Bell as a blower, &c. of glass for three years, and not to absent himself from Bell's service without his consent. As was alleged, Asbury deserted service on 14th April 1835; and on 15th April 1835, Bell obtained a warrant from an English Justice of the Peace to apprehend and take the ‘ body of him, the said Samuel Asbury, and him bring before me, ‘ or some other of his Majesty's Justices of the Peace in and for ‘ the said county of Lancaster, to answer the said information and ‘ complaint, and further to be dealt with according to law.’ In the month of November last, Bell obtained the concurrence of a Scotch Justice of Peace for Lanarkshire to the warrant granted by the English Justice, and apprehended Asbury, then in the employment of Watson, Pellat and Company of Glasgow. He was afterwards carried on board a steam-boat for the purpose of being carried to England. In the meantime, Watson, Pellat and Company, finding that Asbury was absent from work, obtained a warrant from the Sheriff to apprehend and bring him before the Sheriff for examination, which was duly enforced, Asbury being liberated from the steamer, and brought before the Sheriff for examination.

Asbury thereafter presented a bill of suspension and liberation to the Lords of Council and Session, praying that Bell and all others acting in his behalf be, in the meanwhile, prohibited and interdicted ‘ from enforcing and carrying into effect the summary warrants which have already been granted, and from granting and ‘ enforcing any others which may hereafter be applied for in the ‘ premises against the complainer, in so far at least as these may ‘ have in view the removal of the complainer beyond the reach of ‘ the jurisdiction of this country.’

The complainer stated various grounds in support of his plea of the illegality and incompetency of the procedure, and particularly,

13 Feb. 1836.


Asbury v. Bell.

Narrative.

Pleas adverse
to jurisdiction
of Civil Court.

that Bell was seeking to enforce implement of a civil contract, locatio operarum. The respondent, Bell, while he contended that the warrant, and all that followed, was legal and justifiable, maintained that this application was incompetent in the Court of Session.

The warrants under which the complainer was apprehended were purely of a criminal nature. The respondent is not seeking to enforce implement of a civil contract of locatio operarum. The warrant issued by the Justices of Lancashire is, in form and substance, a warrant against a party accused of a crime or offence. It is not in the form of any writ by which civil processes are commenced. It is not a writ summoning the complainer to appear and answer the complaint, but a warrant for apprehending his person; and the apprehension is not 'to the end that he may become bound &c. to appear at the next sessions,' Mayhew, 8 T. R. 110, but it is to bring him before the Justices, to answer, and to be dealt with according to law. Had the complaint charged the suspender with theft or assault, the warrant would have been in the same terms. It is precisely the style given in Burns' Justice, vol. v. p. 186, *voce* Warrant. Besides, the complaint charges an offence punishable under 20. Geo. II. c. 19, 6. Geo. III. c. 25, and 4. Geo. IV. c. 34, § 3. The moment the process is begun, it is fixed as a criminal proceeding; and if the Supreme Civil Court cannot interpose to review the ultimate sentence, neither can it to review or stop any intermediate step.

There may sometimes be a difficulty in determining, whether a judgment, imposing or enforcing a pecuniary penalty, be reviewable by the supreme civil, or criminal judicature. But there is none, when the primary punishment is corporeal, in contradistinction to pecuniary; per L. P. Blair, in *Berry v. Walker*, 17th January 1809, F. C.; when the imprisonment, which may be awarded, is for a defined period, in contradistinction to indefinite, depending on a sum being paid, or an act being performed. Now, by the 4. Geo. IV. c. 34, imprisonment is the primary punishment, and the imprisonment is, not as of a debtor, in the common jail, but as of a criminal or delinquent, in the house of correction, or Bridewell of the county or place where the Justice granting the warrant resides, and the offender is farther punished by being kept at hard labour.

The statute is just much of a criminal nature, if not more so, than the 17. Geo. III. c. 56, which this Court has held to be criminal, and refused to review proceedings under it; *Robertson v. Bisset*, 21st May 1829. The statute in question is also plainly just as much of a criminal nature, the 6. Geo. IV. cap. 129, regarding combinations among workmen, the proper forum for reviewing proceedings of the

Justices under which is the High Court of Justiciary; *McLeod v. 13 Feb. 1836.* Buchanan, 24th January 1835, *Ap. R. C.* vol. xi. The Justiciary Court had before them the point under consideration. In *Dewar v. Asbury v. Bell.* Marianski, July 1835, Dewar, the suspender, after having endured the imprisonment awarded by the Justices for deserting from his service, was, on the day of his liberation, or the day following, again apprehended, and a second time sent to Bridewell, because he would not return to his service. The judgment was first endeavoured to be supported by the master Marianski, on the ground, that he was entitled to enforce implement of the contract of service, by renewing the application. Their Lordships, however, were clear, that the sanction of the statute was a punishment; but as there was an argument raised, that the suspender's conduct amounted to a second breach, and warranted a second punishment, minutes of debate were ordered. The master abandoned the case. In *Fife v. Mungall*, 21st Dec. 1835, an objection was taken to the jurisdiction of the Court of Justiciary to review proceedings of the Justices of Clackmannanshire under this statute. After a hearing before Lords Meadowbank, Moncreiff and Medwyn, their Lordships held the Court of Justiciary to be the proper forum, and repelled the objection. It would produce the greatest confusion, if any decision were now to be pronounced, or opinion indicated, to lessen the authority of these judgments, and thereby again throw the matter loose. 'For there is no such evil as uncertainty in the rights of jurisdiction. It is even beyond that of uncertainty in the law, which is nevertheless stigmatised by the incontroverted maxim, pessima est servitus quum lex vaga aut incerta.' Per Lord Meadowbank, in *Minister of Prestonkirk v. The Heritors*, 3d Feb. 1808.

The Lord Ordinary on the Bills pronounced the following interlocutor:

'The Lord Ordinary having advised this bill, with answers, appoints the same to be boxed to the Lords on Saturday next, in order to the same being reported to the Judges of the Second Division of the Court as soon thereafter as may be; and grants all necessary warrants for enrolling the same accordingly.'

Lord Ordinary's Interlocutor.

Note.—'The Lord Ordinary, as the complainer is not incarcerated, thinks it much more expedient that the determination of the whole Court should be obtained in this case than the determination of a single Judge, as the proceedings are certainly of an extraordinary kind; and more especially as at present advised, he would have been inclined to have refused the bill as incompetent in the Court of Session. He is clearly of opinion that the statute 4. Geo. IV. c. 34, creates what is to be held and deemed to be a criminal offence, and, therefore, all proceedings taking place in

Note.

13 Feb. 1836. *Asbury v. Bell.* *Note.* 'virtue of that enactment must be cognisable in the Court of Justiciary. So, accordingly, the matter was recently determined by that Court; and as far as the Lord Ordinary is able to understand the *primary* warrant in question, it was granted in virtue of that Act. But, *2dly*, the indorsation by the Justices of Peace in Scotland was a proceeding entirely founded on the assumption that the primary warrant was granted upon a charge of a criminal nature. It was therefore itself a criminal warrant; and, therefore, the Court of Justiciary is the proper tribunal for the cognisance of questions like the present arising under it.

'The present shape of the case hardly raises the question as to the competency of the complainer having been taken on board a steam-vessel in order to his conveyance to England, as there is no interdict prayed for against that proceeding, which, in fact, is abandoned. Had it been otherwise, the Ordinary would have been inclined to have dealt with the case as one of illegal detention and imprisonment without the colour of authority, and granted an interdict in the meantime, as, whether the matter with which he stood charged was of a civil or a criminal nature, there was no warrant for confining the complainer on ship-board, and conveying him by sea to any part of his Majesty's dominions out of the authority of this Court. In short, he would have, as in the case of illegal impressment, granted the civil remedy, if prayed for, to prevent, in the meantime, the removal of the party in a way which in no way secured his being transferred to the jurisdiction of the country under authority of which the primary warrant was granted.'

Suspender's
Pleas.

At the advising, *Rutherford*, for the suspender, *pleaded*—That although the proceedings complained of might be held to involve criminal process, yet as, in enforcing the statute, its provisions had been neglected and departed from, it was competent for the party aggrieved to apply by suspension to the civil court.

Judgment.

The Court, upon advising the bill and answers, held the proceedings to be criminal, and that redress could as speedily and effectually have been obtained in the Justiciary Court, and refused the bill as incompetent in this Court, and found expenses due.

Lord Ordinary, *Meadowbank.*
(*Hope*,) James Anderson.

Act. *Rutherford*, Ivory.
Gibson-Craigs, Wardlaw & Dalziel,
Bill-Chamber Clerk.

Alt. Dean of Fac.

W.S. and Wolkerspoon & Mack, W.S. Agents.

R.

The Court also this day refused a bill of suspension, *Cooper v. Bell*, on the ground of incompetency.

FIRST DIVISION.

No. LXXXIX.

16th February 1836.

POOR MRS ANN GRANT OR CLARK

against

JOHN LUDOVEZ NEWMARSH.

JURISDICTION.—(**DOMICIL.**)—*An Englishman by birth, who died in Scotland, where he had resided as Governor of a Fort for fifty years, possessing a farm, and acting as Justice of Peace during that period, and where he had contracted a marriage with a Scotchwoman,—held to be a domiciled Scotchman.*

HUSBAND AND WIFE.—**LEGACY.**—**FOREIGN.**—*An Englishman having, while resident in Scotland, married a native Scotchwoman, also then resident and domiciled there,—found, that the legal effect of the marriage, in regard to funds in England left to the wife by an Englishwoman, by an English will, and which vested in her during the continuance of the spouses to reside in Scotland, must be regulated by the law of Scotland.*

FOREIGN.—**RES JUDICATA.**—*The plea of res judicata, arising from a decree obtained in the Court of Exchequer in England, in favour of two out of three co-plaintiffs carrying on a joint suit against an executor, for recovery of a legacy, in which they all had an interest, having been pleaded by one of the obtainers, a Scotchwoman, in bar of an action in the Court of Session, at the instance of the third co-plaintiff in the English suit, to have it found that all right to the legacy was in him,—held, under opinion of English counsel, that there could be no adjudication between co-plaintiffs, and the plea of res judicata repelled.*

FOREIGN.—**LIS ALIBI PENDENS.**—*Found, that the circumstance of personal funds having been recovered in England, and brought into the courts of equity there, does not bar an action in the Court of Session in regard to them, if they are so situated that that Court has otherwise jurisdiction, and the plea of lis alibi pendens repelled.*

PROCESS.—*Decree granted against a defender, ordaining her to grant a power of attorney, to enable the pursuer to uplift a sum of money which had been lodged in the hands of the Clerk of the Court of Exchequer in England, under an order of that Court, for the use of the defender and others, the right to the sum having been ascertained, in the action in the Court of Session, to be in the pursuer.*

THE late Mr Alexander Trapaud, an Englishman, was appointed

16 Feb. 1836. Governor of Fort-Augustus in Scotland about the year 1746. He resided at Fort-Augustus from the date of his appointment until his death, in December 1796, in the house appropriated to the Governor, acted as a Justice of Peace, and possessed a farm, said to be attached to his official situation, although this was disputed. It was also a matter of dispute, whether he could be removed from his office at pleasure, and ordered on other service, or whether he held it *ad vitam aut culpam*.

Grant or Clark
v. Newmarsh.

Narrative.

Mr Trapaud's first wife had died before his coming to Scotland, leaving an only daughter, who married Mr Timothy Newmarsh of Horseforth, in the county of York.

Mr Trapaud entered into a second marriage, in 1779, with Miss Ann Campbell, a Scotchwoman. This marriage took place in Scotland, and there was no contract of marriage or other settlement to regulate the legal rights of the parties consequent on the marriage.

In 1785, and during the subsistence of this marriage, a legacy of L.600 was left to Mrs Trapaud by Mrs Dorothy Campbell. The testatrix, Mrs Campbell, was resident, and, it is believed, domiciled in England at the period of her death. She named certain executors in her will, of whom her brother, Mr George Robinson, became the survivor. No part of this legacy was paid to Mr or Mrs Trapaud during their lives, nor any judgment for it obtained. Mr Trapaud died in December 1796, leaving a will, whereby he bequeathed his whole property in liferent to his wife, giving the fee or remainder to Mrs Newmarsh, his only daughter by his first marriage, her heirs, executors and successors. Mrs Newmarsh is since dead, and her only son, Mr John Ludovez Newmarsh, the defender in this case, is her heir and executor.

Mrs Trapaud survived her husband about eighteen months, but died in Scotland in April 1798, leaving a will, whereby she bequeathed her whole property to her two nieces, Mrs Ann Clark, pursuer of the present process, and Mrs Beatrice Grant, equally, or share and share alike.

After the death of Mr and Mrs Trapaud, various disputes arose among their representatives, as to the property which had belonged to them; Mr Trapaud being represented by the defender, Mr Newmarsh, and Mrs Trapaud, by her nieces, Mrs Clark the pursuer, and her sister Mrs Grant. These disputes were in part adjusted in Scotland about the year 1804, by a reference to Mr Fletcher, advocate.

It appears from the proceedings of that period, that a question had then arisen, in regard to the legacy bequeathed by Mrs Dorothy Campbell to Mrs Trapaud, viz. how far that legacy belonged to the defender, Mr Newmarsh, as the representative of Mr Trapaud? or to Mrs Clark and Mrs Grant, as the legatees of Mrs

Trapaud? But this question was specially excepted from the reference to Mr Fletcher. This legacy of L.600, bequeathed by Mrs Dorothy Campbell, was payable by her executors, who were resident in England, where the funds out of which the legacy was exigible were also situated; and it appears that, in 1799, the opinion of Sir W. Grant was taken by Mrs Clark and her sister, in regard to the proper manner of proceeding against these executors in the English courts.

16 Feb. 1836.

 Grant or Clark
 v. Newmarsh.
 —
 Narrative.

On the 31st May 1805, a bill was filed in the Court of Exchequer in England in the name of the pursuer Mrs Clark, and her husband, her sister Mrs Beatrice Grant, as the representatives of Mrs Trapaud, and also in name of the defender, Mr Newmarsh, there styled 'John Ludovez Newmarsh, grandson and residuary legatee of said Alexander Trapaud, deceased, an infant under the age of twenty-one years, by Thomas Loyd, Esq. and Mr Shepley Clark, his guardians;' and likewise by Messrs Ferrier and Grant, the surviving executors of Mr Trapaud,—against Mr George Robinson, as the surviving executor of the testatrix, Mrs Dorothy Campbell.

Various proceedings followed upon this bill, terminating in a judgment in favour of the pursuer and her sister, and directing the legacy, with interest thereon, to be paid to Mr Bowyer, then clerk of court, as their mandatary. In obedience to this order, L.514, 10s. was paid by Robinson to Bowyer. It was not established that any appearance had been made for the guardians of Mr Newmarsh in this action; and from the proceedings, it does not appear that the question of right, as between Mrs Clark and him, was ever discussed.

Mrs Grant, the sister of Mrs Clark, transferred her share of the above sum to Mr Newmarsh; and an application was made in the English Court of Exchequer, on 3d February 1815, by Mr Newmarsh, to have Mr Bowyer restrained from paying over to Mrs Clark her share of the sum contained in the above decree: when Mr Newmarsh was ordered, on the 15th February 1815, 'to shew cause to this Court, (Exchequer,) on the last day of this present term, why the said Mr Bowyer should not pay to the said James Clark, and Anne his wife, the said sum of L.651 : 15 : 4, and such other sum of money received by him for their use as aforesaid.' Mr Newmarsh never availed himself of the above order to shew cause, and the money still remained in the hands of Mr Bowyer, and was thereby situated in England. Meantime an action of multiplepinding was raised by Mr Newmarsh in name of Mr Bowyer, before the Court of Session, to which Mr Newmarsh called Mrs Clark as a party, and in which he insisted that he had right to the money in Mr Bowyer's hands. This action was dismissed, (8th July 1814,) on the ground that Mr Bowyer was not subject to the

16 Feb. 1836. jurisdiction of the Scottish courts. Mrs Clark being liable to that jurisdiction, Mr Newmarsh, on the 29th December 1814, raised a summons against her before the Court of Session, praying that she should be ordered to pay the above sum of L.544, 10s. to Mr Newmarsh, or to give her concurrence and authority to the effect of enabling Mr Newmarsh to receive the same from Mr Bowyer. Mrs Clark appeared and lodged defences.

Grant or Clark
v. Newmarsh.

Narrative.

A condescendence and answers were given in, and the case was then allowed to fall asleep. In 1818, a summons of wakening was personally served on Mrs Clark. Replies were thereafter lodged, and after frequent ineffectual orders for duplies, Lord Cringletie, on the 20th November 1819, pronounced an interlocutor, in which, after mentioning that no duplies had been given in, though allowed, he found, inter alia, that Mr Newmarsh had right to the legacy, as the representative of Governor Trapaud; and that there was nothing incompetent in his craving, in this action, a decree to compel the defender, Mrs Clark, to concur in granting an order on Bowyer to pay the money to Mr Newmarsh, and therefore decerning quoad hoc in terms of the libel.

Mr Newmarsh then gave in a minute stating, that though this interlocutor had become final, Mr Bowyer declined to pay the money without either a joint discharge subscribed by Mrs Clark, as well as by himself, or an express finding that a discharge by him, Mr Newmarsh, was sufficient. Answers were given in by Mrs Clark, refusing compliance. Lord Cringletie pronounced an interlocutor, 7th July 1820, 'authorising Mr Bowyer to pay the money 'in his hands to Mr Newmarsh, on his single discharge;' and this interlocutor became final and was extracted.

Being shortly thereafter admitted to the benefit of the poor's roll, Mrs Clark presented a minute, complaining of the irregularity of the procedure, and praying that the interlocutor should be recalled, in respect of a nullity in the summons of wakening, which bore to be dated and signeted in January 1818, whereas the execution was dated January 1817. The Lord Ordinary, on advising the minute and answers, pronounced the following interlocutor, 23d November 1821:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having advised this minute, with answers thereto, In respect, 1st, That the execution of the messenger on 'the summons of wakening bears, that he gave a full double of the 'summons down to the will, and bearing the date and signeting of said summons, and that the summons is dated the 21st, and 'signeted the same day in January 1818; and that thereby the 'defender, Mrs Clark, could not possibly be misled by the date of 'the execution delivered to her, even had it been dated in the year

‘ 1817, (of which there is no evidence, as she has not produced the same,) because she saw that the summons, of which it was an execution, was itself dated in the year 1818, and she herself got it, delivered to herself personally, on the 26th January that year : 2d, In respect that, although the principal execution returned the date 21st January 1817, yet being written on the same sheet of paper as is the summons, which is dated the 21st January 1818, is evidently one of those clerical innocent mistakes which often occur about the beginning of a new year, when people, by force of custom, write the preceding year, and, in the circumstances of the case, could not mislead any one : 3d, That upon a minute being given into process, Mrs Clark answered the same, pleading the merits of the cause, without objection to any irregularity in point of form : 4th, That the process, in so far as she is concerned, is taken out of the Court by an extract, in virtue of which the pursuer has obtained payment of the money, whereby the conclusion of the original summons has been obtained; and it will require an action of some one description or another to bring the matter back to Court, and to obtain redress to the defender : Refuses the desire of this minute, dispenses with any representation, and requests that Mrs Clark, if dissatisfied, may apply to the Court.’

16 Feb. 1838.
Grant or Clark
v Newmarsh.
—
Lord Ordinary's Interlocutor.

Note.—‘ The Lord Ordinary has less regret at pronouncing the foregoing interlocutor, that he is satisfied that his interlocutor on the merits of the cause is right. He believes that no lawyer will deny, that a legacy left to the wife during the life of the husband, without restriction of any kind, belongs to him jure mariti, and that he can dispose of it at his pleasure; and Governor Trapaud having right to the legacies left to his wife, made a will, whereby he disposed of his whole personal estate, which, of course, must carry that legacy. Indeed, if the Governor had made no will, the money would have fallen to his executor. See 15th June 1657, Nicholson and Lyle v. Lyle, *Mor.* 5798, which has remained undisputed ever since.’

Mrs Clark did not reclaim, but subsequently raised the present action of reduction against Mr Newmarsh and Mr Grant, his mandatory in the former action, calling for reduction of all the judgments and proceedings in the count and reckoning, and the wakening thereof, on the ground, 1st, That there was no regular wakening of the action, as the summons was null, in consequence of the above-mentioned discrepancy in the dates of the summons and execution; Marshall, 17th Nov. 1787; Hogg, 2d June 1797, *F. C.* 2d, That at all events the interlocutors were pronounced in entire absence of any fair pleading upon the part of the pursuer, who, at the time they

Pursuer's Pleas.

18 Feb. 1836. were pronounced, was in such poverty as to be unable to defend herself; Millie, 27th Nov. 1801, *Mor.* 12176; Leith, 27th June 1822. 3d, That the defender having obtained decree in an action in this Court, where he was pursuer, is subject to the jurisdiction of this Court in the present action for reducing that decree. 4th, That at all events Mr Grant, the pursuer's mandatary in the former action, must be liable for all the expenses of reducing these decrees. 5th, That the previous proceedings in the English Court of Exchequer constitute a *res judicata* in favour of the pursuer. 6th, That the law of Scotland cannot recognise the claim of the defender, because Governor Trapaud enjoyed, down to the time of his death, the status of a domiciled Englishman. 7th, That the fund in dispute being situated in England, the rights of parties must be settled by English law.

Grant or Clerk
v. Newmarsh.

Pursuer's
Plea.

Defenders'
Plea.

The defenders *answered*—The pursuer is barred from pleading the objection to the summons, as she made appearance in the action, and argued her case on the merits without taking the said objection; *Limond v. Reid*, 22d Dec. 1821. 2. The objection itself is futile; *Forbes*, 20th July 1708; *Earl of Seafield*, 23d Feb. 1709. 3. The decree sought to be reduced was a decree *in foro*, and forms a *res judicata* between the parties, which cannot be opened up on the plea of poverty; *Hunter v. Brown*, 18th Jan. 1806, (not rep.); *Handyside v. M'Intosh*, 16th Nov. 1805, (not rep.); *Sands v. Gordon*, 15th Jan. 1806, (not rep.) 4. The Court has no jurisdiction over the defender, who is a native of England, the decree in the former action being extracted, and that action thus taken completely out of Court; *Bankt.* p. 681; *Haldane*, Aug. 1761, *Mor.* 12,187; *Douglas v. Elphinstone*, March 1768, *Mor.* 8649; *Buchanan*, 5th Feb. 1814. 5. Mr Grant is not liable in this action, because in the former suit he was mandatary for Mr Newmarsh. 6. The English decree in the Court of Exchequer does not form *res judicata*. 7. As the present question relates to the rights arising out of a Scotch marriage, it must be judged of according to the rules of this country.

On the 18th January 1825, Lord Medwyn repelled the reasons of reduction, and assoilzied the defender, 'in respect that the interlocutor sought to be reduced in this process was not an interlocutor in absence.' The pursuer having *reclaimed*, the Court, on the 5th July 1825, pronounced the following judgment:

Judgment.

'The Lords having resumed the consideration of this petition, and advised the same, with the answers, alter the interlocutor of the Lord Ordinary reclaimed against; repel the plea of *res judicata*; sustain the reasons of reduction, and reduce, decern and declare accordingly, to the effect of allowing the petitioner to be

'heard for her interest, in the action in which the interlocutors and decrees were pronounced, sought to be reduced, and remit to the Lord Ordinary to hear parties, both upon the competency of that action, and also upon the merits of the same; and farther, find the petitioner entitled to the expenses of this process of reduction hitherto incurred; appoint an account thereof to be given in, and remit the account, when lodged, to the Auditor, to tax the same and to report.'

16 Feb. 1836.

Grant or Clark
v. Newmarsh.

The case having again come before the Lord Ordinary, a record was made up, in which the pursuer *pleaded*—

1. That the action at the defender's instance against the present pursuer is incompetent, because the proceedings before the Court of Exchequer in England, and the decrees condescended on by her, constitute a *res judicata* in her favour, and form a complete bar to the claims made by the defender against her; *White v. Halyburton*, 13th Nov. 1819, (not rep.) 2. That, even supposing the decrees in the Court of Exchequer not to be sufficient to constitute a final *res judicata* in favour of the present pursuer, still the action at the instance of the defender is incompetent, because the proceedings in the Court of Exchequer, stated in the condescendence given in by her, constitute a *lis alibi pendens*. 3. That the fund in dispute being situated in England, in the hands of an Englishman, it is incompetent to pursue an action such as that pursued by the present defender, for the purpose of obtaining possession of it. 4. That Governor Trapaud never lost the rights belonging to him, in virtue of his original domicil, subject to the law of England, and that the right which subsisted between him and his second wife, in so far as any property belonged to both or either of them was concerned, could only be ascertained and determined by the law of England; vide Act of Parliament 1426, c. 88; *Ersk.* i. 9. 4; *Bruce v. Bruce*, 28th June 1788, affirmed on appeal. 5. That supposing Governor Trapaud to have lost the right which belonged to him, in virtue of his original domicil, and that he had acquired the right of a Scotsman, nevertheless the fund in dispute being situated in England at the time of Governor Trapaud's death, without ever having been recovered by him, the right of parties to it must be settled according to the law of England. 6. That by the law of England the fund in dispute belonged to Mrs Trapaud, and was subject to her unlimited disposal subsequent to the death of Governor Trapaud, and that it now belongs to the present pursuer, her niece.

Pursuer's
Pleas.

The defender *pleaded*—1. Both by the law of England, and by that of Scotland, the legacy of L.600, bequeathed by Mrs Dorothy

Defender's
Pleas.

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Plea.

Campbell in favour of Mrs Trapaud, vested in her ipso jure. 2. The legacy having so vested in Mrs Trapaud during the subsistence of her marriage with Mr Trapaud, it was transferred to him, and became part of his funds jure mariti, as completely as if it had been specially assigned and conveyed to him. 3. The marriage of Mr and Mrs Trapaud having taken place in Scotland, and they having continued to reside there during the rest of their lives, the rights arising out of the contract so made must be judged of and ascertained by the law of Scotland; and according to that law, the husband is entitled to all the moveable effects acquired by his wife during the subsistence of the marriage; *Huber de Conflictu Legum*; *Wyche v. Blount*, 27th June 1801, No. 2, *App. voce Forum competentis*; *Egerton v. Egerton*, 27th Nov. 1812, *F. C.*; *Greenhill v. Ford*, 24th June 1824; *Milligan v. Milligan*, 9th Feb. 1826, *F. C.* 4. Mr Trapaud was domiciled in Scotland; and therefore, independent of every other circumstance, this question must be judged of by the rules of that law, and not by those of England; *Lees v. Parlant*, 12th Nov. 1709, *Mor.* 4791; *Forrest v. Funston*, 21st Feb. 1789, *Mor.* 4823. 5. But even supposing it were to be decided by the law of England, it is in favour of the defender's claim. 6. The proceedings in the Court of Exchequer or of Chancery in England, referred to in the condescendence and answers, were not intended to ascertain the right of the parties, but to recover the funds out of the hands of Robinson, the executor of the testator; and therefore can form neither a *lis pendens* nor a *res judicata*, so as to afford any defence against the defender's claim in his action. 7. Independently of the above plea, the only plaintiffs in those proceedings were the present pursuer and her sister, and the only defendant was Robinson, and therefore any judgment as between those parties is *res inter alios* as to the defender.

Lord Ordinary's
Interlocutor.

The Lord Ordinary pronounced the following interlocutor: 'The Lord Ordinary having considered the closed record, with the writs produced, and interlocutors in causa, and having heard parties' procurators, and thereafter made avisandum with the process, Finds, 1mo, That the proceedings and judgments, or orders in the Court of Exchequer in England, referred to in the record, do not constitute, as between the parties to the present action, either *res judicata* or *lis alibi pendens*, to bar the present defender, John Ludovez Newmarsh, from insisting in the action raised by him in this Court, on the 29th December 1814, against the present pursuer, Mrs Clark, as one of the executrices of Mrs Trapaud deceased, she (Mrs Clark) being then legally domiciled and resident in Scotland, according to the conclusions expressed in the summons: Finds, 2do, That the conclusions of the summons in

' the said action were legal, and competent to receive effect in this 16 Feb. 1836:
 ' Court: Finds, 3^{to}, That the deceased Alexander Trapaud, some- Grant or Clark
 ' time Governor of Fort-Augustus, who died there in the year 1796, v. Newmarsh.
 ' after having been constantly resident in Scotland for fifty years, Lord Ord-
 ' must, under all the circumstances of the case, be held to have nary's Inter-
 ' been legally domiciled in that country at the time of his death: locutor.
 ' Finds, 4^{to}, That the said Alexander Trapaud having, in the year
 ' 1779, he being then resident in Scotland, married Miss Anne
 ' Campbell, a native Scotchwoman, also then resident and domi-
 ' ciled in Scotland, the legal effect of that marriage, in regard to
 ' any property then belonging to her, or which might become vest-
 ' ed in her thereafter, during the continuance of the parties to re-
 ' side in Scotland, must be regulated by the law of Scotland: 5^{to},
 ' That it is admitted by both parties, and fully established by the
 ' proceeding in the Court of Exchequer of England, that the le-
 ' gacy of L.600, bequeathed by the will of Mrs Dorothy Campbell,
 ' who died in 1785, did, by the law of England, become vested in
 ' the said Mrs Anne Campbell or Trapaud, during the lifetime of
 ' her husband, Governor Trapaud; and finds, that it was also so vest-
 ' ed according to the law of Scotland: Finds, 6^{to}, That the legacy
 ' being so vested in Mrs Trapaud, it did, eo ipso, according to the
 ' established rules of the law of Scotland, pass to the said Alexander
 ' Trapaud, the husband, by the force of the legal assignment of the
 ' wife's personal estate, implied in the marriage of the parties cele-
 ' brated in Scotland, as aforesaid, and become part of his personal
 ' or moveable estate at his death, notwithstanding that he had not
 ' received payment or possession thereof, or brought any suit or
 ' action for the recovery of it: Therefore, finds, 7^{mo}, That the de-
 ' fender in the present action, and the pursuer in the action the de-
 ' cree in which is now under reduction, as the legal representative
 ' in mobilibus of the said Alexander Trapaud, has the only good right
 ' to the said legacy, and is entitled to recover payment and posses-
 ' sion of such part thereof as he may not yet have received; and, in
 ' respect that it is admitted that a certain sum of money, part of the
 ' said legacy, is now in the custody of William Bowyer, in the sum-
 ' mons mentioned under, and in consequence of the proceedings in-
 ' stituted jointly in the names of the pursuer and her sister, Mrs
 ' Grant, (who is no party to this action, but has assigned her interest
 ' to the defender,) of the present defender, finds, that the pursuer
 ' is bound to concur with the defender, in enabling him to uplift
 ' and receive the said money, and for that purpose to grant a power
 ' of attorney, as required by the summons in the said action: There-
 ' fore, in the original action, at the instance of the said John Ludo-
 ' vez Newmarsh, repels the defences, and finds and decerns for

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Note.

view, if taken broadly on constructive domicil, incorrect. But as it may affect the question more or less in different views, he has given his judgment on the point of domicil. The question, where a man's legal domicil is, is always a question of circumstances. The principle which regulates it is clear enough, that it is in that place where he had fixed his residence, *animo remanendi*. Residence alone does not fix it, if it be transitory. But the question, whether the intention, and the fact of permanency exist, depends on all the circumstances of the man's situation. A student does not acquire a new domicil by residence at a university, nor a soldier in the King's army, by residence in the place where he is temporarily quartered. But these are not absolute or arbitrary rules. They depend on the principle, and must be regulated and modified by the substance and common sense of the thing; and if the residence is in its reality permanent, the attendance on the lectures in a university, or the subjection to the laws of the army, will not prevent the effect of it. This is the principle laid down by Voet and the civil law writers. It is clearly the doctrine of Pothier in the passage referred to by both parties, *Cont. v. Orleans*, p. 5. It has been recognised in all the cases of authority, and is particularly marked in that of Sir Charles Douglas, House of Lords, March 18. 1796, *Omaney v. Douglas*, who was nearly all his life in service, and when on shore, constantly shifting his residence, yet was held to have lost his Scottish domicil, and acquired an English one, chiefly because he had a house for his wife and family at Gosport. In the present case, without inquiring whether the appointment of Governor of Fort-Augustus was strictly *ad vitam aut culpam*, or whether Governor Trapaud was subject to the Mutiny Act, and liable to be called into service or not, it is surely enough for the point in question, that he had been in the place for fifty years, and constantly resident; and that there is no averment either of an intention to remove him, or of an intention on his part to resign, or to leave Scotland. That he occupied and cultivated a farm is also material, whether it was attached to the office or not: in either view, it implies permanency. That he acted as a Justice of the Peace is still more important; and it is not averred in the record that he did so as Governor; and, on the whole, the Lord Ordinary cannot conceive a stronger case of change of domicil. And having formed this opinion upon principle, it is certainly very satisfactory to him to find that it is confirmed by the opinion of such a lawyer as Sir William Grant. In a case laid before him, on the part of the pursuer and her sister, in 1799, the question of domicil was brought distinctly under his notice, and Governor Trapaud was described as 'Governor Trapaud, an *English gentleman, residing in Scotland*;

"merely in his capacity of an officer in his Majesty's service, happening to die in that country;" and with reference to this, Sir William Grant says, "I think it will be difficult to contend that it is not the law of the domicil that must govern the case, and I do not see any ground for disputing, that Scotland was Governor Trapaud's proper domicil." Yet the facts, as stated in the case, were not nearly so strong in favour of the Scotch domicil; as they are now admitted to be on the record.

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'3. But the question does not exclusively depend on the domicil, though it may be affected by it. This is not properly a question in the *succession* of Governor Trapaud. It is as much a question in the succession of Mrs Trapaud, who survived her husband, and was certainly domiciled in Scotland. But the real question is, what was the effect of the marriage in Scotland, in the rights of Governor Trapaud and his wife? Was the legacy which was vested in Mrs Trapaud legally transferred to the husband before his death? That it was by the law of Scotland, there can be no doubt. But the Lord Ordinary apprehends, that it is a question which must be determined by the law of Scotland. In the same opinion of Sir William Grant, after stating that, by the law of both countries, the legacy vested, he adds, 'But a subsequent question arises, whether a legacy thus vested falls under the husband's *jus mariti*, so as to pass by his will, though he die before his wife, and before the legacy is paid: *Now that question must be determined by the law of the country in which the relation of husband and wife has been contracted AND SUBSISTS.*'

'If, at the time of the marriage, Governor Trapaud had been, in the ordinary sense, a domiciled Englishman, and only accidentally married in Scotland, the *locus contractus* might not regulate the effect of the marriage; or if, before the legacy became vested in 1785, the parties had removed from Scotland, and been properly domiciled in England, there might be room for a similar construction as to the effect of their marriage, as subsisting. But in a case in which the husband had been thirty-three years resident in Scotland before the marriage, and the wife was a native Scotchwoman, in which they were still resident in Scotland, where the legacy became due six years after, and in which the marriage *subsisted in Scotland alone*, till the death of the husband in 1796, it would surely be a monstrous stretch of principle to say, that, upon any idea of a constructive domicil, in consequence of the husband's appointment being of a military character, the *effect of that marriage* should be regulated by the law of England. If the legal domicil was in Scotland, there can be no question in it; but, even if that were doubtful, there can be no question that it was in

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Scotland exclusively that the marriage was contracted, *and did continually subsist.*

'If the Court shall concur in the opinion of the Lord Ordinary, the effect will be, that the present pursuer must grant the power of attorney, and may be charged with horning to that effect. But the Lord Ordinary conceives, that it will also be competent to Mr Newmarsh to demand payment from Mr Bowyer, in virtue of the decree, and, if necessary, to apply to the Court of Exchequer for an order to compel payment.'

The pursuer having *reclaimed*, the Court sisted procedure until the opinion of English counsel should be taken on a joint case for the parties *.

Pursuer's
Pleas.

At the advising of the cause, after this opinion had been obtained, *Dean of Faculty*, for the pursuer, *pleaded*—1. Assuming Governor Trapaud to have been a domiciled Scotsman, the question comes to be, what law determines the interests of husband and wife; and if it be held that this falls to be determined by the English law, it will supersede the second question, viz. that of domicil. The general argument on the first point is, that a person domiciled in Eng-

* *Opinion of Messrs Bikersteth and Charles Hope Maclean.*—The legacy in question being given to Mrs Trapaud, her husband was in her right entitled to reduce it into possession; and if he had done so, the legacy would have become his own absolutely. In fact, he neither reduced it into possession, nor released it, but died leaving Mrs Trapaud surviving him; and under these circumstances, the legacy, by the law of England, became the absolute property of Mrs Trapaud, the surviving wife, and, upon her death, became the property of her executrices, as part of her estate, to the exclusion of the executors of her predeceased husband.

The proceedings in the Court of Exchequer were in accordance with the law of England in this respect; and if the question raised by Mr Newmarsh were now to be litigated in England, the legacy would be adjudged to the executrices of Mrs Trapaud.

But between co-plaintiffs there can be no adjudication; and notwithstanding the joint allegations in the bill, and the several orders obtained upon the joint application of the plaintiffs, including the executors of General Trapaud, we incline to think, that the mere proceedings in the Court of Exchequer would not be considered conclusive of any right, so as to bar any just or substantial claim of Mr Newmarsh. The right, however, could not be tried as between the co-plaintiffs in that suit. If Mr Newmarsh could be advised to prosecute his claim in England, it would be necessary for him to institute a suit of his own, and to explain not only the long delay which has taken place, but the circumstances under which he and the executors of General Trapaud were induced to join in proceedings, now alleged to be at variance with their rights. But Mr Newmarsh, as executor of his mother, the residuary legatee of General Trapaud, cannot, by the law of England, establish any title or claim to the legacy in question. See cases, *Gayer v. Wilkinson*, 1. *Brown's Chancery Cases*, 50, note; *Becket v. Becket*, 1. *Dicken's Reports*, 340; *Mitford v. Mitford*, 9. *Vesey's Reports*, 87; *Baker v. Hall*, 12. *Vesey*, 497; *Pierce v. Thomely*, 2. *Simons*, 167; *Adams v. Lavender*, 1. *McClelland and Younge*, 41.

land, having left, by will in the English form, funds situated in England, that the interest to be claimed under this will is an interest under an English deed, and must be determined therefore according to the rules of the law of England.

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Suppose a question had occurred in England instead of here, between the pursuer and defender, in regard to this legacy as not yet paid, you are told by the English law that the defender could not have pursued any action for its recovery in an English court, because, as executor of Governor Trapaud, he had no right to funds not reduced into possession by the Governor during his life. Mrs Campbell's will being an English will, establishes an interest, which, in the event of certain proceedings being neglected by Governor Trapaud, the husband, vests on his decease in the wife by her surviving.

The rights *inter virum et uxorem* must fall to be decided by the rules of English law, on the principle of the case of *Black v. Brown*, 1828 *. It was there decided, that if there was an in-

* FIRST DIVISION.

20th February 1828.

Mrs ISABELLA BLACK and Miss BROWN against JOHN BROWN'S TRUSTEES.

WILLIAM BROWN of Lynchburg, Virginia, made a will there, on 29th June 1805, which contained the following clause: 'The remainder of my estate, after deducting therefrom the above legacies, is to be divided in the following manner, viz. 'To my father and mother, James and Margaret Brown of Kirkcudbright, North Britain, I leave one-fourth share of the balance of my estate to them, or the survivor of them.' The other three shares were given to the testator's sisters.

William Brown died at Richmond in Virginia, in 1811, leaving a considerable fortune, chiefly personal estate, in America. Part of his estate was in England, in the hands of his partner in trade, Mr Boyd Miller of London.

The executor proved the will in America, and in England administration was granted, by the Prerogative Court of Canterbury, to James and Margaret Brown, the testator's father and mother.

James Brown survived his son several years, and died 23d February 1816. Margaret Brown survived her husband, and died in 1820.

Both James and Margaret Brown had, during their whole lives, been domiciled in Scotland; and on their death they left daughters, the present pursuers.

During the life of James Brown, the father, no remittances were made by the executors in America. But since his death, and during the survivance of his wife, Margaret Brown, remittances were made to the amount, it is alleged, of upwards of L.11,000, every such remittance having been paid to Mrs Brown, (or John Brown for her,) and acknowledgments or receipts for these payments given by Mrs Brown or her attorney, in her name, to the executors in America, as to account of the said share. A balance still remains in America of about L.3000.

Of the funds in England, L.4500 were, during James Brown's life, paid to the agent of James and Margaret Brown, the executors holding the administration there; and this sum was divided amongst the four sets of residuary legatees.

On the 21st February 1815, James and Margaret Brown, the parents of the testator, made a will, by which they bequeathed the whole of their property to

16 Feb. 1836. *Grant or Clark v. Newmarsh.* interest created by a foreign settlement, in funds situated abroad, all questions as to the rights of husband and wife, with regard to those

John Brown of Netherwood; and, in particular, they conveyed to him the fourth share of William's succession, bequeathed by him to them.

Mrs Brown, the widow and survivor, on 24th May 1817, made another will, whereby she confirmed and ratified the joint will, and again conveyed to John Brown the fourth share bequeathed by her son William.

In these circumstances the pursuers, two of the daughters of James and Margaret Brown, brought the present action of reduction, count and reckoning and payment, against the late John Brown of Netherwood, concluding, 1st, For reduction of the joint will by their parents, and the deed of ratification by their mother, because, on the death of James Brown, one-third part of his moveable property belonged as legitim to the pursuers, and consequently the deeds of settlement were void, in so far as they contained a conveyance of that legitim; and, 2d, For production of the state of the moveable property of James Brown at the time of his death, whereby the amount of legitim might appear, and for payment of this legitim, when so ascertained.

After various procedure the reductive conclusions were finally disposed of in favour of the pursuers; and the case having been remitted to the Outer-House, to hear parties on the amount of the legitim, Lord Eldin remitted to Mr Samuel Clerk, accountant, to make up a state of the pursuer's share of legitim. He accordingly gave in a report containing three views. The first view was on the supposition that they were entitled to claim legitim out of the whole property bequeathed by William Brown to his father and mother; the second gave effect to the plea of the defenders, that the whole of the fourth share vested in the mother by force of survivance; and the third was on the supposition that legitim was due only out of that part of William Brown's succession which had been recovered prior to his father's death.

The Lord Ordinary, on 1st February 1827, pronounced the following interlocutor: 'Having heard parties' procurators, approves of the first view given by Mr Samuel Clerk in his report; and in terms of said view, decerns against the defenders for payment to the pursuer of the sum of L.2118 : 0 : 6 sterling, reported as due to her on the 11th of November last, with interest from that date till paid, reserving to the pursuer her claim for her share of the legitim out of the funds still due in America; farther, finds the defender liable to the pursuer in expenses.'

Against this interlocutor the defenders *reclaimed*, and the Court ordered the opinion of American counsel to be taken on a joint case, containing the following queries: 'Mrs Black and Mary Brown, two of the daughters of James and Margaret Brown, have demanded a share of that part of the estate of their brother William, which was bequeathed as above to their father and mother, while the representatives of John Brown of Netherwood claim the whole, as effectually conveyed to him by the joint testament of James and Margaret Brown, and by Mrs Brown's subsequent will.

'By the law of Scotland, children have right to one-third of the moveable estate of their father on his death, and of this portion they may not lawfully be deprived by his will or settlement. The claim of Mrs Black and Mary Brown, in opposition to the will of their father and mother, comes thus to depend on the question, whether the foresaid share, bequeathed by William to his father and mother, or the survivor, was vested absolutely in the father during his life.

'You are therefore requested to say what, according to the law of the state of Virginia, and the construction of the will of William Brown, is the nature of,

parts of the funds which had not been brought to this country, must be regulated by the law of the country where the settlement was

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'the estate or interest accruing to James the father, in the fourth of his son William's estate, bequeathed as above.

'In particular, you are requested to say, whether the aforesaid share, if not reduced into possession during James Brown's life, was wholly (or if in part only, to what extent,) a vested interest in James Brown, the father? Whether, if so, it was an interest absolute and indefeasible, or subject to be defeated in the event of the wife's surviving, either by that survivance alone, or by a will made by the widow? 2d, Whether, under the words of William Brown's will, such an interest would, by the law of the state of Virginia, be held to be vested in James, as would have entitled his children (had his domicil been in America) to demand their portion out of it, the mother surviving? Or whether, if not the whole, any part of the bequest is to be considered as so vested in James Brown? 3d, Whether, if the fund had been reduced into possession during James Brown's life, there would have been any difference on the nature and effect of the interest vested in James Brown?'

To these queries the following answers were given by William West, Esq. Attorney-General of the United States: '1st, James, the father of the testator, took, conjunctly with his wife Margaret, the testator's mother, a vested interest in that portion of the testator's estate which was bequeathed to them; but this vested interest was not an interest absolute and indefeasible in James, as it would have been in regard to a chattel in possession. On the contrary, it was a vested interest in a joint *chose in action merely*, (like that in a joint bond to husband and wife,) on which the marital rights of the husband did not act *absolutely* to transfer at once the wife's interest in that *chose* to him, but on which his marital rights acted only *conditionally*, the conditions being, that he should reduce the *chose* into possession during the coverture, or do some act during the coverture indicating his disagreement to the continuance of the wife's joint interest in the *chose*: such, for example, as bringing a suit for the legacy in his own name alone. But the husband, in this case, having neither reduced the *chose* into possession during the coverture, nor done any act indicating his disagreement to the continuance of his wife's joint interest, but, on the contrary, having done several acts indicating his desire that her joint interest should continue, (such as the joint administration in London, the joint letter of attorney and the joint will,) I am of opinion, that on his death the whole of the joint legacy which remained uncollected at that time survived to his wife by force of that survivorship alone; and on that event belonged to her in her own absolute right, subject to testamentary disposition by her, or, in case of her intestacy, to distribution among her personal representatives; and my opinion would have been the same, independently of the joint acts done by the husband and wife by force of the will alone, and the mere circumstance of his forbearance to do any act indicative of his disagreement to the continuance of the joint interest created by the will.

'2d, With regard to so much of the legacy as had not been reduced into possession by James Brown during his life, I am of opinion, that under the words of William Brown's will, such an interest would not be held, by the laws of Virginia, to have vested in James, as would have entitled his children (had his domicil been in America) to demand any portion out of it, the mother surviving; but that, with regard to so much of the legacy as had been reduced into possession before his death, it became at once, by force of such reduction, into possession, part of his separate estate, was subject to his sole authority, and in the event of his death, intestate, would have been distributed by the courts of Vir-

16 Feb. 1836. made. There was also a case of Newlands, 22d Nov. 1832, subsequent to the case of Brown, which was decided upon the same

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'ginia among his personal representatives, according to the law of his domicil at the time of his death.

'3d, I am of opinion, that if the fund had been wholly reduced into possession by James during the coverture, there would have been this difference in the nature and effect of the interest vested in him, that that which, under the will, had been a vested interest in a joint chose in action merely, would have become a vested interest in a joint chattel in possession; in which last character his marital rights would have attached upon the joint interest of the wife immediately and absolutely, and made the personal subject wholly his own.'

After this opinion had been brought before the Court, they ordered cases upon the point in dispute.

Pursuers'
Pleas.

The pursuers *pleaded*—By the will of William Brown, interpreted according to the American law, a *chose in action*, or right to recover a subject, was vested jointly in Mr and Mrs Brown. These parties being married in Scotland, and resident there at the time of the testator's decease, any right of a personal nature which vested in the wife, or husband and wife jointly, during the subsistence of the marriage, must be held to have fallen, by the rules of the Scotch law, under the *jus mariti* of the husband, unless that was expressly excluded, and to be subject to the claim of legitim.

In the case of Egerton, 27th Nov. 1812, *F. C.*, it was decided that a *chose in action*, which, by the law of England, survived to the wife, in respect the subject had not been reduced into possession, fell under the Scotch *jus mariti*, and was subject to the claim of legitim. This decision was confirmed by that of Craigie v. Gardner, 12th June 1817, and Milligan v. Milligan, 9th Feb. 1825. The circumstance, that these were cases of intestate succession, while, in the present case, the fund was conveyed by a testamentary deed, makes no substantial difference; for here, as in them, all that vested was a *chose in action*. It cannot be maintained that there is any thing in William Brown's will to shew his intention to exclude the Scotch *jus mariti* of his father. So far from that, he did not even effectually exclude his marital rights by the law of America; because, during the five years that James Brown survived the testator, he might, at any time, have severed the joint tenancy and brought the whole fund under his marital right. If the *jus mariti* was not expressly excluded by the will of the testator, the law of America can never be allowed to regulate the rights between parties married and resident in Scotland.

The question is about the succession of James Brown; and even supposing William Brown's intentions were clearly expressed in his will, they cannot regulate the succession of James Brown, which must be determined by the *lex domicilii*, as settled by a train of decisions; Hogg v. Hogg, 17th June 1791.

Defenders'
Pleas.

The defenders *pleaded*—The question, whether the bequest by William Brown to his parents fell under the *jus mariti* of the husband, or became the absolute property of the wife by force of survivorship, must be determined by the intention and legal effect of William Brown's will.

This being an American deed must be interpreted by the law of that country, otherwise it would be impossible for a foreign testator to guard against the distribution of his property after his death, contrary to his declared intentions; Henderson v. McLean, 13th Jan. 1778.

By the opinion of an American lawyer, it had been determined that William

principles. In that case the wife succeeded to a brother in intestacy, and it was there held, that bonds which were not by the Scotch law moveable, but which were so held by law of the testator's country, fell within the *jus mariti* of the husband in Scotland, though his claim was excluded by the Scotch law. This was going a step farther than in the case of Brown, and holding that, in a question of

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Brown, by his will, intended to give, and did give his parents a joint interest in a certain subject, with an absolute survivorship of the fee to the wife, in so far as the subject was neither reduced into possession, nor judicially claimed and decerned for during the husband's life. In other words, to this extent the testator, in the language of the Scotch law, excluded the *jus mariti*, and gave to the wife a separate estate, of which, in the event of her husband's predecease, she was not to be deprived.

Defenders'
Pleas.

That as the wife's absolute interest did not arise till after her husband's death, it resembled the case of a legacy left to her after his decease: That confessedly James Brown had not taken the requisite steps for reducing the fund in dispute into his possession, and that therefore legitim could not be claimed out of it.

This question regards the extent of James Brown's rights to foreign property under a foreign will, not the distribution of James Brown's moveable succession; therefore his domicil can have no effect in its decision, and consequently the cases of Hogg and Egerton, cited by the pursuer, do not apply. Besides, these were cases of intestate succession, and could not apply to the present, which regards the construction of a deed.

Lord Balgray.—By what law are we to ascertain the law applicable to the case? Just the law counsel states in this case; and then you are to consider what steps of the law necessarily apply to it; and when you find that, then you must determine the point according to the law of the domicil. It is just a pure question of fact, what is the law of the domicil? I am quite clear, as this person says, it could not and does not transmit the subject according to the law of Scotland. It is nothing but a mere action.

Opinion of
Court.

Lord President.—I am of the same opinion. At first I had some doubts upon the matter. My doubts are founded on this: first, they alleged, by the law of America, if such a question was made as here, it would have vested in the husband alone, and his discharge would have been good to the executors. But the American executors would have been entitled to say that that is not the construction of the law here without the wife's discharge; and he would have been obliged to produce the wife's discharge; and if he had not that discharge, the doubt was, whether it could have vested in the husband. If he actually had got it at that moment, and brought it home here, it would have been his property: the distinction would have fled off; but as he did not get possession of it, it just remained a right of action, as it originally was. Every thing that he got is admitted.

The Court pronounced the following judgment: 'The Lords having advised these mutual revised cases for the parties, and heard parties' procurators at the bar, recall the interlocutor of the Lord Ordinary, Eldin, submitted to review; find, that this question must be decided by the law of the United States of America, and that, by said law, the funds not reduced under the possession of the husband are not subject to the children's claim of legitim, according to the law of Scotland; and remit to Lord Corehouse, in place of Lord Eldin, to hear parties farther thereupon, and to proceed as accords; find no expenses due to either party, except as to the accountant's report, which is reserved for consideration and disposal of the Lord Ordinary.'

Judgment.

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intestate succession, the law of the domicile of the testator and the *lex rei sitæ* might control the interests arising out of a Scotch contract of marriage. Therefore, on the principles of these two cases, it is submitted that the principle of the Lord Ordinary's interlocutor is wrong, and that it must be held that the legacy belonged to Mrs Trapaud, as it was not reduced into possession by her husband, and as she survived him. But, 2d, Governor Trapaud was at his death a domiciled Englishman, and therefore the question now at issue must be determined exclusively by the laws of England. The original status of Englishman cannot be lost by residence in another country, however long, if such residence be occasioned by military duty. Governor Trapaud, though commanding a fort, was liable to be removed at the will of his Majesty, and must have fixed his residence in whatever place he was ordered to remain at.

His marriage to a Scotchwoman did not make his residence more permanent, nor could his wife's domicile have any effect in determining his, the rights of the wife being merged in the person of the husband.

The arguments founded on his acting as Justice of Peace, and possessing a farm, are equally futile, as neither of these could prevent his being removed to any part of the British dominions. There was a mistake made with regard to the facts of the case of Sir Charles Douglas; *Ommaney v. Bingham*, House of Lords, 18th March 1796, 5. *Vesey's Reports*, 757; for it was said that Sir Charles had no fixed residence at all, and that therefore his military residence might be for that reason held to have given him a domicile. But it appears that the case was decided on a different principle, as he had an establishment at Gosport, where he resided when not employed. Therefore it was not held there that the Scotch domicile was lost by the military employment in England. See *Robertson on Succession*, p. 448.

At all events, it will be improper to decern in terms of the conclusion, that the defenders should grant a joint power of attorney to uplift the money, as it is by no means certain that the production of a decree in the pursuer's favour will not be held in the English courts a sufficient authority for payment of it without any other proceedings; and such a decerniture, if unnecessary, is incompetent.

Keay, for the defender, *pleaded*—

Defender's
Plea.

The question here is, whether the legacy in dispute passed, *jure mariti*, according to the law of Scotland, or whether the rights *inter virum et uxorem* are to be regulated by the law of England. It was at first pleaded in this case, that by the law of England there had been an adjudication, forming a *res judicata* between the defender and pursuer; or, at all events, that there was a *lis pendens*,

arising from the proceedings in the English courts. From the opinion of English counsel, however, it was ascertained that there can be no adjudication between co-plaintiffs, and that there can be no farther proceedings in Exchequer unless a new action be raised. But no action will lie in the Court of Exchequer against the defender, who is resident in Scotland, and not subject to the jurisdiction of the Court of Exchequer. The plea of *res judicata*, or *lis alibi pendens*, must therefore be abandoned.

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The legacy being here left by an English will, we must look to the terms of that will to ascertain whether the legacy vested in Mrs. Trapaud; but as there is no dispute upon that point, the interpretation of the English law ceases there, and it then comes to be determined by the Scotch law, whether the legacy was assigned to Governor Trapaud by the implied assignation in the marriage between the parties. The case of *Egerton*, 27th Nov. 1812, *F. C.*, is one which is directly in point. The first question there was, Did the money vest in the wife or not? Must it be held to require confirmation to effect that, according to the Scotch law, or must it be held to have vested without confirmation, because, by the law of England, no such procedure is necessary? That being settled, the next question was, the parties being married and resident in Scotland, are the rights between the spouses to be regulated by the law of Scotland?

In that case it was decided, that, on the English principle, the property vested in the wife without confirmation; but having once vested in the wife, it came under the *jus mariti* of the husband, according to the principles of Scotch law. Just so, in the present case, the property being undoubtedly in the wife, it is plain you must determine, by the law of Scotland, that it was transferred to the husband by the marriage.

Reference has been made to a subsequent case of *Brown*, as establishing a different principle; and on examining into the peculiar circumstances of this case, it will be found that the decision went entirely on the peculiar phraseology of the will. And in the later case of *Newlands*, the principle was settled in a way completely in favour of the views now contended for. There it was determined, that to ascertain whether a subject is heritable or moveable, you must go to the law of the place where it is situated; and having ascertained that, you must allow the rights of husband and wife in regard to it to be regulated by the law of the country where the marriage took place.

As to the question of domicile, that must always depend upon the facts and circumstances of the case. It is impossible, indeed, to say, that the domicile of an officer in a regiment must be the place where he died, merely because his regiment happens to be there at

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the time; but it is equally plain, that the mere circumstance of being in the army does not prevent the party from acquiring a domicile, if his intention to do so is sufficiently manifested. There is another important element for consideration in this case, that the domicile claimed for Governor Trapaud is not one by residence any where, but merely by birth. It can never be said, that in such a case, because a man happens to be all his life in the army, he cannot, by a residence, however permanent, change the domicile of his birth. A question has been raised, as to whether a governor of a fort is subject to martial law. That is plainly out of the case here; because the main point is the animus of the party to create a domicile. It is of no consequence whether he is removable by Government. The question is not, whether the situation which a party holds is permanent; but the question is, whether he indicated any intention of making a permanent residence. Many familiar instances might be put, viz. that of the late Baron Norton, or the present Deputy-Governor of Chelsea Hospital. He may be regarded as having a Scotch domicile; but why? Because he has a large estate in Scotland, which he, in reality, makes his permanent residence. But suppose the situation were given to a soldier of fortune, who has no property any where, and who resides constantly at Chelsea, there can be no doubt that that must be held to be his residence. The present is a much stronger case than that of Sir Charles Douglas, who had no fixed domicile in England.

The pursuer has no interest to refuse to grant a joint power to uplift the money in England, supposing the right to it to be adjudged to be in the defender. Besides, without such a power, any judgment in the defender's favour would be ineffectual; because the English court might refuse to enforce payment, except on a joint power or discharge; therefore a decerniture in terms of that conclusion is absolutely necessary.

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Court.

Lord Balgray.—I feel no difficulty in this case. The note of the Lord Ordinary renders it unnecessary to go into details; but, from all the circumstances, it is clear that Governor Trapaud must be held to have resided in Scotland *animo remanendi*, and to have acquired a domicile there; and it is equally clear, that all the rights of husband and wife must be regulated by the law of Scotland. In regard to the remaining question, I do not think we can oblige the pursuer to concur in granting a power of attorney, until we know whether that is necessary for uplifting the money.

Lord Gillies.—I take the same view of this case, and I think the question is most satisfactorily determined in the opinion of Sir W. Grant, who, after stating, that by the law of both countries the legacy vests, adds, 'But a subsequent question arises, whether a le-

‘gacy thus vested falls under the husband’s *jus mariti*, so as to pass 16 Feb. 1836.
 ‘by his will, though he die before his wife, and before the legacy
 ‘is paid. Now, that question must be determined by the law of 
 ‘the country in which the relation of husband and wife has been con- Grant or Clark
 ‘tracted, and subsists.’ As to the objection stated, that we have no v. Newmarsh.
 power to force Mrs Clark to join in granting a power for uplifting
 the funds in the Court of Exchequer, I think it of the utmost im-
 portance. But I cannot see, that because the money is in an Eng-
 lish court, that we are to act on different principles with regard to
 it, than if it was in this Court. Supposing it was in the hands of
 the clerk of this Court, who refused to give it up till both parties
 concurred in granting authority, and that we had found the prop-
 erty of the sum to be in A, we should force B to concur in uplift-
 ing it, for he has no right to refuse. It certainly is desirable to
 know, whether a joint power is necessary in this case; but then
 there may be a litigation for years before that point be ascertained;
 and therefore I am for ordaining the pursuer to concur with the de-
 fender in granting a power of attorney, whether it be necessary or
 unnecessary.

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Court.

Lord Mackenzie.—I do not think we can lay down a strict rule, excluding from consideration wholly residence arising from military service. In ordinary cases, where a soldier resides in a country not his original domicil, merely because he is ordered to do so, on temporary military duty, he appearing all the time to have no voluntary determination in the matter, such residence may not be allowed to change his domicil; but where he accepts the government of a fort, which is well understood in general practically to fix a man for life to that locality, and does reside there accordingly his whole life, and a long life, it seems very difficult to lay that out of view in fixing his domicil; and if other circumstances concur with this, such as the absence of any fixed property in his original country, or of any expression of desire, or intention, to return to it,—his marrying in the country where he has taken up his residence,—his accepting other functions there of a nature implying fixed residence,—there seems to be no getting over the impression that he has acquired a domicil there, and has quite lost all other domicil; and that, I think, appears to be the present case.

Then, as to the effect of the Scotch *jus mariti* on the English legacy, I cannot see how that can be affected by the rule of English law, that an English husband does not acquire a legacy left to his wife, without reducing it into possession. Suppose the English rule had been, that the husband did not acquire property falling to the wife at all, would that have excluded the Scotch *jus mariti* from all moveables situated in England? Just as little can a limitation

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‘ or otherwise brought into such a situation as to enable my said trustees and their foresaids to make a general division.’

It is also declared, ‘ In case any of my said brothers and sisters shall die before me, or before the foresaid period of division, without leaving any lawful child or children, or if the children of any of my said brothers or sisters so predeceasing shall die without leaving lawful issue before attaining the age of twenty-one years, it is hereby declared, that the share or shares allocated to my said brothers and sisters, and their children so deceasing, shall again accrue and be added to the general fund of division hereby conveyed in trust, and shall be divided among my surviving brothers and sisters, share and share alike, and in case of their death, among their children, equally, according to the rule, and under the conditions particularly before and after laid down.’ The trustees are authorised to sell, immediately after his death, all or any part of his heritable property. ‘ But if at that time a sale shall not be thought advisable, I empower my said trustees to let the subject upon lease for any term of years they may think proper, the rents to be applied in yearly payments to my said brothers and sisters and their children, according to their several shares and proportions above mentioned; and I recommend it to my said trustees to proceed in the meantime with all proper dispatch in the sale of my said heritable property.’

James Thorburn died in 1830, and was survived by all his brothers and sisters. He left landed property worth about L.10,000, and L.1500 of bank deposits.

John Thorburn, one of his brothers, died without lawful issue, in February 1833, leaving a trust-deed and settlement, conveying his whole property to trustees, for certain purposes, and directing them to pay the residue to two illegitimate children. James Thorburn's trustees were unable to effect a sale of the landed property till February 1835, so that no final division, as directed by the trust, has yet taken place. A partial division, however, of the annual proceeds of the estate, whilst unsold, and of the money in the bank, was made in December 1833, some months after John Thorburn's death.

In these circumstances the only surviving and accepting trustees of James Thorburn, viz. his two brothers, William and Robert Thorburn, brought the present action of multiplepoinding, in which they claimed, as trustees, for behoof of themselves and others having interest, the share of John Thorburn, on the following plea: The share of the deceased John Thorburn accresces, in terms of the trust-deed, to the general fund of division, and falls to be added to the shares of the other parties interested in the succession of the

truster, in respect that the said John Thorburn died, without leaving lawful issue, before the period when any division of the funds was or could be made, as directed by the trust-deed; and that the right to the share of the trust-estate never having vested in him, he had no power to convey the same to his trustees.

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A claim was lodged for the trustees of John Thorburn, in which they pleaded—*1st*, John Thorburn's share and interest in the means and estate of the said James Thorburn, under the said trust-deed, was moveable, and vested in the said John Thorburn; *Angus v. Angus*, 6th Dec. 1825. *2d*, John Thorburn's said share and interest in the means and estate of James Thorburn was effectually conveyed to the claimants by the said holograph settlement; and they are entitled to uplift and receive the same, as trustees, for the purposes of the trust created by John Thorburn.

The Lord Ordinary pronounced the following interlocutor: The Lord Ordinary having heard counsel for the parties, and having afterwards considered the record, productions and whole process, In respect the late John Thorburn died before the period of division specified in the trust-deed, finds, that his share of the succession did not vest in him previous to his death; therefore prefers the trustees of the late James Thorburn, Esq. of Kelton, to the fund in medio, and decerns in the preference accordingly; finds no expenses due.'

Lord Ordinary's Interlocutor.

Note.—'Mr Thorburn of Kelton, by his trust-deed, directs, that as soon after his death as may be thought most prudent and expedient, his trustees shall divide the residue of his succession into nine shares, and allocate them among his brothers and sisters. If the deed had stopped there, there would have been room to hold, that as John Thorburn survived his brother some time, his share should be holden as vested, whether the trustees had actually proceeded to the allocation. But in the immediately subsequent clause, it is carefully provided that the trustees shall afterwards convert the estate into cash, or bring it into such a situation as to enable them to make a general division; and it is declared, that if any of his brothers or sisters die before him, or before the said period of division, without issue, the share of that brother or sister shall fall into the general fund. As predeceasing the period of division is therefore put on exactly the same footing as predeceasing the truster, it seems to follow that the right was not to vest in the one case more than in the other.'

Note.

'No good reason is stated for suspecting that the trustees improperly postponed the period of division.'

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The defenders *reclaimed*, and at the advising, *D. M'Neill*, for the reclaimers, *pleaded*—That the deed contemplated two periods; viz. 1st, A period for allocating the shares among the testator's brothers and sisters; and, 2d, A subsequent period, for payment of the shares so allocated, and general division of the fund: That the right vested by the survivance of the first of those periods; and that the subsequent clause, applicable to the case of any of the legatees predeceasing the second period, was in effect a substitution of the surviving brothers and sisters to the predeceaser: That this was obvious when the words were attended to: the shares were described as the shares already 'allocated;' and it was provided, that they should 'again accrue and be added to the general fund of division,' necessarily importing, that they had been separated from the general fund: That, as John Thorburn survived the first period, the legacy vested in him; and as he had left a deed of settlement in favour of the claimants, the substitution in favour of the other brothers and sisters was thereby evacuated.

Judgment.

The Court unanimously adhered.

Lord Ordinary, *Corehouse*.

M'Neill, Anderson.

Agents. D. Clerk.

Act. Dean of Fac. (*Hope*,) *Moir*.

M. Thorburn, W. S. and Archibald M'Neill, W.S.

Alt. *D.*

C. R.

FIRST DIVISION.

No. XCI.

18th February 1836.

THE REVEREND DONALD GORDON

against

TRUSTEES OF THE MINISTERS' WIDOWS' FUND.

MINISTERS' WIDOWS' FUND.—*A minister holding a church under 5. Geo. IV. c. 90, found entitled to be admitted as a contributor to the Widows' Fund.*

By an Act of Parliament, passed in the 19th year of the reign of his Majesty, Geo. III. c. 20, intituled, 'An act for the better raising and securing a fund for a provision for the widows and children of the ministers of the Church of Scotland, and of the heads, principals and masters in the universities of St Andrews, Glasgow, Edinburgh and Aberdeen,' it is, inter alia, enacted, 'That every minister, head, principal, or master, who has been

‘ordained or admitted since the 29th day of September 1778, or 18 Feb. 1836.
 ‘who shall hereafter be ordained or admitted to a benefice in
 ‘the Church of Scotland, or to an office in any of the universi-
 ‘ties aforesaid, shall be subject and liable to one or other of the
 ‘annual rates therein mentioned, in the option of the said mi-
 ‘nisters, heads, principals, and other masters respectively, to be
 ‘made within the time and in the manner therein directed:’—
 ‘Provided always, That what is therein enacted shall not com-
 ‘prehend any person who shall hereafter be ordained or admitted
 ‘to a benefice in the said church of a temporary nature, or to
 ‘a precarious office in any of the universities aforesaid, where
 ‘there is no security for the continuance of such benefice or office;
 ‘and that it shall not be competent for any such person to claim
 ‘the benefit of this fund, it being intended only for provision to the
 ‘widows and children of the ministers, heads, principals and mas-
 ‘ters, holding fixed benefices in the said church, and permanent
 ‘offices in the universities aforesaid.’

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By an Act of Parliament, passed in the 4th year of the reign of Geo. IV. c. 79, intituled, ‘An act for building additional places of worship in the Highlands and Islands of Scotland,’ it is, inter alia, declared ‘lawful for his Majesty, by a commission under his royal sign-manual, to nominate, constitute, and appoint such persons as his Majesty shall deem fit to be his Commissioners for carrying into execution the purposes thereof.’ By another Act of Parliament, passed in the 5th year of the said reign of Geo. IV. c. 90, intituled, ‘An act to amend an act for building additional places of worship in the Highlands and Islands of Scotland,’ the said act passed in the 4th year of said reign is repealed, ‘save and except so much thereof as relates to the appointment of Commissioners for the execution thereof;’ and it is, inter alia, enacted, that ‘if the said Commissioners shall determine that any additional place of worship ought to be provided for the parish or parishes from which application shall have been made, then the said Commissioners are empowered and directed to require the heritor or heritors making such application to settle and agree with the presbytery of the bounds, so as to define and set apart a certain district within such parish or parishes, for behoof of which district such additional place of worship is to be erected or provided, and to which the labours of the minister to be appointed, as therein directed, to officiate at such additional place of worship, shall be confined.’ The said Commissioners are, by the said act, empowered to erect or purchase a suitable building for any such additional place of religious worship, ‘to be and become an additional place of religious worship, in full communion with the Established Church of Scotland,’ with

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a church-yard or place of burial, and a dwelling-house, with such offices and appurtenances as it may be proper should be afforded to the minister to be thereafter appointed, pursuant to the said act, to officiate at such additional place of worship. The said Commissioners are further authorised to 'ascertain and fix the stipend which shall be paid and payable to the minister to be nominated and appointed to officiate at any such place of worship, from the term of Whitsunday or Michaelmas, immediately preceding the date of his admission thereunto by the presbytery of the bounds, and which stipend shall not exceed the sum of L.120 per annum in any case, (including the sum necessary for communion elements, which shall be provided by and at the expense of the said minister).' The right of presentation to the churches to be erected in virtue of the said act is therein declared to be in 'his Majesty, his heirs and successors;' and if no minister shall be nominated or appointed by his Majesty within the space of six calendar months after the date of the intimation therein specified, or after the date of a vacancy, 'it shall, in that event, be lawful for the presbytery of the bounds within which such place of worship is situated, according to the law of Scotland in like cases, jure devoto, to nominate and appoint a fit person to be minister of the said place of worship.' When a person so nominated shall be admitted and ordained by the presbytery of the bounds as therein directed, it is by the last quoted act ordained, that 'he shall be thereby entitled and bound to discharge, within the district for behoof of which the said place of worship shall have been erected or provided, all the duties of a minister of the Church of Scotland, save and except the right and duty of church discipline, and shall be in all respects subject to the discipline and government of the Church of Scotland, by presbyteries, provincial synods, and general assemblies, as by law unalterably established.' It is expressly set forth, that the district 'set apart for the duties of such minister is not disjoined from the parish or parishes to which they belong, or erected into separate parishes.' It is also provided that the parliamentary ministers and elders shall, in the management of the poor's funds, be subject to the control and direction of the kirk-session and heritors of the parish or parishes to which the said district belongs, and they are directed and required 'to keep a regular record of their receipts and disbursements, and to produce the same to the kirk-session or kirk-sessions of the parish or parishes in which the said district shall be situated.' And it is likewise provided, 'that the elders officiating at such place of worship do not, along with such minister, form any separate and distinct kirk-session, and cannot derive any authority as such from the provisions of this act,

‘ but are merely members of the kirk-session or kirk-sessions of the
 ‘ respective parish or parishes in which the district has been set
 ‘ apart, and have no authority or jurisdiction except such as by law
 ‘ belongs to them as members of such kirk-session or kirk-sessions,
 ‘ and acting as members of meetings of the same.’

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The General Assembly of the Church of Scotland, on the 25th day of May 1833, passed an Act, by which it was enacted and declared, ‘ That the whole districts in Scotland, now or to be hereafter
 ‘ provided with places of worship and ministers, in terms of the acts
 ‘ 4. Geo. IV. c. 79, and 5. Geo. IV. c. 90, shall be, and are
 ‘ hereby, from and after this date, erected into separate parishes
 ‘ quoad sacra; and to that effect, are hereby declared to be dis-
 ‘ joined and separated from the parishes of which they at present
 ‘ constitute a part:’—‘ That all ministers, already inducted or set-
 ‘ tled as ministers within the said districts, or who shall hereafter
 ‘ be inducted and settled in the same, shall and are hereby autho-
 ‘ rised to exercise and enjoy, within their respective districts, the
 ‘ whole powers and privileges now competent to parish ministers of
 ‘ this church, and that as fully and freely in every respect, and
 ‘ without molestation or interference, as if their respective districts
 ‘ had been ordinary parishes, and they had been regularly inducted
 ‘ as ministers thereof; and that the said ministers are and shall be
 ‘ constituent members of all presbyteries, synods, church courts and
 ‘ judicatories whatsoever, and shall enjoy every privilege as fully and
 ‘ freely, and with equal powers, as parish ministers of this church.’

The pursuer was appointed, under the above-mentioned Act, 5. Geo. IV. c. 90, to the parliamentary church of Store, in 1829, and he has brought the present action of declarator against the Trustees of the Widows’ Fund, to have it found that he is entitled to be received as a contributor to that fund. The Lord Ordinary ordered cases, and reported the cause upon them to the Inner-House.

The pursuer *pleaded*—The statute constituting the Widows’ Fund makes the qualification of ministers entitled to claim its benefit to be a fixed benefice in the Church of Scotland. The pursuer is entitled to be admitted to the fund, in as much as he is, by 5. Geo. IV. c. 90, secured in a permanent stipend and manse, and is entitled to discharge, within the district allotted to him, all the duties of a minister of the Church of Scotland, except the rights and duties of church discipline. It is not necessary that he should have a separate parish, as the act does not limit the privilege to parochial clergy. Second ministers who have no separate parishes have been, in various instances, admitted; as in the case of Dundee, where three clergymen are appointed to one parish, and yet are admitted on the fund as holding separate benefices. Since the esta-

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blishment of the fund, thirty new benefices and offices in the universities have been established, and the holders admitted on the fund.

2. But assuming that their right was not complete under 5. Geo. IV, it was made perfect by the Act of Assembly, which communicated to them all the privileges of the old parochial clergy within their districts, which were erected into parishes *quoad sacra*, conferring on them the power of nominating their own elders, and nominating their own kirk-sessions. The General Assembly did not exceed its powers in erecting the parliamentary districts into parishes, as the power to do so, provided the proceedings do not affect the teinds, is in the church courts, without the sanction of Parliament or the Court of Teinds; *Stair*, ii. 8. 27; *Ersk.* i. 5. 23. Second ministers have, in a variety of instances, been nominated within burghs, without the interposition either of Parliament or of the Commissioners of Teinds; and parishes have thus been erected by the authority of the church courts alone, a sufficient endowment having been secured by the burgh or otherwise. This has taken place to a great extent in Edinburgh, and also in other burghs, as in Haddington in 1636, Cupar in 1646, and Dundee in 1683. See *Connell on Tithes*, p. 85, 86. Several of the erections of parishes and charges in Edinburgh had been made on the sole authority of the Town-Council and Presbytery; the New Greyfriars in 1722, St Andrews in 1784 and 1800, St Mary's in 1824, and St Stephen's in 1828. In all these instances, the ministers have been admitted to the benefit of the fund. In this proceeding the General Assembly has not run counter to the terms of the Act of Parliament, but has merely given those privileges of an ecclesiastical description, which the statute had not attempted to confer, and which it would have been improper for the civil power to have interfered with.

The difference between the amount of the stipend of the parliamentary ministers and that of the clergy, under the small stipend act, is too trifling to affect the question; and the admission of additional members cannot be prejudicial to a fund of this description. Therefore the pursuer, as holding a benefice in the Church of Scotland, which is not of a temporary nature, but secured to him indefeasibly under express statute, and as sanctioned by the supreme ecclesiastical authority, is entitled to be admitted to the benefit and privileges of the fund in question.

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Pleas.

The defenders *pleaded*—The point is not so much whether the pursuer's benefice is fixed and permanent, (which might also be disputed,) as whether it is a benefice in the proper sense within the pale of the Church of Scotland, as recognised by law. The only species of benefice known in the law is that of a parish minister, having a particular locality specially appropriated, in which

the whole duties of his office may be discharged. The statute under which the pursuer holds his appointment does not give him a parish, and was intended to give a different status from that of a parish minister. It only allots to him a district, which it declares is not disjoined from the parish or parishes to which it belongs, nor erected into a separate parish, and in which he is debarred from exercising the rights and duties of church discipline, which are thus left to be performed by the regular minister of the parish. Besides, he has no distinct and separate kirk-session, which is essential to the idea of a parish minister. There is not a single authenticated case in which a party was admitted as a contributor, where he was not either a parochial minister or a member of a university. It was ultra vires of the General Assembly to erect the districts allotted to the parliamentary clergy into parishes, and that act was in direct contravention of the statute, which expressly declared that the said districts should not be disjoined from the original parishes. The cases cited by the pursuer were all either sanctioned by the Court of Teinds, or authorised by particular statutes. In regard to the case of Dundee, and of collegiate churches in general, there is a parish in which the ministers are entitled to officiate as parochial clergy; and such parishes, though sometimes not legally, are always practically divided.

The Legislature, by making the stipends of these ministers too small to admit of their paying the rates, shewed its intention that they should not be admissible; and their civil status being thus fixed by an Act of Parliament, cannot be altered by any act of the General Assembly. As the Widows' Fund has been created by statute, it is by the acts of the Legislature alone that new classes of contributors can be added, or any change or alteration made in the existing state of the fund. Besides, by a late act, the vacant stipend of the churches forms a great source of revenue to the fund; and parties in the situation of parliamentary ministers cannot be admitted to the benefit of this source of revenue, as in their case it can never happen that any thing can in this way accrue to the fund, as their livings are never vacant, so as to allow their stipend so to be appropriated. Farther, by the admission of so many new members, the calculations on which the fund was established will be altogether deranged.

Lord President.—This is a case which requires grave consideration. By 5. Geo. IV. c. 90, a sum was granted to erect and set apart buildings for additional places of worship, and to make suitable provision for the residence of the minister, &c. But by § 25, it is declared, that the district to be assigned to such minister 'is not disjoined from the parish;' and by § 16, the minister and

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elders of the parish are to provide the attendance of the elders to officiate at the new place of worship; but it is declared that they, along with the parliamentary minister, do not form any separate or distinct kirk-session; and § 15 provides, that these parliamentary ministers shall discharge all the duties of a minister, 'save and except the right and duty of church discipline,' which they could not exercise, as they were not to have any kirk-session. But in 1833, the General Assembly passed an act, whereby these parliamentary ministers were empowered 'to exercise all the duties of parish ministers as fully and freely as if their districts had been made separate parishes;' making them constituent members of the presbytery, and giving to them 'the like powers, authorities and privileges now pertaining by law to parochial ministers of the church.' It is said that this act was ultra vires, and in direct contradiction of the Act of Parliament, 5. Geo. IV. But this I think is not the case. Parliament did that which properly fell under its powers: it gave money to build a church and manse, gave a stipend to the minister, reserved the rights of the parish minister, and the distinct parishes, gave the patronage to the Crown, and left the matter of church discipline, and the jurisdiction of the new minister, as well as his functions and status in the church, to be regulated by the Court of Teinds, if necessary, and by the General Assembly. Accordingly, the Assembly did not, as they could not, disjoin the district from the parish, and erect it into a separate parish: they only authorised the minister to have the same authority within his district as the old minister had in the other part of the parish; and they admitted him to be a member of presbytery, which they alone could do, and which they had often done as to second ministers, and the numerous additional ministers in Edinburgh, Glasgow, and other large towns.

The words of the act, 19. Geo. III. c. 20, are quite general,—That every minister, head, principal or master appointed to any benefice in the Church of Scotland, or to an office in any of the universities, &c. Here there is no limitation to the then existing ministers, nor any distinction as to the mode of patronage, whether by private patrons, heads of families, jure devoluto, or otherwise. Accordingly, not only all the then existing ministers and professors were admitted, but all the additional ministers and professors, (though by the bye professors are not named in the act, but they are held to be included, under the old name of masters,) and many of both have since been created, and have been adopted into the fund, whether such professorships were erected by the Crown, or by the patrons of the universities,—though all these new admissions would have equally interfered with the calculations on which the rate of contribution was fixed. It is argued by the defenders, that from the smallness of the stipends of these parliamentary ministers, only

L.120, it would be a great hardship to find that they must be contributors. But we have nothing to do with that. Before the small stipend act, many of the old clergy had much less; Cranshaws, about L.35; Glendevon, under L.30,—and yet they were forced to contribute. If such minister has no other income, he will naturally choose the lowest class. An argument is raised on a late act, giving the vacant stipends to this fund; and it is said, that in the case of these parliamentary ministers there never will be any vacant stipend. This is an anomaly; but there is no help for it. In the same way the widows will not have right to the ann. But still they are ministers of the Church of Scotland, and that is all that is required by the act. As to the commencement of this right, I think that it cannot go back before the Act of the Assembly 1833, by which alone they acquired the status of ministers of the kirk; but I doubt whether it ought, in justice and equity, to go back farther than the date of our decree.

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Lord Balgray.—We must bring it back to the date of the act.

Lord Gillies.—This action is in a peculiar situation. It is an action at the instance of Mr Gordon, one of the parliamentary ministers, against these trustees. All that we can do is to find in terms of Gordon's summons. As to the other ministers we can discern nothing, for they are not here. If we discern against the trustees, they can bring an action to compel the other ministers to enter also; for if one is admitted, the others may be compelled to enter; but that is not before us. It is going a great way, to bring an action to find a party bound to enter this fund as at the date of an Act of Parliament; for the money out of which he would make his payments has been bona fide spent. But on the merits I have considerable doubts, for the act admits only such as have benefices. Now, can Mr Gordon, who has no teinds nor lands, but only a stipendiary allowance from Parliament, be looked on as having a benefice? I have doubts also as to the competency of the act of the General Assembly. I think it was ultra vires.

Lord Mackenzie.—In my opinion, the parliamentary ministers have all the qualifications necessary to admit them on the fund. They are in the act called ministers. They must be in the Church of Scotland, because they are of no other church. But it is said they do not hold benefices,—that they are only stipendiaries, having salaries by Act of Parliament. It is true they have not benefices in the ordinary meaning of the canon law; but neither have the greater part of the clergy of Scotland benefices in the strict sense of that word. They have only stipends given them by Act of Parliament; which were not originally, and are not necessarily paid out of tithe. Take, for example, the ministers of Edinburgh, who are paid out of a tax. How then can the parliamentary mi-

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ministers be excluded, as not being beneficiaries, when they have a stipend, and even a manse, and it cannot be pretended that their office or rights are of a temporary nature? As to the objection that they have no separate parish,—that may apply as well to all second ministers. But it is said they have not the full powers of the other clergy. The answer is, the General Assembly has now given them these powers. I doubt if that be a good answer, and whether an Act of Assembly was the competent mode of doing this. I certainly incline to think that it was not. But supposing that they have not the full powers, still are they not ministers of the Church of Scotland? I think they are; therefore on the whole I concur in thinking they should be admitted on the fund.

Lord President.—The General Assembly did not disjoin the parishes. They only declared that the parliamentary ministers should, within their districts, have the same power as parish ministers.

Dean of Faculty.—The Act of Assembly is different from what is now supposed. It is a disjoining act, and therein lies the clear incompetency. If it is to be found that the ministers are entitled to be admitted on the fund, in consequence of the Act of Parliament establishing additional ministers, then they must become liable from the date of their appointments under that statute; but that is not the ground of the action on which the pursuer has sought to establish his claim; and it would lead to serious results to these ministers; for in that view they were all entitled and bound to enter before the Act of the Assembly, and are liable for arrears. The pursuer, however, does not claim in respect of that statute, apart from the Act of the General Assembly, but pleads, that his situation under the statute was changed by the Act of the General Assembly, which gave him a new character; and that, therefore, from the date of the latter Act of the General Assembly, he is entitled to the benefit of the Widows' Fund. In point of fact, no claim was ever made till after the proceedings in the Assembly. In regard to the competency of that act, there are two ways in which parishes might be disjoined and erected into separate parishes quoad sacra,—either by the Teind Court, or by the Presbytery of Edinburgh, for they seem to have acquired a sort of right to this effect within the boundaries of the city. But look to the Act of the General Assembly. There is no calling of the heritors of these parishes, as is done before the presbytery, to hear them with regard to their rights, and a decree thereafter pronounced, disjoining them from the others quoad sacra; but the General Assembly, by a legislative act, declares and enacts that the whole districts in Scotland, now or to be hereafter provided with places of worship and ministers, in terms of the act 4. Geo. IV. c. 79, and 5. Geo. IV. c. 90, shall be, and are hereby, from and after this date, erected into separate pa-

ishes quoad sacra, and to that effect are hereby declared to be disjoined and separated from the parishes of which they at present form a part. Now, is there an instance on record, since the church was regularly settled, of the General Assembly assuming a jurisdiction of disjoining and erecting parishes? The presbyteries are said by some to have a right to do so, though that can only be in a regular process with all the proper parties called; but the Assembly can have no right to interfere with parishes, much less with the districts specially set apart under the acts of Parliament in question, for these parliamentary ministers. It is perfectly evident that there can be no benefice without a district. The act gives a power to the presbytery and Sheriff to allot districts out of various parishes for the parliamentary ministers, who are to be assistants to the different ministry from whose parishes the district is taken. A contract is entered into between the Government and the heritors, the Government building the church, on condition of the heritors contributing the ground, &c.; but, in order to have power to go on with this contract, it has always been the custom of the presbytery to proceed by calling parties, and the presbytery alone has the power, the Assembly not even having any review in the matter. But, in the present instance, the General Assembly has, without calling any parties, and regardless of any form of process, at once declared these several districts to be erected into separate parishes, and disjoined quoad sacra from the others. It is a very great assumption of authority in the General Assembly thus to consider themselves at once entitled to say, by a legislative act, that all these districts shall be held as erected quoad sacra into separate parishes, and that these ministers are in all courts of law to be held entitled to possess all the civil rights arising therefrom. There is nothing in modern times equal to this incompetent assumption.

The Lord President.—Assuming that the General Assembly exceeded its power, in giving these parliamentary ministers the privileges under the late act,—were these ministers not entitled to baptise and marry in their districts, and to do every thing there but excommunicate or censure, which they could not do without a session? and are they not thereby ministers in the sense of the Widows' Fund Act, without calling in the aid of the Act of the Assembly?

Dean of Faculty.—Then your Lordships will pronounce judgment in consequence of the Act of 1824.

Lord Mackenzie.—I suspect the payment must draw back to the date of the act, or that of the minister's appointment under it, in case he insist on admission upon the fund.

Lord Gillies.—Certainly your Lordship must not make it payable from the date of the Act of the General Assembly, for that would be recognising the power of the Assembly in that act, which should

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18 Feb. 1836. not be done. As to their admission on the fund, I am not against it; but I have no feeling in favour of it. It was not, I am sure, contemplated, when this act was framed, that these ministers would come under it.

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Dean of Faculty.—If you hold them to be entitled, because under the Act of Parliament they are ministers, then their right will date from the periods of the respective appointments; and it may be discussed in minutes whether they are to be liable in arrears.

Keay.—But then that question should not be prejudged by the terms of the interlocutor, as bound to enter.

Lord President.—No. But the interlocutor should be as the Dean suggests.

Judgment.

The *Court* pronounced the following judgment: 'Find that the pursuer is entitled to be admitted and received as a contributor to the Ministers' Widows' Fund, and appoint parties to lodge mutual minutes as to the rate which the pursuer shall be liable to, and the date from which such payment shall commence,' &c.

Lord Ordinary, Fullerton.
(Hope,) Grant.
D. Clerk.

Act. Keay, Robertson, Inglis.
James Robertson, W. S. and Harry Inglis, W. S. Agents.

Alt. Dean of Fac.

C. R.

SECOND DIVISION.

No. XCII.

18th February 1836.

DAVID AIKMAN, (MRS HUTCHISON'S TRUSTEE,) RAISER.

GEORGE BROCKIE AND OTHERS, CLAIMANTS.

JOHN MARCHBANKS AND OTHERS, CLAIMANTS.

FIAR. — TRUST. — LEGACY.—*A testatrix directed her trustees to 'set apart L.1000, (contained in a bond,) and apply the yearly 'interest thereof, as an annuity to Walter Colville, my nephew, 'during his life; and declaring, that on the death of Walter Colville, and at the first term of Martinmas or Whitsunday thereafter, 'the said sum of L.1000 shall be divided, and applied by my trustees in manner following: That is to say, they shall pay and deliver L.400 thereof to Mrs Brockie, wife of Thomas Brockie, and L.400, L.100 and L.100 to three others, 'and to their respective 'heirs, in case of their decease: Mrs Brockie had previously, by a mutual deed with Thomas Brockie, conveyed to him, in case of his surviving her, the whole goods in communion or property 'otherwise*

'belonging to me at the time of my decease,' appointing him, by the same deed, her executor, under burden of payment of a fourth of the free produce to Mrs Brockie's next of kin: The testatrix died in 1819, Mrs Brockie in 1823, Thomas Brockie in 1826, and Walter Colville, the nephew, in 1833:—Found, in a question betwixt the representatives of Thomas Brockie, the husband, and those in right of the next of kin of Mrs Brockie, the wife, that the fee of the L.400 had vested in Mrs Brockie, and was conveyed to Thomas Brockie by the said mutual deed executed by the spouses.

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One-fourth of the amount directed to be paid to those in right of Mrs Brockie's next of kin, in terms of said mutual deed; and also one of the sums of L.100 directed to be paid to the representatives of a legatee who had predeceased the liferenter.

IN 1818, Mrs Hutchison, by trust-disposition and deed of settlement, conveyed to David Aikman and others, as trustees, her whole heritable and moveable property. Part of this property consisted of a heritable bond for L.1000 in her favour. The trust-deed declared, 'that my trustees shall hold the subjects above conveyed in trust, and shall apply the same in manner following: 1st, In payment of debts, &c. 'In the second place, they shall set apart the foressaid sum of L.1000, contained in the bond before mentioned, and shall apply the yearly interest thereof, as an annuity to Walter Colville, my nephew, during his life, payable the said annuity at two terms in the year,' &c.; and declaring, that 'on the death of the said Walter Colville, and at the first term of Whitsunday or Martinmas thereafter, the said sum of L.1000 shall be divided and applied by my said trustees in the manner following: That is to say, they shall pay and deliver L.400 thereof to R. W. Hamilton; L.400 to Mrs Brockie, wife of Thomas Brockie, farmer at Belville; L.100 thereof to James Marchbanks, farmer at Crosshall, and the remaining L.100 to Miss Janet Ord, residing at Portobello, or to their respective heirs, in case of their death.'

Narrative.

Mrs Hutchison, the truster, died in 1819, survived by Walter Colville, her nephew, and by Mrs Brockie.

In 1815, a mutual disposition had been executed between Mrs Brockie and her husband, Thomas Brockie, in which he made a settlement in favour of his wife, who, in like manner, 'assigned, &c., as I, by these presents, with and under the special burden, exception and provision under written, assign, dispoise, convey and make over, to and in favour of the said Thomas Brockie, my husband, in case he survives me, all and sundry moveable goods and household furniture,

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‘ and all other moveable effects of whatever denomination belonging to me, or which may, or shall be in communion between us, or otherwise belong to me at the time of my decease; with full power to him, immediately thereafter, to use and dispose of the same at pleasure; surrogating and substituting the said Thomas Brockie, my husband, in my full right and place of the premises; and I do hereby nominate and appoint the said Thomas Brockie, in case he shall survive me, my sole executor.’ To this disposition and assignation a condition was attached, that Thomas Brockie, within six months after his wife’s death, should make up an inventory of the whole debts due to him, and goods in communion at the dissolution of the marriage, with the exception of the household furniture; and that he should grant a bond for one-fourth of the free amount, after deducting debts, to his wife’s next of kin, payable at the first term after his death. Mrs Brockie died in 1823, and was survived by her husband, who, in implement of the above condition, granted a bond in terms thereof. Thomas Brockie died in 1826, after having nominated the claimants, George Brockie and others, his executors. After Mr Brockie’s death, George Brockie and others, as his representatives, paid to the executors of his wife the amount of the bond which had been granted by Mr Brockie, who, on the other hand, acquitted and discharged Mr Brockie’s representatives of the said sum, and declared the same to be in full of all claims and demands which they could ask under the said mutual disposition and settlement.

Walter Colville, the nephew of Mrs Hutchison, died in 1833. On that event, the principal sum of L.400 became payable to the party in right of the fee, and was demanded by George Brockie and others, Mr Brockie’s representatives, on the one hand, and by John and William Marchbanks, sons of James Marchbanks, Mrs Brockie’s nearest of kin, on the other. Mr Aikman, Mrs Hutchison’s surviving trustee, brought a multiplepoinding, calling both claimants to discuss their claims of preference.

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Mr Brockie’s representatives *pleaded*—Mrs Brockie having survived the testatrix, the fee of the L.400 conveyed to trustees for her behoof, under the burden of Colville’s liferent, vested in Mrs Brockie, and thus not only fell under her husband’s *jus mariti*, but was comprehended in the conveyance in his favour, contained in the mutual disposition and settlement. 2. The other claimants have no title to the fund, because, (1.) it had been conveyed by Mrs Brockie to her husband, under the disposition and settlement; (2.) Mrs Brockie’s representatives are farther excluded, in consequence

of the arrangement upon Thomas Brockie's death, and the discharge granted in terms thereof. 18 Feb. 1836.

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Mrs Brockie's representatives *pleaded*—1. In terms of Mrs Hutchison's settlement, the fee of the L.400 did not vest at all in Mrs Brockie during her life, but on the death of Walter Colville, the liferenter, vested in James Marchbanks' sons, or one or other of them, as her heirs. 2. The fee of the L.400 did not fall under the mutual disposition and settlement, or accrue, by virtue of that settlement, to him, or those who now claim in his right. 3. By the arrangement between Mr Brockie and Mr Marchbanks, made after Mrs Brockie's death, Mr Brockie must be held to have restricted his right, under his and his wife's settlement, to the funds therein set forth, to the exclusion of any claim to the L.400 in question, or to have admitted that he had no such claim. 4. They were entitled to the L.100, provided to their father under Mrs Hutchison's settlement.

The Lord Ordinary pronounced the following interlocutor and note :

' The Lord Ordinary having resumed consideration of the debate, with the closed record and whole process, *lmo*, Finds, that by the conception of the trust-settlement of the deceased Anne Haig or Hutchison, the fee of the sum of L.400 sterling did vest in the also deceased Jane Marjoribanks, wife of Thomas Brockie, by and upon her survivance of the said Anne Haig or Hutchison, and was conveyed to the said Thomas Brockie by the mutual disposition and settlement executed by the said spouses in July 1815, and by the nomination therein contained of the said Thomas Brockie as her executor; and therefore ranks and prefers the claimants, George Brockie, John Brockie and Adam Brockie Boyd, as executors of the said Thomas Brockie now deceased, *primo loco* upon the fund in medio, to the extent of the said sum of L.400 sterling, with interest thereof from and after the term of Whitsunday 1838 till paid; grants warrant to the British Linen Company and their Manager to make payment to the said claimants of the sum of L.350; decerns against the raisers of the multiplepoinding for the balance resting due to the claimants of the said L.400, and interest thereof, after deducting the said consigned sum and interest, and decerns *ad interim* accordingly: *2do*, Ranks and prefers the claimants, John and James Marjoribanks, and their curator, on the said fund in medio, to the extent of L.100 sterling, (being the whole balance or remainder of the said funds,) with interest thereon from the said term of Whitsunday

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Note.—' There has been no competition as to the L.100, and it ought, perhaps, not to have been given up as part of the fund in medio in a multiplepointing. But as the parties entitled to it are claimants on the L.400, and have been put to no trouble in discussing this part of the case, there seems no ground for subjecting the raisers in any part of their expenses.

' The other part of the case belongs to a class of questions, as to which there is often great difficulty ; and resolving, as they do, in a great measure, into *quæstiones voluntatis*, it is not easy to deduce from the decisions any rule or canon of interpretation of universal application, or even, at first sight, to reconcile some of those decisions with others. On considering the whole series of authorities, however, the Lord Ordinary thinks the present case sufficiently clear.

' He is of opinion, in the first place, that the trust-settlement of Mrs Hutchison clearly provided the liferent of this L.400 to Colville, and the fee to Mrs Brockie. She does not use these technical words indeed, but that the substance of the provision is to this effect there can be no doubt. In the next place, he thinks it equally clear, that under such a provision, if made without the intervention of trustees, the fee would vest immediately on the death of the testator, and might be effectually conveyed by the fiar, although ultimately predeceasing the liferenter. The only real difficulty, therefore, is as to the effect of the trust—a contrivance by which it is no doubt possible to suspend the vesting of any beneficial interest in such a property, either during the subsistence of a liferent, or even for a longer period, if such should appear to have been the wish and intention of the granter. But it by no means follows, that such a wish and intention is to be presumed from the mere fact of a trust having been constituted ; and the practical rule rather appears to the Lord Ordinary to be this, that wherever the fee is *finally* destined (on the expiration of the liferent) to a certain individual, or to a single definite class or description of persons, without any *ulterior* provision or destination whatever, the right will vest from the death of the testator exactly as if there had been no trust ; but that where the destination is to a *succession of persons* beyond those first named as fiars, the right, if there be no speciality, will not vest in any of them, but remain in the trustees, till it appears, on the termination of the liferent, to which of them it truly belongs. In the first case, there is in truth no legal contingency, and no intelligible motive for suspending the vesting, or postponing the power of disposal, there being

‘ from the beginning no doubt of the person by or through whom the fee *must* be taken, and the testator having no views or wishes beyond that person ; whereas, in the latter, it is natural to suppose, that having named a succession of persons, one or other of whom is to take on the termination of the liferent, he did not mean to give any of them a power to disappoint that contingent right of succession, by exercising a power of disposal by anticipation, and may therefore be fairly presumed to have left the fee in the trustees, on purpose to avoid such a disappointment. In the other case, the presumption would be, that the trust was meant only to secure the interest of the liferenter, and to protect the funds till its termination.

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‘ Such, accordingly, appear to have been the principles which have governed the decisions, both those in which the fee was found to have vested before the death of the liferenter, and those where it was found not to have vested. The case of *Sivright and Dallas*, 27th Jan. 1834, *F. C.*, is very remarkable in the first class, both because the fee was there destined, (through trustees,) not (as in the present case) to a specific individual, but to children nascituri, and because an absolute power of distribution was given to the liferenters. The case of *Russell and McDowall*, (or *Crawford’s Trustees*), 6th Feb. 1824, *F. C.*, which was very elaborately considered, involved the very same principle, and is a case a fortiori to the present, because the fee (which it was found George Crawford could dispose of before the expiration of the liferent) was not destined simply to him and his heirs, (as in this case,) but failing those, to his two younger brothers, and their heirs nominatim in succession. The same may be said of the more recent case of *Leitch’s Trustees*, 2d June 1826, (4. *Shaw*, 659,) which was affirmed on appeal in February 1829, (3. *Shaw* and *Wilson*, 366,) where, though there was an ulterior destination of the fee beyond that to Andrew Leitch, viz. to the sisters and nieces nominatim of the testator, it was still found that the fee vested in Andrew, and might be disposed of by him during the subsistence of the liferent, in consequence of the marked omission of certain words in the clause relating to him, which were anxiously inserted into all the previous destinations. The case of *Merrilees*, 17th May 1826, (4. *Shaw*, 591,) is also a very remarkable one, as assuming the fact of the vesting (and consequent power of disposal) in a fiar during the subsistence of the liferent, in circumstances peculiarly favourable for the opposite conclusion ; and the Lord Ordinary accordingly observes, that it is a case much relied on at the last advising (in this Court) of the subsequent case of *Leitch*.

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‘ In all the cases, again, which have been decided the other way, there has been a series of conditional institutions beyond that of the parties first named as fiars, and the whole structure of the deed has been such as to raise an irresistible presumption that the trust was created mainly for the purpose of keeping the beneficial interest, or substantial right of the fee, from vesting anywhere (but in the trustees) till the running out of the liferent. Nothing can illustrate this better than the very recent case of *Mowbray or Walker’s Trustees*, 9th July 1834, (12. *Shaw*, 910,) in which there was not only a very long and complicated series of conditional institutions as to the fee, but an express provision, repeated at three different stages of this complex destination, that the trustees should take certain parts of the subjects *to themselves in fee*, as trustees for certain ulterior, variable, and contingent purposes. In fact there are in substance three separate and successive trusts created in certain events, with an anxious provision, that when these events occur, though long after the death of the truster, the fee shall again be taken, in express terms, *to the trustees themselves*, who might as well have been different persons, as the same to whom the whole estate was to pass on the death of the granter; and the provision is therefore quite inconsistent with the notion of any substantive interest being vested on the occurrence of that death.

‘ In the present case, the destination is simply, and once for all, to ‘ *Mrs Brockie and her heirs*;’ and as Mrs Brockie survived the testator, there seems no reason for doubting that the property then vested in her, and was from that time forward at her disposal. The mere mention of her heirs, it is humbly conceived, can never, after the cases of *Crawford and Leitch*, warrant the supposition that the trust was created in any degree for the purpose of protecting the conditional institution of unknown parties, by depriving the only named fiar of the power of disposal; it being manifest, in the Lord Ordinary’s apprehension, that these words were introduced, not with any view of suspending the vesting, but solely to meet the contingency of Mrs Brockie herself predeceasing the testator, and the legacy consequently lapsing. The addition, in short, was made not out of any jealousy of her, but entirely out of favour; and not to restrain her full right subsequent to the testator’s death, but to secure the benefit of it, (if she died before that event,) for her sake, to her representatives.

‘ None of the other objections to the claim of her husband’s executors seem to be at all tenable.’

John and William Marchbanks *reclaimed*. The Court, being of opinion that the question, whether, under the terms of Mrs Hut-

chison's settlement, the fee of the L.400 had vested in Mrs Brockie, 18 Feb. 1836. was attended with difficulty, appointed the parties to state their arguments and authorities in cases.

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Pleaded for Thomas Brockie's representatives.—The question was, whether the intervention of a trust, or, at least, of a trust conceived in terms of that executed by Mrs Hutchison, has the effect of suspending the vesting of the fee until the death of the liferenter. Now, although a trust-deed may be, and often is, used for the purpose of preventing the contingent fee from vesting, it is as often used without any such intention, and for the purpose of securing the temporary interest of a liferenter. The rule deducible from the cases is, that it is only where there is an ulterior substitution to the fee, that trusts are held to prevent the fee from vesting; and that where the fee is finally destined, on the expiration of the liferent, to a certain individual, without any ulterior provision of this nature, the right vests from the death of the testator, as if there had been no trust. See *Sivright v. Dallas*, 27th Jan. 1824, where it was found, that a right capable of being transmitted, was vested in the fiar during the life of the person by whom the sum bequeathed was liferented; but that it did so vest, notwithstanding a contingency as to the amount of the interest depending on the exercise of a power of division, which, by the trust-deed, was bestowed upon a surviving parent. See also *Leitch's Trustees v. Leitch*, 2d June 1826, affirmed in the House of Lords, 2d Feb. 1829. It has been maintained on the other side, that there was a distinction, in as much as a testamentary conveyance to trustees of a subject, to be held by them for behoof of a certain person in liferent, and others in fee, constitutes a fiduciary fee for those persons, and, immediately on the testator's death, vests a right in the persons for whose behoof that trust is constituted, capable of being transmitted by them; while a simple conveyance to trustees, with directions to apply the property in a certain manner, for behoof of certain persons during their lives, and, after their death, for certain others, does not constitute such a fiduciary fee in regard to the individuals for whose behoof the trust was created, and consequently gives them no right which can be made the subject of transmission, until the event occurs when the sum becomes actually payable to, and exigible by them. But there is no such distinction in law. See *Russell v. M'Dowall and Selkirk*, 6th Feb. 1824; *Merrilees v. Matthew*, 17th May 1826, in which last case the fact of the vesting was assumed. Cases of simple legacies also present analogies to the present case. Where a legacy is granted to an individual, without mentioning to his heirs, the legacy lapses in the event

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of the legatee predeceasing the testator. It is equally clear, that if he survive the testator, although he may predecease the period when the legacy becomes payable, the fee vests in him although no mention be made of his heirs. There is an exception to this, where the payment of the legacy is only exigible at a period which may never occur, as, for example, the legatees attaining a particular age. Accordingly, it has been repeatedly decided, that a legacy bequeathed to A, though not payable until the death of B, by whom the legacy is appointed to be liferented, vests in A, to the effect of being transmissible immediately on the death of the testator, and that the vesting is not at all affected by his predeceasing the liferenter; *Fouke v. Duncans*, 1st March 1770; *Nesbit*, 27th June 1829; *Smith v. M'Beath*, 30th May 1834; *Wallace v. Wallace*, 28th Jan. 1807.

Pleas for John
and William
Marchbanks.

Pleaded for John and William Marchbanks.—The clause in question implies that the L.1000 is to be set apart in the trustees' hands; or, in other words, that the fee of it, as well as of the other estate and effects, having been conveyed to them by the settlement, they are to remain the fiars of it, for the special purposes therein expressed, and, inter alia, are to exercise their right of fee, by applying the yearly interest as an annuity, payable to Walter Colville during his life; but the deed does not vest this fund in the trustees, either expressly or by implication, for behoof of Walter Colville in liferent, and Mrs Brockie in fee. Indeed, the words, 'liferent and fee,' do not once occur throughout the clause, and the words and structure of it indicate a different meaning. It is important that the provision in question is made through the medium of a trust, and that not merely by conveying the testator's whole means and estate to trustees, with directions to them to pay a certain sum to one party in liferent, and to another in fee; but by farther directing the trustees to take the fee of the particular fund out of which the provision is made payable to themselves, for the purpose of paying the annual produce to one party, and then, at his death, dividing the principal sum amongst certain other parties, or, in the event of their death, among their heirs. The mode of vesting raises the presumption, that the testatrix did not mean to give any vested right of fee before the period of division, but that she reserved the fee during all that period in the trustees, for the express purpose of suspending the ultimate claim to the principal sum till the period of division arrived, and thus empowering the trustees to apportion it at that period among the parties to whom it is destined, or their heirs, according as these parties were then alive, or had predeceased. The

presumption in all such cases is, that till the period for the ultimate apportionment of the fund, there is no vested right to the principal sum except in the trustees, and that the continuance of a trust has been adopted for the very purpose of extending the supposition of such a vested right, till it shall appear which of the parties is alive at the period of distribution, and to whom, therefore, in terms of the settlement, the principal sum is ultimately to belong; see *Duncan and others v. French*, 27th June 1809, *F. C.*; *Nesbit v. Macdougall*, eo. die; *Glendinning and Ghaunt v. Walker and others*, 30th Nov. 1825, *F. C.* and 4. *S. and D.* 237; *Mowbray v. Scougalls and others*, 9th July 1834, *F. C.* and 12. *S. D. and B.* 960, affirmed in House of Lords. The same principle of suspending the vesting of a sum till the death of a party, who is to draw the annual proceeds, by vesting it in trustees for behoof of that party, and also for behoof of other parties, to whom the principal sum is ultimately destined, the one failing the other, is implied in the special case of *Buchanan v. Downie*, 12th Feb. 1830, *F. C.*, and 8. *S. and D.* 516. The cases referred to by the Lord Ordinary and the other parties are not inconsistent with these views. Further, in the case of *Merrilees*, the question was, whether a law-agent, who was factor for trustees, under a deed of settlement, and had paid part of a legacy to the nearest in kin of a legatee, after his decease, without requiring confirmation, instead of paying it to a party in whose favour the legatee had left a testament, was liable in relief to one of the trustees, who had been subjected in a second payment; and it was held, that he was liable for those payments which were made after he knew of the testament. Throughout the whole argument, it was assumed, without discussion, that the legacy vested in the legatee, so as to be validly conveyed by his testament; and it is with regard to this point of vesting that the case is cited as an authority. But, 1st, It cannot be considered as an authority, because the point was never discussed; and, 2dly, Supposing it to have been correctly held that the legacy did vest, the circumstances under which it was so held were entirely different from those of the present case.

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and William
Marchbanks.

The Court concurred in the result of the Lord Ordinary's interlocutor, holding that the fee of the L.400 had vested in Mrs Brockie. While their Lordships could not concur in all the reasons assigned by the Lord Ordinary in his note, they held that the case of *Merrilees*, 17th May 1826, applied, and that the question so far was raised there, that it had been taken for granted by the whole Judges of this Division of the Court, that the fee had there vested, and that there was a consequent power of disposal; and upon that, the lia-

Opinion of
Court.

18 Feb. 1836.


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Judgment.

bility of a party proceeded. Upon this principle of construction, and looking to the particular phraseology of Mrs Hutchison's deed, their Lordships were disinclined to alter the findings of the Lord Ordinary.

' The Lords having advised the cause, and heard counsel for the parties, find, that the said John and William Marchbanks, and their trustees, tutors and curators, are entitled, by the settlement of Mrs Brockie, to one-fourth part of the debts, means and effects in communion between her and her husband at the death of the first of them, and that they are therefore entitled to one-fourth part of the sum of L.400, and interest thereof from and after the term of Whitsunday 1833, to which the present discussion relates; rank and prefer the said George Brockie and Mrs Brockie, and Adam Brockie Boyd, the accepting and surviving executors of the said deceased Thomas Brockie, to three-fourths of the said sum, and interest, as aforesaid, due and to become due thereon; and rank and prefer the said John and William Marchbanks, and their trustees, and tutors and curators, to the remaining one-fourth of the said legacy, and interest as aforesaid; and to this extent alter the interlocutors submitted to review, and, quoad ultra, adhere thereto, and refuse this reclaiming note, &c.; find no expenses due to either party.'

Lord Ordinary, *Jeffrey.*
Thomson.

Act. *Monteith.*

Alt. *Dean of Fac. (Hope,) and*
J. S. Darling, W. S. and W. Hunt, W.S. Agents.

R.

FIRST DIVISION.

No. XCIII.

19th February 1836.

SIR DAVID MILNE

against

SIR JOHN MARJORIBANKS' TRUSTEES.

SALE.—(LOCUS PŒNITENTIE.)—*A correspondence having taken place regarding the sale of a landed estate,—held, that the terms of the letters did not import a concluded bargain, and that the sellers were therefore entitled to enter into a new transaction with another party.*

THE Trustees of the late Sir John Marjoribanks being, for various reasons, anxious to wind up the trust, met with an obstacle in the

agreement which Sir John Marjoribanks had entered into with re- 19 Feb. 1836.
 gard to the purchase of the estate of Simprim, in Berwickshire. It
 formed part of the bargain concluded between Sir John and the
 seller of that property, that the price, amounting to L.37,000, should
 remain in Sir John's hands, bearing interest at the rate of $3\frac{1}{2}$ per
 cent., until a judgment should be pronounced by the House of
 Lords with regard to the validity of the title. Thus, in order to
 allow the trust to be immediately wound up, it was necessary that
 some steps should be taken for relieving Sir John's estate from this
 large contingent claim.

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 joribanks'
 Trustees.
 Narrative.

Accordingly, at a meeting of Trustees, held on the 11th of January 1834, Mr Charles Cuninghame, their commissioner, was instructed to make up a state of the trust affairs, and to be prepared to advise the Trustees as to the practicability of denuding of the trust, and executing an entail in terms of the trust-deed; and in doing so to have in view a sale of Simprim.

The following passage in a letter, dated 16th January, from Mr Alexander Cuninghame, the son and partner of Mr Charles Cuninghame, to Mr Milne, refers to what passed at this meeting: 'As, however, it appeared to the Trustees that Simprim might be disposed of, it was suggested by Mr Marjoribanks, that some member of the family would take it, or that (other matters being arranged) some one else might be found to do so, and among others your father's name was mentioned, but merely as a matter of commonplace conversation.' On the morning of the 14th January, Mr Adam Anderson, one of the Trustees, had a conversation, relative to Simprim, with Mr Milne, the pursuer's son, with whom he was on terms of intimacy. Parties were not agreed as to the import of this conversation. Mr Anderson admitted that he stated it was probable that the Trustees would part with Simprim, and that being aware the pursuer had formerly looked at it with some views to a purchase, he wished Mr Milne to ascertain what were his father's present sentiments in regard to it, and that he referred Mr Milne to Messrs Cuninghame and Bell, the agents for the Trustees, for information. But he denied that he made, or represented himself as authorised to make any offer of sale to Mr Milne. Mr Anderson also stated, that he had refused to address Mr Milne in writing on this conversation on the subject, and that he made Mr Milne aware, that whatever his own opinion might be, it was the wish of others of the Trustees that Simprim should be sold to some of the members of the Marjoribanks' family. The import of this conversation being thus disputed, its terms do not seem to have entered into the grounds of decision, either by the Lord Ordinary or the Court.

On the same day, the 14th, Mr Milne, by authority of the pur-

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—
Narrative.

suer, addressed the following letter to Mr Carlyle Bell, one of the partners of the house of Cuninghame and Bell, the agents of the Trustees: 'MY DEAR SIR,—Mr Adam Anderson spoke to me to-day regarding the wish of Sir John Marjoribanks' Trustees to dispose of Simprim, and stated, if Sir David Milne were still inclined to become the purchaser of that estate, the Trustees would wish to transfer it to him. My father, to whom I have spoken on the subject, is not indisposed to enter into the proposed transaction, if the terms are unobjectionable; and, therefore, I will be obliged by your sending here the papers which may enable Sir David to come to some resolution on the subject.'

To this letter, on the same day, Mr Alexander Cuninghame, a partner of the said firm, and son of Mr Charles Cuninghame, sent the following answer: 'DEAR SIR,—In terms of your request, I beg to inclose an outline of particulars of the estate of Simprim, which will give you an idea of how it stands. I can furnish more particulars if required; and I may mention, that Mr Bell of Swintonhill valued it, and is of opinion that it is one of the most eligible purchases which could be made in Scotland.'

'Another party has been spoken to, and is inclined to entertain the proposal, but cannot fix till he hears from London.'

It appeared from the books of Messrs Cuninghame and Bell, that the outline of particulars inclosed in this letter had been drawn up for the information of the party who was stated to be already in the field. It contained the following passages: 'The estate was purchased by Sir John Marjoribanks, in May 1832, for L.37,000; but Sir John having shortly afterwards died, and his Trustees not having funds to pay the price, are anxious to get quit of the bargain.' And again, 'The transaction stands at present on a minute of sale, and Sir John's Trustees would place any one in his shoes by just assigning it over.'

On the next day, the 15th, another meeting of Trustees was held, and the following passage occurs in the minute of that day's proceedings: 'Mr Marjoribanks however having stated, that he thought it proper to offer the transaction to the members of Sir John's family before closing with any stranger, and that he had accordingly written to Mr Campbell Marjoribanks on the subject, and expected an immediate answer, the meeting quite approved of Mr D. Marjoribanks' suggestion, and agreed to delay for an answer from Mr Campbell Marjoribanks; but they consider it quite imperative this purchase should be taken off their hands before the entail is executed.'

On the same day, and, as he alleged, subsequent to this meeting, which was not admitted by the pursuer, Mr Alexander Cuning-

ham received the following letter from Mr Milne : ‘ DEAR SIR,— 19 Feb. 1836.
 ‘ My father has perused the statement sent by you as to the estate
 ‘ of Simprim, which Sir John Marjoribanks’ Trustees have offered
 ‘ to transfer to him; and he desires me to say, that he is willing to
 ‘ enter into the proposed transaction.

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 joribanks’
 Trustees.

Narrative.

‘ You will therefore be so good as send to him a note of the pa-
 ‘ rochial and public burdens, &c., and the missives which passed
 ‘ between the former proprietor and Sir John Marjoribanks.

‘ Of course, after this intimation, Sir David will understand,
 ‘ that any negociation you may have opened with other intending
 ‘ purchasers will now drop.’

Mr Alexander Cuningham returned an answer on the same day,
 stating the resolution come to by the Trustees at the meeting, and
 that he was, in these circumstances, barred from proceeding farther
 till their determination was known.

Mr Milne, next day, the 16th, in a letter to Mr A. Cuning-
 ham and the pursuer, expressed his surprise that a preference
 should be given to other parties. He said, ‘ Sir David has acceded
 ‘ to the proposal of the Trustees, and he could hardly have expected,
 ‘ that after he had intimated his acceptance, they should still give
 ‘ an opportunity to other purchasers to deprive him of the estate
 ‘ offered to him. I am sure, that when the matter is explained to
 ‘ the Trustees, they will not be disposed to resile from their own
 ‘ proposals in the manner which the terms of your letter imply.’

On the same day an answer was sent by Mr Cuningham, de-
 fending the conduct of the Trustees, which contains the following
 passage : ‘ And when the Trustees held their meeting yesterday fore-
 ‘ noon, and it was reported what was going on, Mr David Marjori-
 ‘ banks expressed his opinion, that the family were entitled to a
 ‘ preference over any stranger.’ The letter concludes with this
 sentence : ‘ I am further directed to state, that Mr David Marjori-
 ‘ banks has come forward with a proposal at this day’s meeting,
 ‘ which had been accepted.’

It appears from the minutes of the meeting of Trustees of 16th
 January, that this proposal made by Mr D. Marjoribanks related
 to a sale of Simprim to Mr Thomson of the Royal Bank; and that
 Mr Cuningham was directed to inform Mr Milne of this. On the
 17th, the transaction was closed by a missive from Mr Charles Cu-
 ningham on behalf of the Trustees, offering Simprim at the same
 price of L.37,000, and a missive by Mr Thomson accepting of it.

A letter, dated the 16th January, was granted by Sir William
 Marjoribanks, eldest son of the late Sir John, but not one of his
 Trustees, and Mr David Marjoribanks, a trustee, guaranteeing Mr

19 Feb. 1836. Thomson from any loss or damage from the purchase. A disposition was granted to Thomson on the 22d January.

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joribanks'
Trustees.

Narrative.

Such were the circumstances under which the pursuer raised the present action of implement and damages against the defenders, concluding for implement of the agreement, which he alleged to have been concluded with him, to sell the estate of Simprim, or otherwise for damages, laid at L.10,000.

Pursuer's
Pleas.

The pursuer *pleaded*—1st, The negociation which took place (as above set forth) between the defenders and their authorised commissioner and agents on the one part, and the pursuer and those acting for him on the other part, amount to a concluded offer and acceptance, or bargain obligatory upon the defenders, and which they are bound to implement, by transferring to him the right to the estate of Simprim, which the late Sir John Marjoribanks had. 2d, The transaction with Mr Thomson not being a bona fide sale, but being a covert or collusive transaction, intended to defraud the pursuer of his rights, and, moreover, being posterior in date to the transaction with the pursuer, cannot defeat the right of the pursuer to compel implement of his bargain, or the obligation of the defenders to implement that bargain. 3d, The transaction with Mr Thomson being a covert and collusive transaction, for behoof of one of the trustees themselves, in prejudice of the rights of the pursuer, is not a legal obstacle to the implement of the bargain with the pursuer. 4th, In the event of the defenders refusing to implement the bargain with the pursuer, he is entitled to damages from them.

Defenders'
Pleas.

The defenders *pleaded*—1st, There was no such offer of the estate of Simprim made, on the part of the defenders, to the pursuer, previous to the letter written by Mr David Milne, on the 15th of January 1834, as entitled the pursuer to hold that letter as the completion of a bargain of sale of the estate of Simprim. 2d, The verbal conversation between Mr Anderson and Mr David Milne on 14th January 1834 did not constitute or imply any offer of this estate by the defenders to the pursuer. 3d, The letter written by Mr Alexander Cunningham, on the same day, to Mr Milne, in answer to his letter of inquiry, did not constitute or imply any such offer. 4th, Mr Milne's letter of 15th January 1834 could not have any effect, in so far as the defenders are concerned, except as an offer addressed to their agent, which, when it was laid before them, they were at liberty to accept or decline; and the defenders were in no respect bound, by the mere sending and receipt of such letter, except to signify their intention in regard to the pursuer's desire to

purchase, expressed therein. 5th, Mr Cuninghams answer to this letter of the same date constituted a sufficient intimation to the pursuer that his proposal might not be entertained at all by the defenders; and the subsequent correspondence explicitly declared their determination not to accept of it. 6th, Neither to the defenders, nor to any one of their number, can the imputation of mala fides, fraud or collusion be justly applied. 7th, The pursuer never having acquired any right to the estate of Simprim, and the defenders never having become bound to convey it to him, the pursuer is not entitled to demand damages from the defenders, in consequence of their refusing to do so.

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joribanks'
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Defenders'
Pleas.

The Lord Ordinary pronounced the following interlocutor :

' The Lord Ordinary having heard parties' procurators, and considered the closed record and process, finds, that there was no concluded bargain for the sale of the lands of Simprim between the pursuer and the defenders, and therefore sustains the pleas of the defenders; assoilzies them from the conclusions of the action, and decerns: finds the defenders entitled to expenses, and allows an account thereof to be given in, and to be taxed by the Auditor.'

Lord Ord-
inary's Inter-
locutor.

Note.—' The alleged conversations between Mr Milne and Mr Anderson must be thrown entirely out of view. The only inference that can be drawn from the opposite statements on this point is, that there was a misapprehension on one side or the other, but on which side, it is now confessedly impossible to ascertain, and, indeed, considering the subject in dispute, incompetent to investigate by parole proof, even if that were attainable. The question must be determined by the correspondence, and on that the Lord Ordinary entertains no doubt.

Note.

' The case of the pursuer must rest on the assumption, that the letter of Mr Cuninghams, of the 14th of January, constituted an offer of the estate to him on the terms contained in the enclosed paper, and that the transaction was concluded by his acceptance of that offer, in the letter from his son of the 15th January; and his case would have been a strong one, if he had made it out, as laid in the summons. It is there averred, that at the meeting of the Trustees on the 11th of January, ' it was resolved " to apply to the pursuer to become the purchaser of the estate; ' and that, ' for the purpose of making an offer of the said estate to the pursuer, a minute or missive was drawn out by the said Trustees, or under their direction, setting forth the terms on which they were willing to convey it to the pursuer; ' and that the said minute or missive was accordingly transmitted to the pursuer in the above-mentioned letter of Mr A. Cuningham. But this

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—
Note.

' statement is not only unsupported, it is in some essential particulars disproved by the written evidence. *First*, It does not appear that the Trustees had come to the definitive resolution of parting with the estate, and certainly there is no proof that they had formed even an intention of offering it to the pursuer. *Secondly*, It is proved that the 'note of particulars,' termed by the pursuer a "minute or missive," was not drawn up by the direction of the Trustees for the purpose of making an offer to the pursuer, but was drawn up by their agents, for the information of another party who had some intention of purchasing. *Thirdly*, The letter of the 14th January was addressed to the pursuer by Mr A. Cunningham, who was only the agent of the Trustees, and who had no power to make an offer. Though inclosing the 'note' already referred to, that communication was described as 'an outline of particulars which will give you an idea of how it stands.' And the letter clearly imported that a similar communication had been made to, and was then under the consideration of another party.

' In these circumstances, the Lord Ordinary is of opinion, that the letter of the 14th of January must be viewed, not as an offer of the estate on the terms contained in the inclosed 'note,' but merely as the communication by an agent of the information which he possessed respecting it. He conceives that the first letter which admits of being construed as an offer is that of the 15th of January, and it is clear that that offer never was accepted by the Trustees.'

Pursuers'
Pleas.

The pursuers *reclaimed*; and at the advising, *Dean of Faculty*, for the reclaimers, *pleaded*—That the intention of the defender to sell to the pursuer was evident from Mr Cunningham's letter, giving an account of the proceedings at the meeting of the 11th January, taken together with the communication by Mr Anderson to his son, Mr D. Milne, on the 14th: That the note of particulars inclosed in a letter, sent in answer to one on the part of Mr Milne, stating that he was not unwilling to enter into the transaction, and expressing a wish to see certain papers, in order to come to a resolution, must be held to be an offer: That after Mr Milne's letter of the 15th, accepting the offer, and begging them to drop any negotiations with other intending purchasers, they opened a new correspondence with another party: That Mr Marjoribanks had not displayed any wish to find a purchaser, until he was aware that the pursuer was ready to give the price asked, for Mr Marjoribanks' offer is made at the meeting of the 16th, and in Mr Cunningham's letter of that date, he admits that a report was given of what was going on, and this report must have referred to the contents of the

letter of Mr Milne, which led to the sending of the statement: That the sale being made to one of the Trustees in reality, though nominally to Mr Thomson, was in fact for the purpose of preventing the purchase of the pursuer: That the plea, that the defenders were not bound by the acts of Mr Cuninghame, was untenable: That in all these circumstances the pursuer was entitled to obtain implement of the bargain, which had been concluded with him by Mr Cuninghame, on the part of the defenders: That in England, parties were often held bound by correspondence much less explicit; and in one case Lord Eldon held a party bound by a letter, in which he did not intend to make an offer, but which was so expressed as gave room for the other party to take it as an offer.

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joribanks'
Trustees.**

**Pursuers'
Plea.**

The Court did not hear *Mr Rutherford* for the defenders.

Lord Balgray.—I have given great attention to this case, and I can never submit to the first principles of the law of Scotland regarding the sale of landed property being subverted. All our authorities concur in holding, that for the sale of land, the consent of both parties, in writing, is necessary, and that there is locus poenitentiae till the written consent of both parties has been given. If there was a bargain in this case, it must have been made by the letters of the 14th and 15th January. Now, look to the terms of these letters. The first letter of Mr David Milne, dated 14th January, says, ‘ My father, to whom I spoke on the subject, is not ‘ indisposed to enter into the proposed transaction, if the terms are ‘ unobjectionable,’ and asks for papers, ‘ which may enable Sir ‘ David to come to some resolution on the subject.’

**Opinion of
Court.**

But I think the whole case lies in the reply made by Mr Milne to the answer to his first letter. In it he says, speaking of his father, ‘ He desires me to say that he is willing to enter into the ‘ proposed transaction ;’ but he requires something ulterior to this letter, for he adds, ‘ You will therefore be so good as send to him ‘ a note of the parochial and public burdens, &c.’

Before his final resolution, therefore, he wanted further information and papers. In these circumstances, I think the Trustees were perfectly at liberty to sell and dispoⁿe the estate to another purchaser, as there was no concluded bargain with Sir D. Milne.

Lord President concurred. The question is, whether there was a concluded agreement betwixt the pursuer and the defenders. I think, according to the law of Scotland, there was not. *Lord Eldon's* opinion is of no weight, because the rules of the English law may be totally different from those of ours. Neither do I attach much importance to the note of particulars which was sent to Mr

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Milne. It seemed to be drawn up for the information of inquirers, and might have been given to many others. The expression in it, that 'Sir John's Trustees would place any one in his shoes,' meant, that they would assign over the minute of sale to the purchaser. I am therefore for adhering. I cannot, however, assent to the opinion of the Lord Ordinary, regarding the want of power in Mr A. Cuninghame.

Lord Gillies.—I have some difficulty in this case. If the note of particulars sent in the letter to Mr Milne was a circular, that would make a difference; but it appears that the agent of the parties sent this statement at the request of the offerer, in which he told him, that the Trustees 'would place any one in Sir John's shoes.' Now, in these circumstances, I think, 'would place any one,' means, 'would place you in his shoes.' Then there arises a question, whether Mr Milne's letter was an acceptance or not? It is clear, as he was made aware that another person was in the field, that the Trustees were bound to wait till they heard from this other person; but then it seems that he went off, and a bargain was concluded with a new purchaser. But, notwithstanding these difficulties, looking to the general principles of the law of Scotland in regard to sales of land, I cannot think there was here a finished transaction. If the subject had been any other thing, I should have been of a different opinion.

Lord Mackenzie.—Though I have some difficulty, yet I cannot think there was here either a definitive offer or acceptance. What is called the offer is contained in the note of particulars, inclosed in the letter to Mr Milne; not in the letter itself. Observe what Mr Milne asked; not an offer, but a note of particulars. Such a note is accordingly sent to him in a letter. That letter contains no offer. But it is said that a part of the statement in the note is to be held as an offer, though not in its proper place. I am not able to adopt that view. The passage about 'placing any one in Sir John's shoes,' alludes, I think, to the mode of conveyance, in case of a sale, and was merely meant to intimate that the buyer would be placed in the same situation as Sir John; I do not think the meaning of these words can be pushed further with any certainty. Then Mr Milne's answer was too cautious for an acceptance. He was bound to have done more to preclude himself from resiling; for I am not of opinion that his expression could be safely construed as sufficient to prevent his drawing back. He says his father is willing to enter into the proposed transaction; does that mean that he concludes it? He does not say, You have made an offer: I close the transaction by accepting it. On the contrary, after intimating his willingness to enter

into the transaction, he says, Send a note of the burdens and the missives, &c. He was thus at liberty to have objected to some of these, and to have broken off. He very likely understood himself to have accepted, but the words do not sufficiently express it.

The Court adhered, but refused additional expenses.

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Judgment.

Lord Ordinary, Fullerton.
furd, H. J. Robertson.
Agents. B. Clerk.

Act. Dean of Fac. (Hope,) M'Neill. Alt. Ruther-
Greig & Morton, W. S. and Cunningham & Bell, W. S.

C. R.

FIRST DIVISION.

No. XCIV.

19th February 1836.

GEORGE WALLACE

against

GEORGE DICKSON AND OTHERS.

PROCESS.—JURY TRIAL.—STAT. 55. GEO. III. c. 42, § 6.—*In an action for payment of work done under a contract, a missive tendered in evidence of the agreement having been refused, because unstamped, and verdict therefore given for the defender,—a new trial was granted after the missive had been stamped, on the ground that it was essential to the justice of the case.*

WALLACE brought an action against Dickson and others, for the balance of the price of building a chapel in Portobello, founding on a missive of agreement. The defenders refused payment, on the ground that the chapel had not been finished in terms of the contract, and that they were not liable as members of the congregation. The case went to trial before a Jury, and the pursuer, after endeavouring unsuccessfully to make out his case upon other evidence, tendered the missives. The Court refused them in evidence, as they were unstamped, and a verdict was given for the defender. A bill of exceptions was taken by the pursuer, but was not signed by the Judge, as the pursuer, before bringing it forward, moved for a rule to shew cause why a new trial should not be given, which rule was granted. In moving for the rule, the pursuer *pleaded*—That the defenders had, on the record, not disputed the terms of the agreement, but rested their defence on the grounds of non-li-

Pursuer's
Plea.

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Others.

bility as members of the congregation, and that the work had not been performed agreeably to contract: That the missive having now been stamped, a new trial was essential to the justice of the cause, and must therefore be granted, in terms of the stat. 55. Geo. III. c. 42, § 6: That the remedy of non-suit was unknown in our law; and that the effect of the verdict, unless a new trial was granted, would be to form a *res judicata*, although there had been no real trial, but the case had misgiven on the technical ground stated by the defender, which prevented all inquiry into the merits of the case: That he was entitled to a new trial on the principles established in the cases, *Clark v. Thomson*, 1. *Murray's Rep.* 161; *Skene v. Maberleys*, 2. *Mur.* 353; *Leven v. Young and Co.*, 1. *Mur.* 375; *Smith v. Kemp*, 4. *Mur.* 411; *Cadyow v. Wilson*, 5. *Mur.* 98: That the facts in the case of *Paterson v. Ronald*, 31st Jan. 1820, 2. *Mur.* 188, were not as represented by the defender, for the deed was stamped when the new trial was moved for, though the report did not notice the fact.

Defender's
Pleas.

The defender, on appearing to shew cause why a new trial should not be granted, *pleaded*—That the pursuer could not make out that a new trial was, in the circumstances, essential to the justice of the case, unless he could prove surprise either in fact or law; because, if knowing that the missive was unstamped, and that therefore it could not be received in evidence, he yet went on with the trial, he had himself to blame: That the pursuer was from the first, and throughout the long preliminary procedure, both in making up the record and in framing the issues, perfectly aware that the missives would be necessary to prove the agreement: That there is no Scotch case in favour of granting the new trial, as the case of *Paterson v. Ronald* was retried on a bill of exceptions taken to the charge of the Chief Commissioner rejecting a deed as unstamped, which, in fact, did not require to be stamped: That the speech of the Chief Commissioner, in the case of *Cadyow v. Wilson*, is against the plea of the pursuer; and that, in the English case of *Vincent v. Cole*, *Chitty on the Stamp Laws*, 43, note, the Court refused to set aside a non-suit, on the ground that it had proceeded from the want of a stamp.

Opinion of
Court.

The Lord President.—I have no doubt that a new trial should be given. If the proof had been taken before the Court of Session, and an unstamped deed had been tendered, the Court would have sisted procedure till the deed had been stamped.

Lords Gillies and Balgray concurred.

Lord Mackenzie.—The only doubt I have is raised by the English case; but on the whole I concur. 19 Feb. 1836.

The Court unanimously granted a new trial.

Wallace v.
Dickson and
Others.

Act. Robertson, Graham Bell.

Alt. Dean of Fac. (Hope,) More, Thomson.

Ferrie & Jamison, W. S. Hotchkis & Meiklejohn, W. S. and W. A. G. & R. Ellis, Judgment.
W. S. Agents. Jury Clerk.

C. R.

SECOND DIVISION.

No. XCV.

19th February 1836.

Dr ROBERT WHITEHEAD

against

JAMES HENDERSON JUNIOR, AND JEAN HILL, (JOHN HILL'S REPRESENTATIVE.)

BILL OF EXCHANGE.—VITIATION.—PROOF.—1. *The holder of a bill, vitiated by alteration in the date, is not entitled to sue upon the bill, &c. and enforce payment of it against the acceptors, when the alteration is not proved to have been made in presence of the acceptors, or with their knowledge and consent.* 2. *Circumstances found insufficient to elide the plea of nullity, arising from vitiation in the date of a bill.*

JOHN HENDERSON of Peasebanks died intestate in July 1807, leaving a widow and four children, James, John, and two daughters, all in pupillarity. Besides lands and houses, he held in tack some lime and coal works. John Hill (one of the acceptors of the bill after mentioned) was a manager of certain of these works. James Weir, Henderson's clerk, had a general superintendence. On Henderson's death, the works were continued under the management of the widow, assisted by Robert Russell, John Hill, and James Weir. On the 6th of July 1808, the Court nominated and appointed Mr John Rowat to be factor loco tutoris to the children, Weir and Hill being continued in the management. At the time of John Henderson's death, John Hill, and James Henderson, clerk to a brewery in Hamilton, were debtors to him in a bill granted by them to him for L.100, dated 18th May 1807. That bill had been entered, in a private ledger kept by John Henderson, to the debit of James Henderson and John Hill, thus: Narrative.

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Henderson,
&c.

Narrative.

' JAMES HENDERSON and JOHN HILL,—Dr.

' 1807.

' May 18. To cash, per bill on demand, with legal interest till
' paid, - - - L.100 0 0'

One year's interest of that bill, from the 18th of May 1807 to the 18th of May 1808, was paid to Mr Rowat on the 3d of March 1809.

The pursuer alleged that that bill was, at the same time, delivered up by Rowat to the acceptors, on receiving from them a renewed bill for the same sum, accepted by them and the defender, James Henderson junior. This renewed bill, written by John Hill, was in the following terms :

' *Hamilton, 18th May 1808.*

' L.100 Sts

' One day after date hereof, pay to me or order, at the
' Post-office in Hamilton, the sume of One Hundred Pounds Ster-
' ling, recived in cash from the aires of the deceast John Hender-
' son of Pesebanks.

' *To James Henderson, Clerk to the*
' *Brewerie, and James Hender-*
' *son junior, Baxter in Hamilton,*
' *and John Hill, Portioner in*
' *Stonhall.*'

' JAMES HENDERSON.
' JAMES HENDERSON.
' JOHN HILL.'

This bill was evidently vitiated in date, in as much as the last figure 8, in 1808, was superinduced over the figure 7.

The statement of the pursuer regarding this admitted alteration, as in Art. 5. of his condescendence in the present action, is in these terms: 'In writing it, Mr Hill, by mistake, made the date 1807 instead of 1808. But the mistake was observed while the pen was in his hand, and the ink was yet wet, and he corrected it by substituting the figure '8' as the proper date. It was after that correction, which was made by consent of the other two acceptors, and in presence of them and Mr Rowat, and James Weir, a clerk employed on the estate, that the bill was signed.' It was, as the pursuer farther alleged, delivered in this state, blank in the drawer's name, to Rowat, and a note of the transaction was entered in Rowat's cash-book by James Weir, the clerk, of date 3d March 1809.

The property of the deceased Mr Henderson was managed by Rowat, for the benefit of the children and the widow, who married the pursuer, Dr Whitehead, in 1809. The management of Rowat ceased in 1810; and a state of accounts, as between him and Hen-

derson's heirs, down to Martinmas 1810, was made out by the clerk, James Weir. At that time no part of the interest of the renewed bill was paid. The acceptor, James Henderson senior, was still a clerk to the brewery, James Henderson junior carried on business in the same place, and John Hill was still a manager of the works. Rowat was succeeded in the management of the estate by the pursuer. James Henderson, the heir, and John Henderson, his brother, chose for curators Major Burns, James Henderson, a wright, Rowat, and the pursuer Dr Whitehead, whose appointment was judicially confirmed. Dr Whitehead took the general management, retaining Weir as clerk, and Hill as a manager.

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Whitehead v.
Henderson,
&c.

Narrative.

The bill in question was, with other documents of debt, delivered by Rowat to the pursuer, who, finding that it had not been signed by Rowat as drawer, filled in his own name as the drawer, on account of the heirs. About that time the accounts of the estate kept by Weir and Rowat, down to Martinmas 1810, were laid by the curators before David Kay, accountant in Glasgow, to examine and report upon them. Three years' interest of the bill, from 18th May 1808 to 18th May 1811, was paid by John Hill to the pursuer, who marked the payment on the back of it. Hill died in April 1812. A report as to the state of accounts down to Martinmas 1810 was obtained from Mr Kay in October 1812. The acceptors, James Henderson senior and junior were then labouring under embarrassments, and delayed payment. The pursuer raised the present action in this Court against them and Jean Hill, the daughter and representative of John Hill, the summons having been signeted on the 30th of March, and executed on the 15th of April 1814.

The ground of action is stated thus: 'The pursuer, by his bill, dated 18th May 1808, drawn by him upon and accepted by James Henderson, &c. ordered them, one day after date, to have paid to the pursuer, or order, the sum of L.100, received in cash from the heirs of the deceased John Henderson of Peasebanks, the interest of which sum, as appears from a writing on the back of the said bill, subscribed by the pursuer, was settled up to 18th May 1821, as the said bill bears.'

In a joint defence, it was objected, *first*, That the bill is 'vitiated and erased in its date;' and, *2d*, That it had been compensated by the counter claims of James Henderson senior; 'for the defender, James Henderson, in the month of October, instituted an action before the Sheriff of Lanarkshire, concluding for payment of a debt due to him by the representatives of the deceased John Henderson of Peasebanks, in whose right it is presumed the pur-

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'suer, Dr Whitehead, makes the present claim. In that action 'deduction is allowed for all claims they can instruct against the 'defender, James Henderson, and for L.100 originally due to the 'said deceased John Henderson, being the very sum concluded 'for in the present action, which therefore falls to be dismissed.'

The pursuer lodged a condescendence, which was followed by answers for the defenders, and replies. At advising the cause, the Lord Ordinary, Pitmilley, on 10th May 1817, 'in respect of 'the vitiation in the date of the bill,' sustained the defences, but reserved to the pursuer his claim for any debt which he could establish to be due to him by the defenders. The Court, on 16th December 1819, upon a reclaiming petition and answers, recalled, in hoc statu, the interlocutor, and remitted to the Lord Ordinary 'to hear counsel for the parties farther, when the action depending 'before the inferior court is brought forward, and to do therein as 'he shall see cause, superseding all questions as to expenses until 'the final issue of the cause.'

The action referred to in the foregoing interlocutor was raised in 1813 by James Henderson senior against the late John Boyes, and Mr James Henderson, the eldest son of John Henderson, as representing their fathers respectively, and concluded against the defenders, Boyes and Henderson, for payment of a certain balance; but deducting 'from said sum the after-mentioned debts 'owing by the complainer to the said John Boyes and John Henderson, viz. the sum of L.120 sterling, being arrears of rent due 'by the complainer for the toll-bar at Avonbridge for the year 'with whatever interest may be due thereon: Item, Of the sum 'of L.22 sterling, being the rent of a garden possessed by the complainer from Mr Boyes, from the years 1809 and 1810, with 'whatever interest may be due thereon: Item, Of the sum of L.100 'sterling, contained in a bill dated the day of 'payable drawn by the said John Henderson upon and 'accepted by the complainer and the now deceased John Hill, portioner of Stonehall, with whatever interest may be due thereon: 'Item, Of whatever sums either of the defenders can instruct to 'have against the complainer, in any manner of way whatever.'

James Henderson senior allowed the action at his instance to fall asleep. In March 1815, he raised an action of wakening against Mr Henderson and his curators. The other defender, Boyes, had obtained leave to advocate; and the Sheriff found it competent to proceed in the action against them, and renewed an interlocutor which had been pronounced in 1814, allowing a proof. James Henderson senior, however, did not proceed to prove his libel. At the time when he was referring the Court to the proceedings in

that action, and at the date of their judgment of 16th December 1819, the action itself was again asleep. Weir and Rowat were then alive, but have since died. James Henderson, the heir of John Henderson, became major in July 1817, and by that event any curatorial charge which the pursuer, Dr Whitehead, had in the action raised by James Henderson senior ceased. James Henderson senior would not proceed to prove his libel. He allowed the process to sleep. At length Dr Whitehead resumed proceedings in the present process, and a record was completed, (14th November 1834,) in terms of the Judicature Act, containing the pursuer's statement as to circumstances attending the alteration in the date of the bill; the action referred to in the judgment of the Court of 16th December 1819 having been advocated, to be discussed ob contingentiam of this process.

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Whitehead v.
Henderson,
&c.

Narrative.

The pursuer, founding upon certain excerpts from the cash-account of Rowat, as factor, with Henderson's heirs, and on an excerpt from the pursuer's own accounts, as curator for the children, which shewed that a bill, in the terms libelled, was entered in these accounts, and that interest as chargeable for the same had also been entered, but without producing the bill of 1807, in lieu of which the one of 1808, sued on, was said to have been granted, *pleaded*—

Pursuer's
Pleas.

1. The bill libelled is valid as a document of debt for cash received by the acceptors from the heirs of Mr Henderson, and the debt is resting owing to the pursuer as drawer of the bill on account of the heirs and representatives, for whom he acts. 2. The counter claims of the deceased acceptor, James Henderson, made against the heir of Mr Henderson, for sums alleged to have been owing to him prior to Mr Henderson's death, were prescribed at the date of his action, and there is nothing shewn to elide prescription. 3. The counter claims of the deceased acceptor, James Henderson, for the period prior to Mr Henderson's death, are ex facie of his libel exceeded and extinguished by the sum which it is there admitted he owed to Mr Boyes and Mr Henderson for rent. 4. The counter claims of the deceased acceptor, James Henderson, after the death of Mr Henderson of Peasebanks, are libelled to have become due on the sole employment of Mr Boyes, posterior to the time when the copartnery was dissolved, and are not due by or chargeable against Mr Henderson's heirs and representatives; (1.) Because the heirs and representatives were not partners, and had no concern with the brewery at or for the time when they are alleged to have become due; and, (2.) Because the claims are unfounded and not resting owing.

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Defender's
Pleas.

The defender *pleaded*—1. As the pursuer admits that he is neither the drawer of the bill libelled on, nor an indorsee of that bill, he has no title to maintain the present action. 2. The bill libelled on being vitiated in the date, furnishes no ground of action. 3. The bill libelled on having been dated 18th of May 1807 is prescribed, and the debt pretended to be proved thereby can be proved only by writ or oath of the acceptors. 4. Even if the defenders were liable in payment of the bill libelled, it is more than extinguished in the relative action of count and reckoning.

The Lord Ordinary pronounced the following interlocutor and note :

Lord Ordinary's
Interlocutor.

‘ The Lord Ordinary having resumed consideration of the debate, with the closed record, bill libelled on, and whole process, In respect that the said bill is visibly vitiated and altered in the date, and that the pursuer does not undertake to instruct by direct proof, or otherwise than by inferences from the documents in process, which are quite inconclusive, the averments in the fifth article of his revised condescendence, viz. that the bill, being written by the late John Hill, one of the acceptors, was at first dated, by mere mistake, in 1807, instead of 1808, but was instantly corrected by him, while the ink was still wet, in presence and with the consent of the other acceptors, finds, that no action can lie upon this vitiated instrument, and, therefore, sustains the defences, assoilzies the defenders, and decerns; finds expenses due.’

Note.

Note.—‘ It may be right to state, that the pursuer intimated at the debate his readiness to prove the averment in the 3d article of his condescendence, that Mr John Henderson of Peasebank (the creditor in the original bill, of which that now libelled on is said to have been a renewal,) died in July 1807; and as the bill now in question bears to be for value received ‘ from the heirs of ‘ the deceased John Henderson of Peasebank,’ it was contended, that this proved that the true date *could not* have been 18th May 1807, as the defenders have positively averred on the record, (vide their statement of facts, Art. 4,) and that this alone should be held as establishing that the alteration was made merely to correct an error, and should not be regarded as a vitiation.

‘ The case of Henderson and Hay, 20th Feb. 1802, (*M.* 17,059,) though not referred to by the pursuer, certainly gives some countenance to this argument. But that was a far stronger, and a very peculiar case. There, a bill, drawn in October 1799, had been first made payable at Martinmas 1780; and then to correct this preposterous date, had been altered (the Court thought instantly, and by the acceptor himself, who was the writer of the

' bill) to 1800. The particulars of the case are very shortly reported; but it does not appear that the acceptor seriously denied the explanation so probably given, but stood entirely upon the naked and extreme point, that the document being *ex facie* altered, could not be looked at in judgment. In the present case, it seems enough to say, that there is no relevant offer or attempt to prove what was the true date of the bill; and even supposing that alleged by the defenders to be *impossible*, (as was palpably the case in Henderson and Hay,) the most that could be made of it would be, that the date should be held *pro non scripto*, which the Lord Ordinary rather apprehends would be a nullity. But in point of fact, it appears to the Lord Ordinary to be by no means impossible, that the true date of the bill was 18th May 1807, as alleged by the defenders, even though it were established that Mr John Henderson was then alive. The pursuer admits that *there was a bill of that date* for the same sum, which does not, however, appear to be now forthcoming; and if that bill was blank (as this is admitted to have been) in the drawer's name, there would be no great difficulty in adding, 'the heirs,' &c. to that original document, and, by vitiating its date, converting it into the bill now libelled on, with an additional year's currency. In fact, it is impossible to look at the bill produced, without being very forcibly struck with the probability of this suggestion. The words, 'the heirs of the deceased John Henderson of Peasebank,' being evidently written in a constrained hand, and crowded into the last line, with what the Lord Ordinary would call the most palpable appearance of an *ex post facto* operation. But without actually assuming this to be the fact, it seems enough that the pursuer cannot prove the distinct and relevant averments in the fifth article of the condescendence. It is quite plain that the onus of such proof is on him; and equally plain that the entries in Henderson's or Mr Rowat's books, or any statement made in a separate action by James Henderson senior, (one of the original acceptors, but now dead, and not represented by any one,) can be no evidence against the present defenders.'

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Whitehead v.
Henderson,
&c.

Note.

The pursuer *reclaimed*. At the advising, 26th May 1835, the Court expressed a wish that the pursuer should produce any farther evidence of the allegation as to the time and manner in which the bill was altered in date with consent of the acceptors, and accordingly ordained him to produce Rowat's books referred to, and also his own books in which there are any entries relative to the bills in question, and granted diligence.

Their Lordships at the same time, upon examination of the bill,

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&c.

seemed to think that the words in the bill, 'the aires of the deceast ' John Henderson of Pesebank,' were not crowded into the last line, as had appeared to the Lord Ordinary.

Upon advising the preceding report of the diligence, the *Court* ordered the parties to print such farther documents now in process as they might deem important to the illustration of the point in dispute, and to prepare minutes of debate on the whole cause.

Pursuer's
Pleas.

The pursuer *pleaded*—The bill is altered in one figure of the date, but the alteration was made by Hill, the acceptor, merely in correction of a mistake. Such a correction does not vitiate a bill. The date is not an indispensable part of a bill. In several cases of the kind in England, it has, both in cases in error and on demurrer, been ruled, that if the bill be made payable within a certain time from the date, and no date be expressed, the Court will hold it to be payable within the time specified, after the day on which it was drawn or issued. If the date be expressed, but apparently altered, the alteration will not, at least if made in correction of a mistake, agreeably to the intention of the parties, be any objection to the bill as a document of debt; *Chitty on Bills*, c. 5, 169; *De La Courtier v. Bellamy*, 2. *Shower's*, 422, 411; *Hague, &c. v. French*, June 25. 1802, 3. *Bos. and Pull.* 173; *Giles and another v. Bourne*, 1817, 6. *Maule*, 73.

An addition or correction to supply or declare the real intention of the parties may, as well at common law as under the stamp laws, be made, even after a bill or note has been in circulation; *Chitty, Bills*, c. 5, 206, 1833; *Attwood v. Griffin*, 1. *Ry. and Mood.* 425. A 'mere omission, or mistake of date, may be inserted or corrected without invalidating the instrument;' *Chitty, Bills*, c. 5, 169. There is no objection under the stamp laws to a bill so altered or corrected; *Chitty on Stamp Laws*, 25, 27; *Peacock v. Murrell*, (1819,) 2. *Starkie*, 558; *Sherrington v. Jermyn*, (1828,) 3. *Carr. and Payne*, 374.

In Scotland similar rules have been followed. An alteration 'merely to correct a mistake, and in furtherance of the original intention, does not invalidate a bill;' 1. *Bell*, 392, (5th ed.); *Henderson v. Hay*, 20th Feb. 1802, *F. C.*; *Mill v. Russell*, Jan. 16. 1810, *F. C.*; *Fairweather v. Alison*, 12th Feb. 1817, *F. C.*; *Sutherland v. Morrison*, 1st July 1823, 2. *S. & D.* 442. (See session papers.)

In reference to the documentary evidence, he *pleaded*—That the true date of the bill was not 18th May 1807. The statement, that that date was the true date, is disproved by the fact of Mr Henderson's death in July 1807, and the bill itself, which bears inter-

nal evidence that it was granted to his heirs. The bill was not altered, and there was no occasion to alter it, with the view of attempting to save it from prescription. There is evidence in the books of Rowat, which shews that the bill, when taken, was of the date it bears, 18th May 1808.

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Henderson,
&c.Pursuer's
Pleas.

At the commencement of Rowat's cash-book there is engrossed an 'inventory of bonds, bills and promissory-notes belonging to the representatives of the deceased Mr John Henderson, delivered over to John Rowat, their factor.' Amongst these is the following: 'James Henderson and John Hill, per bill, 18th May 1807, for L.100. No part of interest paid.'

This was the original bill for which James Henderson senior and the other defenders admitted that full value had been received from Mr John Henderson.

There is a 'Cash accompt, John Rowat, factor, with the heirs of the deceased Mr John Henderson of Peasebanks,' in which there are the following entries:

' 1809.

- ' Mar. 3. To James Henderson and John Hill, received from them
 - ' interest on their bill from 18th May 1807 to 18th
 - ' May 1808, - - - - L.5 0 0
 - ' Got a new bill for L.100, dated the 18th
 - ' May 1808, and accepted by James Hen-
 - ' derson senior, and James Henderson
 - ' junior, and John Hill, at

In a subsequent part of the same book, the accounts are posted from the cash-account, as in ledger, and there is this entry:

' James Henderson and John Hill, Dr. Cr.

' 1809.

- ' Feb. 9. To stock as p. bill, 18th May
 - ' 1807, for - - - L.100 0 0
 - ' No interest paid up.
- ' Mar. 3. By cash for one year's interest
 - ' up to 18th May 1808, - - - L.5 0 0
 - ' N. Got a new bill accepted by James Hen-
 - ' derson senior and junior, and John Hill,
 - ' at , dated 18th May 1808.
 - ' To interest for one year up to 18th May
 - ' 1808, - - - - L.5 0 0'

All these entries are in the handwriting of Weir, the clerk.

At page 21 of the ledger there is an interest-account, in which there is the following entry, also by Weir:

19 Feb. 1836. ' 1810.

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&c.

Pursuer's
Pleas.

' Sept. 3. By James Henderson, for one year's interest, up to 18th
' May 1808, settled 3d March 1809, L.5 0 0'

Certain states, in the handwriting of Weir, were found among the papers of the late John Henderson, writer in Hamilton, the second son of Mr Henderson of Peasebanks, and were laid before Mr Kay, the accountant.

The first is a ' State of Particulars that constitute the charge against John Rowat, in his accounts with the heirs of the deceased John Henderson of Peasebanks, from Whitsunday 1807 as to the heritable property, and from Martinmas 1807 as to the profit and loss upon tacks and moveable property to Martinmas 1810, and referred to in the general state of accounts made up for these periods, annexed hereto.'

In this state, under the head ' Moveable property,' which is branched into two divisions, viz. ' interest on bonds,' and ' bills and interest thereon, up to Martinmas 1807, there is charged

' James Henderson and John Hill, as per bill 18th

' May 1807, - - - L.100 0 0

' Interest thereon from 18th May 1807, 2 8 4

————— L.102 8 4'

The sum total of the charge is L.10,893 : 10 : 8.

After the charge there is, page 6, ' State of Particulars that constitute the discharge in favours of John Rowat, in his account with the heirs of the deceased John Henderson of Peasebanks, from Whitsunday 1807 as to the heritable property, and from Martinmas 1807 as to the profit and loss upon tacks and moveable property, to Martinmas 1810, and referred to in the general state of accounts made up for these periods, annexed hereto.' In this branch of the state, under the head ' Sundries, as per their bills and missives,' there is entered as contra to the bill of 1807, at Rowat's credit, ' James Henderson and John Hill, as per their bill 18th May 1808, L.100 : 0 : 0.' It again appears, under the head of ' Arrears of interest due upon bills, &c. at Martinmas 1810, James Henderson and John Hill on L.100, from 18th May 1808, L.12 : 8 : 5.'

Rowat thus charged himself with the bill of 18th May 1807, and discharged himself by stating at his credit the bill of 18th May 1808, received in place of it. On the latter bill interest is entered as in arrear from its date, 18th May 1808.

In a general state of account of charge and discharge, and under the head of moveable property, Rowat charges himself with ' bills, and interest thereon, up to Martinmas 1807, as per page 5,

‘ L.2193 : 12 : 10.’ Among these, forming part of this sum, there is the bill of 18th May 1807, on which half of the year’s interest, which had been paid, is stated as at Martinmas 1807. Under the same head, on the discharge side of the account, Rowat is credited,

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By sundries, as per their bills and missives, p. 7, L.2427 5 1 ⁶/₈ Pursuer's Pleas.

‘ By sundries for arrears of interest at Martinmas

' 1808, p. 8, - - - - 88 14 6'

Amongst these is the bill of 18th May 1808, with interest as in arrear from that date at Martinmas 1810.

From these accounts and states of Mr Rowat's intromissions, Mr Kay, the accountant, framed a scheme of division of the property, bringing out the exact balance in the account of charge and discharge on the accounts as made out by Weir.

Weir entered the payment of the three years' interest in the cash-book, which he kept for the estate under Dr Whitehead, as follows:

‘ CASH, Dr. To James Henderson and John Hill for the interest
‘ on their bill of L.100, up to Martinmas 1810, L.12:8:5. To
‘ ditto for ditto on do., from Martinmas 1810 to 18th May 1811,
‘ L.2:11:7.’ In an account of sundries, Debtor to stock, Weir
made the following entries: ‘ James Henderson and John Hill, for
‘ arrears of interest on L.100 up to Martinmas 1810, L.12:8:5.
‘ James Henderson and John Hill, on their bill of L.100 up to
‘ 18th May 1811, L.2:11:7.’

The stock itself is entered by Weir in the cash-book as at Martinmas 1810, 'James Henderson and John Hill, per bill 18th 'May 1808, L.100.'

Again, on the 1st of January 1813, Weir posted an account from the cash-book into the ledger, where he states James Henderson and John Hill as debtors to stock : ' For principal, per bill 18th May 1808, L.100 ; ' and the arrears of interest as at Martinmas 1810, and 18th May 1811, and places the interest as paid up to the latter date to their credit.

The books of the pursuer, Dr Whitehead, in which Weir made these entries, were examined and reported upon by Mr Kay at Whitsunday 1814. The payment of the interest is there stated from the books in the charge against Dr Whitehead as follows :

' Henderson and Hill to Martinmas 1810,	L.12	8	5	} L.15 0 0.
' From do. to 18th May 1811,	-	2	11 6	

' From do. to 18th May 1811, - 2 11 6)

The defences against this action are dated 3d, and were lodged 8th June 1814. From this evidence, it is plain that the true date of the bill libelled on was not the 18th of May 1807, but the 18th of May 1808.

In the inventory, under date February 9. 1809, the original bill

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is entered with this note, 'No part of interest paid.' The entry of the 3d of March 1809 credits the year's interest paid from 18th May 1807 to 18th May 1808. The interest account in the ledger again states the settlement of the interest on 3d March 1809 as a payment of one year's interest up to 18th May 1808. The account in the ledger against the acceptors debits them for the original bill, gives credit for the interest paid up to 18th May 1808, and notes the receipt of the new bill from the acceptors, James Henderson senior, James Henderson junior, and John Hill, dated 18th May 1808. Throughout the various accounts of Rowat, and the states of charge and discharge of his intromissions, the bill delivered up is invariably mentioned as dated 18th May 1807, and the renewed bill as dated 18th May 1808. Sometimes the entries are in name of James Henderson and John Hill, who had originally received the value, and in whose name the account stood, the name of James Henderson junior being apparently dropped for brevity, but the bill is always entered as dated 18th May 1808. These accounts were made out in 1810. They were after that time placed in the hands of Mr Kay, who did not take the debt into account for division, because his scheme was to divide then only those debts which were realised. In July 1811, the payment of the interest is entered by Weir, the clerk, as on account of the bill dated 18th May 1808. On the 1st of January 1813, Weir enters as stock the bill dated 18th May 1808, and states the interest upon it as paid up to 18th May 1811. It is clear, then, that the bill was in this state, and bore the date of 18th May 1808, at the time the action was raised in March 1814, when prescription had not run, and when there was no occasion to alter the date, 'in the view of attempting to save it from prescription.'

Defenders' Pleas.

Pleaded for the defenders—The fact of vitiation being admitted, it follows, that the bill is not an actionable document of debt. The date of a bill is inter essentialia, and if erased, or if figures be superinduced, the bill is null as a document of debt; *Hamilton v. Monteath*, 1st Dec. 1824, 3. *S. and D.* 345. It is incumbent upon the pursuer to establish any circumstances that may elide the plea of nullity; *Hennan*, 5. *Bing.* 183; *Bishop*, 1. *Mood. and Mal.* 116, and 3. *Car. and P.* 55. But the sufficiency of the averment in Art. 5. of condescendence may be questioned; *Bryce v. Dickson*, 16th Nov. 1810, *F. C.*, and 1. *Bell*, 392. Then, as to the evidence,—the books of Henderson, or of Rowat, cannot be looked at as evidence in favour of the pursuer, this being in fact the same as to tender the books of a party in his own cause. Even if they were admissible, they could merely prove that Rowat made the entries, hav-

ing before him a bill which purported to bear date 18th May 1808. 19 Feb. 1836.
 But then the bill could purport to bear that date only in consequence of vitiation. The entries do not prove that he had before him an unvitiated bill bearing that date. The pursuer only meets this by saying, it was the same bill as that now libelled on. But the excerpts or documentary evidence founded on afford no proof, but the contrary, of the granting or existence of any bill other than the one of 18th May 1807; and in truth that bill is the document now sued on.

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 &c.
 —
 Defenders'
 Pleas.

In no case has the holder of a bill been found entitled to make a change in its date, even to correct an error, if made after acceptance, and without the consent of the acceptor. The only instances in which the rule of nullity had been relaxed, are cases which in fact resolve into a personal objection against the party pleading on the vitiation,—when he proposed or consented to it before acceptance,—and when the vitiation was waived, or could not be stated, provided the stamp acts did not interfere; such as the cases of *Fairweather, Sutherland, Murchie v. M'Farlane*, 1st July 1796, *F. C.*; *M'Lean v. M'Lennan and Morrison*, 20th May 1834, *F. C.* Wherever such evidence is wanting the rule applied, as laid down by Boyle, L. J. C., in *Callender v. Kilpatrick*, 10th Dec. 1812, *F. C.*

As to the plea, that at all events the pursuer can prove, aliunde of the bill, that there was a debt due by James Henderson senior,—1. There is no evidence of this, as the inferior court process said to contain the admission of such a debt cannot be founded or relied on. 2. This action proceeds upon bill alone; and if decree cannot be pronounced, on the ground that the bill alone proves the debt, it cannot be pronounced at all; *Russell v. M'Nab*, 14. Dec. 1822, 2. S. & D. 88; *Ettles v. Robertson*, 15th Feb. 1833, 11. S. D. B. 397, as reversed on appeal, *Sh. Sup.* vol. i. part 2, p. 138; *Stirling v. Langs*, 4th March 1830. And even if James Henderson had made such an admission in the process referred to, that could establish nothing against his co-acceptors; *Houston v. Yuill*, 31st May 1812; *Hannay's Trustees v. Blair*, 31st Jan. 1823, *F. C.*; *M'Indoe v. Frame*, 18th Nov. 1824, *F. C.*

At the final advising,

Lord Justice-Clerk.—I formerly was disposed to concur with the Lord Ordinary, and now that we have seen the whole evidence adduced, I have not the slightest doubt as to the propriety of adhering. It is to be kept always in view that the action is laid upon the bill alone. Now, in order to be the foundation of an action, the bill must afford legal evidence of the debt. But here there is a

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palpable vitiation of the date. And where such vitiations exist, it is indispensable for a party who founds on the bill, and who wants to get the better of the vitiation, to establish, by evidence *luculentior*, that it had been so altered with the knowledge and sanction of the other parties previous to its being issued. Here the pursuer attempts to establish the fifth averment, by founding alone on documents,—such as, excerpts from his own books or those of Rowat, who stood pretty much in the same situation as a party to the action. No such mode of proof has hitherto been sanctioned. His Lordship then went into an examination of the information furnished from the books, and the report of the accountant, and stated it as his opinion, that the undertaking to prove the statement in Article 5. of condescendence had failed. There might be grounds for establishing the debt otherwise, as to which he could give no opinion; but, in the mean time, he was satisfied of the propriety of adhering.

Lord Meadowbank.—I formerly expressed doubts, originating in a feeling that the debt was really due; but I am now satisfied with the interlocutor, on the ground that the bill cannot be looked at as a document of debt.

Lord Glenlee concurred, adding, that it was not likely that all the three acceptors were present when the bill was granted. If it was altered at that time, Hill had no right to alter it outwith the presence of the parties. It would be dangerous to go against principle, and sustain this document as the ground of action.

Lord Medwyn.—The bill is no doubt vitiated; and it is stated by the defenders that its date was altered to save it from prescription, when the action was raised in 1814. The pursuer admits the alteration, but says this was done at the time to cure a mistake; and there is no doubt that he must prove this. It seems, however, clear, that there were two bills, and this is the second of the two. 1. The bill bears to be for value from the heirs of John Henderson. These words do not appear to be written in a constrained hand, or *ex post facto*. The defenders did not originally allege any vitiation but in the date. Now, it is admitted that John Henderson died in 1807. 2. The second bill has three acceptors. Rowat entered in this book, as factor, the bill of 18th May 1807, by James Henderson and John Hill, and farther enters its payment, and the substitution of the bill of 18th May 1808. In the entry in Rowat's cash-book, the date 18th May 1808 seems unobjectionable. If this entry be admitted as evidence, that there were two bills is clear. Now, Rowat was *factor loco tutoris*, an officer appointed by the Court, and his books may be looked to as evidence, though those of Henderson and Dr Whitehead cannot. If we could look at Henderson's books,

we would see another circumstance proving the existence of two bills. The bill of 1807 is payable on demand, while that of 1808 was at one day after date. This accounts for what is stated as singular, that a new bill should have been taken. It may have been, besides getting James Henderson also as an acceptor, to obviate the bill being on demand, so as to make it bear interest, as it was now to remain as a loan. 3. Rowat's accounts were examined in October 1812, by Kay, to Martinmas 1810. They were found to contain on one side the bill of May 1807, with interest to Martinmas 1810, and on the other, or discharge side, the bill 18th May 1808, and interest to Martinmas 1810 in arrear L.12:8:5. It is true, that in Dr Whitehead's books the bill is entered as James Henderson and John Hill's. It is singular that this should be so. But it is obviously a mistake, because the date is distinct, 18th May 1808.

But though the defender's theory, that the bill was altered in date to save prescription, seems to be disproved, is the statement of the pursuer proved? Certainly the evidence shews that there were two bills, and that the bill now sued on was the last of these. Besides, the defenders join, in the defences in 1813, in stating that this debt was due and unpaid. They never alleged that there was any other bill but that of 1807; and if the bill of 1808 was substituted for it, this seems enough to shew, at least, that there is a debt still due. But unquestionably the document is vitiated; and whatever may be the presumptions, they are not so strong as to make it sufficiently probable that the alteration was made at the time, in presence of the acceptors. It is safest to adhere to the strict rule of law.

The Court adhered, and allowed additional expenses.

Judgment.

Lord Ordinary, Jeffrey. Act. Rutherford, Paterson. Alt. Dean of Fac. (Hope,) Russell. Lockhart, Hunter & Whitehead, W. S., and Wm. Wotherspoon, S. S. C. Agents. R. Clerk.

R.

FIRST DIVISION.

No. XCVI.

20th February 1836.

ISAAC BAXTER
against
JOHN MACARTHUR.

ARBITRATION.—JUDICIAL REFERENCE.—*A referee having issued a final award, about fifteen months after the last proceedings in the cause, without communicating its import to the parties, farther than reading the award over on the day before it was signed, in presence of their agents, who stated no objections,—the Court, on a motion to interpose their authority to the award being objected to, sustained the objection.*

Narrative.

IN this case a judicial reference of a complicated action of count and reckoning was made to Mr Walter Moir, Sheriff-substitute of Glasgow, on 20th December 1833. After hearing the parties, the arbiter, on 29th May 1834, issued long notes of his opinion on the various questions that had been discussed. Subsequent meetings took place, and a paper was given in by the defender.

The arbiter took the proceedings to avisandum in August 1834. On the 30th November 1835, he issued his final award, having read it over the day before to the agents of the parties, who made no objections to it, but not having otherwise intimated his views, or issued notes of his intended award. In a letter of 16th January 1836, from the referee, in answer to one from the agents of the pursuer, the following passage occurs: ‘ In answer to your letter of this date, I have to state, that my final award in the case of Mr Baxter and Mr M^cArthur does not contain a decision upon any point on which I had not previously heard parties at full length in writing, and also viva voce, at diets appointed for that purpose, which, I believe, appears on the face of the record.’

The case having been enrolled by the pursuer, for the purpose of having the authority of the Court interponed, the defender objected, and the Court ordered him to give in a minute of his statement and objections to the Court proceeding to approve of the award.

**Objector's
Pleas.**

The objector averred, that the final award decided many new points, and embraced principles not noticed in the notes in May 1834;

and that his agent, after an interval of nearly fifteen months, could not be expected to remember the particulars of the case, and therefore was unable to state any objections on hearing the award read over the night before it was issued, and *pleaded*—That he had not been sufficiently heard on the whole case; in particular, that he had not been heard at all on several points embraced by the award, in consequence of the arbiter having issued his final award without previously communicating its import to the parties concerned: That it is the universal practice for referees and arbiters to intimate the intended award to parties, and to afford them time to state their objections thereto; which practice ought certainly to have been followed in a case involving so many points as the present: That as the referee was in law held to be functus after giving his award, the proper course was for the Court to take up the cause themselves, or remit it to the Lord Ordinary; *Glennie v. M'Phail*, 24th Feb. 1825, 3. S. and D. 575, affirmed by the House of Lords 11th May 1829, 3. *Wilson and Shaw*, 389.

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M'Arthur v.
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Pleas.

The respondent averred, that the final award formed merely a continuation of the accounts, to which the notes, in May 1834, referred, and an application of the principles previously adopted by the referee, and communicated to the parties, and *pleaded*—The objector cannot now quarrel the award, as his agent heard it read over before it was signed, and approved of it: That the objectors had been fully heard, as appeared from the notes of the referee: That the award embraced no point which had not been fully discussed, as was stated in the referee's letter of the 16th January 1836: That it is perfectly established that an arbiter is not bound to issue notes of his opinion to the parties before pronouncing his decree.

Respondent's
Pleas.

The Court pronounced the following interlocutor: 'The Lords having advised this case, and heard counsel for the parties, remit the case again to Mr Moir, as judicial referee, with instructions to him to hold his award as merely the notes of his intended judgment, and to hear the parties farther, and do therein as shall be just.'

Judgment.

Act. Sol.-Gen. (Cunninghame,) Penney. Alt. A. E. Monteith. James Burness,
S. S. C. and Campbell & M'Dowall, S. S. C. Agents. S. Clerk.

C. R.

SECOND DIVISION.

No. XCVII.

20th February 1836.

DAVID WYLLIE

against

JOHN BRAND.

PROCESS.—(SUSPENSION.)—*A party having prayed for suspension of a charge on the ground of forgery, and that without caution or consignation, and having afterwards, in Court, expressed his readiness to find juratory caution, and craved leave to amend his bill,—found to be incompetent thus to amend the bill, which was refused.*

WYLLIE suspended, on the allegation of forgery, a charge on a bill for L.200, dated 21st August 1835, said to have been drawn by him upon and accepted by Alexander Wyllie, and to have been indorsed by the complainer to the charger, Brand, and prayed for suspension ‘without caution or consignation.’

The Lord Ordinary refused the bill, adding in a note, ‘If caution had been offered, the bill would have been passed. But forgery is not to be *presumed*, and the genuine subscriptions produced do not appear to the Lord Ordinary to prove it, and no circumstance is stated to make it probable. To pass the bill in this situation without caution would just be to suspend upon the mere uncorroborated averment of the party, and to assume the commission of a crime upon his bare word.’

The suspender *reclaimed*, and Ivory stated certain new facts, and was willing to find juratory caution. The present bill prayed it might pass without caution or consignation, and he would amend his bill accordingly.

Judgment.

But the Court held it incompetent thus to amend the bill, which was refused, with expenses *.

Lord Ordinary. Cockburn.

Act. Ivory.

Alt. H. J. Robertson.

James

Imrie, W. S. and John Richardson, W. S. Agents.

T. Clerk.

R.

* The motion for expenses having escaped the observation of the Court, and the clerk refusing to say any thing about expenses in the interlocutor, the counsel for the charger appeared, and again moved for expenses; when, upon the admission of the suspender’s counsel, that, according to his recollection, expenses had been moved for when the cause was decided, they were allowed.

SECOND DIVISION.

No. XCVIII.

23d February 1836.

JOHN MILLER AND ANOTHER, (DR BLACK'S TRUSTEES,)
against
 DR BLACK'S NEXT OF KIN.

TESTAMENT.—TRUST.—LEGACY.—*Found, in a question with the next of kin, that a bequest to trustees was valid, whereby a testator appointed them to ' apply the rest and residue of my estate and ' effects to such benevolent and charitable purposes as they may think ' proper ; and if the same shall amount to £.600 sterling, or upwards, I recommend to my said trustees, and their foresaids, to ' execute a deed, vesting the same in themselves, and to apply the ' annual proceeds thereof, after deducting expenses, in yearly payments, to faithful domestic servants, settled in Glasgow or the ' neighbourhood, who can produce good testimonials of character ' and morals from their masters or mistresses, after ten years' service. No person to be entitled to more than £.10 sterling yearly, ' but as much less as my said trustees may think proper. And if ' the free residue of my estate shall not amount to £.600 sterling, ' authorise my trustees to distribute the same to such charitable or ' benevolent purposes as they may think proper.'*

CLAUSE.—LEGACY.—*A testator having appointed his trustees to lay out £.2000, ' taking the interest of the said sum payable to a party ' during her life,' and the said principal sum itself payable ' to my ' said trustees, or their aforesaids, at her death,'—found, that the fee of the said sum is vested in the trustees, not as individuals, or for their own personal benefit, but as such trustees only, and must form part of the residue of the testator's estate.*

DR JAMES BLACK, formerly a surgeon in Jamaica, had resided for many years in Glasgow prior to his death, which happened on the 19th October 1834. Narrative.

By trust-disposition and settlement, dated 31st May 1827, Mr Black, ' being resolved to settle the succession to his estate, in ' order to prevent all disputes among his successors after his death, ' and having full confidence in the persons after named for executing the trust thereby committed to them,' assigned and disposed to James Maxwell, George Rowan, and John Miller, merchant in Glasgow, and to such of them as should accept, and to the sur-

23 Feb. 1836. **vivors or survivor of the acceptors, and to such person or persons as might be assumed by them, or to the survivors or survivor, as trustees or trustee, for the ends, uses, and purposes therein specified, his whole estate and effects, heritable and moveable. The purposes of the trust were, 1st, The payment of his debts, and the expenses of executing the trust. 2d, The payment to the said James Maxwell of one hundred guineas to purchase a piece of plate, and the payment to his second child of L.300. 3d, To lend out L.2000 on good heritable or personal security, and to take the interest thereof payable to the testator's cousin, Mary Maxwell, during her life, 'and the said principal sum itself, payable to my 'said trustees, or their foresaids, at her death.' 4th, To pay L.200 to Stephen Rowan, James Hutton Rowan, and George Christian Rowan, and also to dispoise the flat of a house in Union Place, with pertinents, to James Hutton Rowan. 5th, To pay to James Black Miller the sum of L.500 sterling. 6th, To pay to Marion Miller, residing in Glasgow, the yearly interest of L.3000 during her life, and also deliver to her all the testator's household furniture and plenishing, and at her death to pay the said sum of L.3000 to Mr James Black Miller. 7th, To pay to the testator's servant, Susan Johnston, if she should be in his service at the time of his death, the sum of L.250, to be laid out in the purchase of an annuity at the sight of the trustees; and if Susan Johnston should have left his service, the trustees are to pay her L.100. 8th, To pay to the Directors of the Glasgow Infirmary, of the Lock Hospital, of the Magdalen Asylum, and of the School for the Instruction of the Deaf and Dumb, the sum of L.200 each. The amount of these specific legacies was L.7300. Lastly, It is directed that the trustees 'shall apply the rest and residue of my estate and effects to such 'benevolent and charitable purposes as they may think proper; and 'if the same shall amount to L.600 sterling or upwards, I recommend 'to my said trustees, and their foresaids, to execute a deed, vesting the same in themselves, and to apply the annual proceeds 'thereof, after deducting expenses, in yearly payments to faithful 'domestic servants, settled in Glasgow or the neighbourhood, who 'can produce good testimonials of character and morals from their 'masters or mistresses, after ten years' service. No person to be 'entitled to more than L.10 sterling yearly, but as much less as my 'said trustees may think proper. And if the free residue of my 'estate shall not amount to L.600 sterling, I authorise my trustees 'to distribute the same to such charitable or benevolent purposes 'as they may think proper.'**

Messrs Rowan and Miller accepted the trust. The fortune left by the testator, which was entirely personal, (with the exception

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Narrative.

of the dwelling-house, which he appointed to be conveyed to James Hutton Rowan,) amounted to L.19,395 : 17 : 11 $\frac{3}{4}$, of which, after deducting the debts and special legacies, there remained a balance of L.11,963 : 5 : 6 $\frac{3}{4}$.

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Regarding Dr Black's supposed state of information as to the probable amount of his fortune, the following facts were admitted : Dr Black's cash-book contained statements of his affairs, representing his property, as in 1804, to amount to L.8400 ; as in 1825, to L.12,286 : 3 : 7, besides ' fifteen shares in the New Stock Gas Company,' the value of which, at that time, is not stated ; and as, in 1827, being the year in which he executed the said deed of settlement, to be L.12,721, 6s., besides ' fifteen shares Gas Company's Stock, fifteen shares New do., one share B. Garden ;' the respective values of which shares are not at that time stated.

The deed of settlement was found in the repositories, in an envelope, backed thus, in the handwriting of Mr Lawrie, the writer by whom the deed was prepared :

' Dr James Black's Settlement, executed this 31st day of May 1827 years, and deposited with me till called for.' (Signed) WM. LAWRIE.'

There was found in the repositories a circular by James Arthur, M. D., deputy-inspector of hospitals, dated 20th February 1822, addressed to Dr Black, on the back of which was the following pencil markings or jottings of special legacies made by Dr Black :

' James Maxwell, ...	L.400
' M. Maxwell, ...	2000
' Rowans, ...	600
' M. Miller, ...	3000
' J. B. Miller, ...	3500
' Charities, ...	600

' L.10,100

' Bakers, ... L.5,600

' Thistle, ... 3,500

' Gas, ... 3,000

' Stock, ... 5,000

' L.17,100'

There was also found in the repositories a paper containing holograph memoranda as follows :

' To Marion Miller and Mary Maxwell the interest of my L.7453 ' three per cent. stock, and my shares of the gas company. The ' annual interest for their lives, share and share alike, which is to

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—
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' devolve, upon their death, upon James Black Miller, son of John Miller, St V. Street; in case of death, to his sons in succession, and their heirs. To the eldest lawful daughter of James Maxwell, Esq. of Baillieston, L.500. To George Rowan of Holmfauldhead, L.500 ea.

' To four charities L.1000, or L.250 ea. To Susan Johnston, my servant, L.10 per annum, to be paid every six months.

' To Jessie and M. Gammot, ... L.50—L.25 ea.

' To John and M. Stewart, ... 50

' To Mrs Stark, ... 200

' To Greigs, L.50 ea. 400

' Household furniture.

' M. Miller.

' The residue for servants.

' A sermon to be preached every 4th June by the clergy of Glasgow in succession, for which they are to be allowed 5 guineas; and the annual interest to be distributed in rewarding good and faithful servants ; or prizes of L.5 ea.—Domestics, 3 male and 3 female; manufacturing do.; agricultural, in the circle of 3 miles round Glasgow, do.; trades do.

' Trustees,—Provost and Bailies and Clergy.'

The Trustees having been advised that it was doubtful how far the bequest of the residue of Dr Black's fortunes was vested, or could be carried into effect, brought a process of multipoleinding.

Claim for Next
of Kin.

The next of kin of Dr Black claimed to be preferred for the undistributed part of the estate, being L.11,963 : 5 : 6 $\frac{1}{4}$, or for whatever the same might be ascertained to amount to, after satisfying the legacies and provisions in favour of the persons mentioned in the said deed of settlement, or for whatever sum the residue might amount to at any future period, in the event of the same being increased in consequence of any of the legacies or provisions lapsing, or of it being found, in the course of this process, that any of the said legacies or provisions shall fall to be held as residue, and *pleaded*—In so far as regards the residue of the said estate, the will is void, from uncertainty or otherwise; from not being so conceived as to carry any object which the testator may have had in view into effect; and farther, from being executed in error on the part of the granter as to his means, circumstances and condition.

Plea in law.

Claim for
Black's Trustees.

The Trustees claimed the whole fund in medio, being the personal estate left by Mr Black for the purpose of paying the legacies

specified in this deed of settlement, (most of which they had already paid,) and of vesting the residue, in terms of the said deed, in the claimants themselves, by a proper deed, and applying the annual proceeds thereof, after deducting all necessary expenses, in yearly payments, not exceeding L.10 sterling each, to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce good testimonials of their character and morals from their masters or mistresses after ten years' service, and *pleaded*—

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1. Instructions or recommendations given to trustees as to the disposal of trust-funds are binding and obligatory, and ought to be carried into effect. 2. The instructions given to the Trustees in the trust-deed executed by Dr Black are sufficiently specific and distinct, and the trust-deed is in all respects a valid and effectual deed, whereby the whole of his funds were vested in the Trustees for the purposes therein expressed, to the exclusion of his heirs-at-law or next of kin, excepting in so far as legacies or provisions may have been left to any of them by the trust-deed. See *Hill v. Burns*, 14th Dec. 1824, and *Crichton v. Grierson*, 12th May 1826, both affirmed in the House of Lords. 3. There being no uncertainty as to the purpose to which the testator intended the residue of his estate to be applied, and there being no error or mistake, as alleged by some of the claimants, in the execution of his trust-deed, there is no reason why the same should not be carried into full effect. Plea in law.

Besides this leading question upon the construction of the will, a point was raised upon the import of the clause, 'In the third place, I appoint my said Trustees to lend out the sum of L.2000 sterling on good heritable or personal security, taking the interest of said sum payable to Mary Maxwell, my cousin, half-yearly during her life, commencing the first term's payment at the first term of Whitsunday or Martinmas that shall occur after my death, and the next at the next term thereafter, and so on half-yearly and proportionally, and the said principal sum itself payable to my said Trustees or their aforesaid at her death.' Miss Maxwell is still living, and draws the liferent of the said provision; but it being doubtful whether upon her death the principal should go as a legacy to the Trustees as individuals, or fall for distribution into the general fund, Mr Miller and Mr Rowan claimed separately to be preferred individually for the said principal sum of L.2000 sterling, as the legacy or provision before specified, payable to the Trustees upon the decease of Miss Maxwell, or for the proportionate interest of each therein, in the event of his surviving the liferentrix.

Claim by Trustees as individuals for L.2000.

The answer for the Trustees was a denial that either of these claimants had any right to the L.2000 on the death of Miss Maxwell,

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Answer for the Trustees.

and they *pleaded*—That, under the terms of the trust-deed, the sum of L.2000, of which the interest is to be paid to Miss Maxwell during her life, belongs not to the Trustees as individuals, or for their own behoof, but to them in their character of Trustees, and forms part of the residue of the trust-funds, to be employed for the trust purposes, as specified in the deed.

The record being closed, the Lord Ordinary, on the joint application of the parties representing the importance of the questions at issue, ordered cases.

Pleaded for next of kin, (as to the application of the residue.)—The plea of the next of kin is well founded, on various legal and equitable grounds.

(1.) The bequest is challengeable, on the broad general ground of uncertainty and indefiniteness in its meaning and purposes, and particularly as to the amount of funds which are said to be placed at the discretion of the Trustees for the purposes alleged. And, although the validity of such charitable bequests has been discussed in recent cases, the present differs from these in the terms and the alleged scope and object of the bequest, and far exceeds in uncertainty and vagueness the bequests decided upon in the cases of *Hill v. Hood's Trustees*, 14th Dec. 1824, *F. C.*, and *Crichton v. Grierson*, 12th May 1826, where the Court and the House of Lords decided upon the simple and intelligible nature of the special bequests, and avoided deciding as to the powers of trustees to make a will for the testator. *Lyndhurst, (C.) in Crichton v. Grierson*, 3. *Shaw's Appeal Cases*, p. 338, stated, 'I cautiously abstain from expressing any opinion upon that point, because I think this question does not at all turn upon that position,' and that it was a narrow one. Such a power over the property of a testator, indeed, is contrary not only to the civil law, but to the law of Scotland.

By the Roman law generally the power of testamenti factio could not be devolved by a testator, or the disposal of his property placed in arbitrio alieni. As to the validity of a legacy left in arbitrio tertii, see *De Cond. et Demons.* l. 52; *De Hæredibus Instituendis*, l. 32 and l. 68; *Voet*, 28, t. 5, sect. 29.

The only text which appears to be at all contrary to those which have been quoted is the following: *Dig. b. 30, tit. 1, l. 43*, 'Legatum in aliena voluntate poni potest, in hæredis non potest.' But *Pothier*, b. i. art. 8, § 2, in his *Treatise on Testaments*, reconciles the two texts. *Voet* also gives satisfactory explanation of the contrary passages, b. 30, tit. i. sec. 36.

The law of Scotland, adopting the principles of the civil law, also

holds sacred the same privilege, as confined to the testator himself; 23 Feb. 1836. *Dirleton*, see title, 'Dispositio collata in arbitrium alterius;' *Stewart's Answers*, p. 74; *Swinburne on Testaments*, vol. ii. p. 463, and vol. i. p. 22. Referring to the decisions, see *Murray v. Fleming*, 21st Feb. 1729, *M.* 4075; *Arniston Sess. Pap.*, *Dick v. Ferguson* and her children, 22d Jan. 1758, *Kames*.

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As to the law of England, see *Brown v. Yeale*, cited in note, 7. *Vesey*, 50; *Morrice v. The Bishop of Durham*, 9. *Vesey*, 399; 10. *Vesey*, 522, 539; *James v. Allan*, 3. *Merivale*, 17; *Omaney v. Butcher*, *Turner and Russell*, 260; *Legge v. Asgill*, *Turner and Russell*, 266; *Fowler v. Garlike*, 1. *Russell and Mylne*, p. 232. See also *Vesey v. Jamson*, 1. *Simon and Stewart's Reports*, p. 69, where the bequest was very similar to that in the case of *Crichton v. Grierson*, and was held void.

Dr Black again directs his Trustees to apply the residue of his estate to such benevolent and charitable purposes as his Trustees may think proper; but there is no direction as to the particular nature of those purposes,—or of the particular scheme of charity or institution to be benefited,—or the range of localities,—or means of denoting the special purposes of benevolence and charity which the testator may have aimed at. The recommendation rather increases the indefiniteness and uncertainty of the will; for there is no express will, command, or appointment. There is an indication of mind, very vague certainly, and coupled with a recommendation depending upon uncertain or unknown circumstances. Accordingly, in the case of *Morris* against the Bishop of Durham, already quoted, the Lord Chancellor stated the law thus: 'That no trust upon words of request or recommendation can be supported, unless the object and subjects of it are certain.' Then again it is but a mere recommendation, coupled with and depending on an uncertainty or a state of ignorance on the part of the testator, as to whether circumstances would arise in which his recommendation, if the Court could enforce it, could be acted on; and this recommendation can never be considered as a declaration of intention, being in itself vague, indefinite, and uncertain. Now here, independently of the general vagueness, the unconcluded and uninformed state of mind as to the amount of the residue, and the doubt, or the impossibility of letting in the recommendation, who can fix, for the testator has not fixed, the peculiar attributes and qualities precisely characteristic of the persons supposed to be entitled to claim under this clause? It was doubtful whether every one of the domestics entitled to the benefit of the fund shall have served one particular master or mistress for the period of ten years; or whether service generally for ten years, though under different

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masters and mistresses, shall form the test of the claim. No one could say that the characteristic of faithful domestic servants, even though coupled with the production of testimonials, was so precise a description as to leave no difficulty or impossibility in the administration of this vague bequest. The Trustees ought not, under circumstances of such doubtful expediency, independently of the uncertainty and vagueness of the will, to be intrusted with a fund so large in amount, beyond the conception of the testator, when it may be so applied, or rather perverted in its application, as to be productive of evils quite adverse to, and uncongenial with the purposes of charity and benevolence, which had evidently been floating in the mind of the testator, but of which there is no definite expression in his settlements.

(2.) There can be no doubt of the power of the Court (*Ersk. iii. 9. 14.*) to direct or control the Trustees in the execution of the purposes of the trust; and it is equally clear, that under this action the Court can define the powers of the Trustees as to the quantum of the residue which they are bound to apply in fulfilment of the alleged or supposed purpose of the bequest, if by possibility the Court can venture to extricate it. The Trustees ought to be restrained from applying a larger sum than the L.600 for that specific purpose.

There could be no animus or intention to bequeath L.12,000, when the testator was ignorant that his fortune amounted to that sum, having no certainty that the residue would exceed L.600. Unless the extent of the disposable property can rationally be held to have been within the comprehension or conception of the testator, it is in vain to think that any will can have been expressed in regard to it, more especially when his expressed intentions evidently denote a sum comparatively inconsiderable in amount. When the Court finds a testator indicating what he believes will be the sum at the disposal of his trustees under a charitable bequest, it will not strain the charitable intention beyond the belief and wish of the testator. It will not sanction trustees in appropriating a larger sum than the testator believed it was in his power to give. The general principle laid down in Hill's and Crichton's cases may stand good, and the dangerous extension of a testator's expressions, now attempted, be nevertheless reprobated. The point is new, and not touched by the cases referred to.

(3.) The holograph memoranda found in the repositories bear out these views. He there clearly points at limiting the reward of domestic servants to six persons at L.5 each, which would thus just exhaust the interest of L.600 at 5 per cent.

(4.) The claimants are entitled to found on these memoranda,

not as documents to be used in contradiction or opposition to the regular deed of settlement, but as authoritative adminicles of evidence of the testator's meaning. It is not intended to rear up these memoranda to make a new will, but to explicate the doubtful words in a regular settlement, and to render free from dubiety and uncertainty the clause in question. See Wigram on 'the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, 5th proposition.'

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The Trustees *pleaded*—The clause imports that the residue was to be devoted to charitable purposes, to be left at the discretion of the Trustees, with a recommendation, in the event of the residue exceeding L.600, to apply the funds to the purpose mentioned by the testator. The only questions, therefore, are, whether it was competent for the testator to delegate to the Trustees any such discretionary power in regard to the selection of the charities? and whether the existence of such a discretionary power involves an uncertainty sufficient to vacate the settlement?

Trustees' Pleas.

The rule of law is, that a person may dispose of his property either by a deed *inter vivos* or *mortis causa*, in such manner, and for such purposes as he chooses, provided these purposes are in themselves lawful. Testamentary deeds, in particular, are such favourites of the law, that it is imperative upon courts of justice to interpret them in the manner best calculated to carry into effect the intentions of the testator. In this case the testator's intention, that the residue of his funds should be devoted to charitable purposes, is beyond doubt; and the only question is the competency of his delegating to his Trustees a certain amount of discretionary power in regard to the selection of the charities to which his funds were to be applied. The principles and analogies in favour of the competency of such delegation are obvious: they will be found illustrated in the following decisions, which afford an *a fortiori* inference in support of this settlement: *Murray v. Fleming*, 1729, *M.* 4075; *Campbell v. Campbell*, 1738, *M.* 4076; *Trustees of Brown*, 1762, *M.* 2318; *Wharrie*, 1760, and *Snodgrass*, 1806, *M.* 6599, App. No. 1; *Hill v. Burns*, Dec. 14. 1824, *S. & D.* vol. iii., affirmed on appeal; *Crichton v. Crichton's Trustees*, May 12. 1826, *W. & S.* App. vol. ii. p. 80; 3 *W. & S.* App. 329.

The civil law is inapplicable. One of the main grounds assigned why the right of *testamenti factio* was incapable of delegation, was, that it was a right personal to a testator to dispose of his property to the defeasance of the rights of his lawful heir. In this case, the testator did not delegate the power of others, (if they should think fit,) to defeat the rights of his heirs or next of kin, by making

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a will for him; but in his own proper person he defeated those rights by a direct conveyance to trustees, not to make a will for him, but to execute a will made by himself, although with the power of exercising a certain discretion in the mode of carrying his intentions into effect.

Nor does the denial of this power of delegation in the civil law appear to have been absolute. It is expressly said in one of the laws quoted by the pursuers, *legatum in aliena voluntate poni potest, in hæredis non potest*. And the reason of the distinction is clearly laid down by Voet in one of the passages quoted, the doctrine of which amounts to this, that there can be no valid legacy where the power to make it is delegated to the heir of the testator, for the obvious reason, that as he must necessarily be the debtor in the obligation, the legacy would be void, from the defect of obligation to pay it.

The law of England would not refuse to recognise a trust-deed, such as the present, on the ground either of the uncertainty in the expression of the testator's will, or the incompetency of delegating such discretionary powers as those which were conveyed to the Trustees in the present instance. The next of kin admit that the English courts make an exception from the application of these principles, in regard to bequests to charitable objects; which is just, in other words, admitting that the English courts would refuse to apply them to the trust under which they, the defenders, act.

In the case supposed by Lord Dirleton, there is no disposition to trustees, but a disposition to persons unknown and indefinite, namely, such as ten of the testator's friends specified in the disposition might afterwards choose to name. It was therefore not a disposition in trust, but (as remarked by Stewart) a mandate for those friends to name an heir for the testator. It can require no argument to shew, that in addition to the obvious difficulties against the validity of such a deed, derived from the peculiarities of the law of deathbed, it must necessarily prove inefficacious, upon the principle that '*morte mandatoris perimitur mandatum*.' *Murray v. Fleming*, 21st Feb. 1829, is a direct authority in the Trustees' favour; and see *Snodgrass v. Buchanan*, 16th Dec. 1806; *Brown*, 3d August 1762; *Campbell*, 16th Dec. 1738.

The case of *Dick* is inapplicable, as the deed was found ineffectual; not in consequence of any vagueness or uncertainty in the nature of the trust, but in consequence of the refusal of the trustees to accept or to act. The trustees have no interest to dispute the general powers of the Court in regard to trust-estates, but they know of neither principle nor authority for the Court taking it upon itself to alter a trust-deed, where the intentions of the testator are

unambiguously expressed, or to limit the purposes of the trust to a part only of the sum which the truster has thought fit to appropriate to them. It has been seen that in the present case the terms used by the testator are free from all ambiguity, while there is not the least pretence for saying that he believed the residue of his funds could not exceed L.600.

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The Court cannot take extraneous documents and jottings into consideration in construing wills. This is only competent in cases where the expressions of intention are doubtful. Besides, nearly the whole of the jottings are prior in date to the settlement which they have been adduced to explain, or rather to control. The authorities on which the pursuers rely, while they are limited to cases of doubtful expression of intention, expressly lay down the distinction between jottings prior to the deed and jottings subsequent to it, absolutely excluding the former class from the rule which admits of the latter being taken into consideration, under particular combinations of circumstances.

In the question as to the fee of the L.2000 liferented by Miss Maxwell, Mr Miller and Mr Rowan *pleaded*—

The terms of the nomination of the Trustees shew that it was to the claimants, 'and to such of them as shall accept hereof, and to the survivors and survivor of the acceptors, the major number alive and accepting at the time being always a quorum, as trustees or trustee.' And in the third clause of the settlement, Dr Black says, that 'the said principal sum itself (L.2000) payable to my said trustees or their foresaids at her death.' It is just as clear that the Trustees, in their individual capacity, should get the L.2000 on Miss Maxwell's death, as that she should now draw the interest of that sum. The Trustees may maintain that Mr Miller and Mr Rowan are not mentioned by name in the third clause of the settlement—that they are only called 'my said trustees,'—and that therefore that sum belongs to them as trustees. But if Dr Black had not intended to give the claimants this sum, he would have declared that it was to form part of the residue. Farther, it is clear that this sum could never be contemplated by him as part of the residue after payment of the special legacies, because in that event there could be no doubt that the residue must have amounted to more than L.600. Yet it is manifest from other parts of the deed that Dr Black was in doubt whether the residue would amount to that sum. Nothing was more likely than that he should make this bequest to his Trustees, one of whom was a very near relation, and both of whom will have the trouble of executing the trust, and who are not otherwise legatees under the deed.

Claim of Mr Miller and Mr Rowan to legacy of L.2000.

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As to the claim by the Trustees individually to the fee of the L.2000, provided in liferent to Miss Maxwell, the Trustees *pleaded* — The subjects are conveyed to them as trustees, and for purposes specified; and although no doubt it may be said that one of these purposes was the payment of L.2000 to Mary Maxwell in liferent, and to themselves in fee, the question still remains behind, whether it is to themselves as individuals, or as trustees; but that it was in the latter, and not in the former capacity, may be argued from the circumstance, that the principal sum is not only appointed to be taken payable to the trustees named in the trust-deed generally, but also to them 'or their aforesaid,' meaning thereby any individuals that they might assume under the powers of assumption conferred on them, a circumstance which may be held to indicate, that in appointing the principal sum to be lent out in the manner set forth, the testator had in view, not the interest of the trustees as individuals, but the interest of the trust-estate.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the revised cases for the parties, and whole process, finds, *Imo*, That the fee of the sum of L.2000, directed to be liferented by Mary Maxwell, belongs to and is vested in the Trustees of the late James Black, not as individuals, or for their own personal benefit, but as such trustees only, and must accordingly form a part of the residue of his estate, to be disposed of as such residue is, by his trust-deed, directed to be disposed of, after the termination of the said liferent, and the payment of all the special legacies and provisions: Finds, *2do*, That the destination of the whole of the said residue, contained in and expressed by the last provision or declaration of the said trust-deed, is not void, either for uncertainty, or as having been made through error or ignorance on the part of the truster; that the trustees are therefore bound to carry it into effect, and to administer and apply the said residue in conformity to the said destination; and that the next of kin of the truster have no title or interest in the matter, so long as the trustees shall duly administer as aforesaid: And before farther answer, appoints the cause to be enrolled, that parties may state what decret of preference, or otherwise, will be required to carry these findings into effect, with reference to the shape of the action, and the present state of the fund in medio.'

Note.

Note.—'The first point turns wholly on a *quæstio voluntatis*; and it seems to the Lord Ordinary impossible to suppose, that the truster really intended to give L.2000 to any individuals who might happen to be vested with the character of his trustees at

‘ the death of his niece, Mary Maxwell. There is a full power in
 ‘ the deed to assume additional trustees at pleasure, and an instruc-
 ‘ tion to fill up the place of those who might die or be disqualified,
 ‘ while the direction upon which this claim of the existing trustees
 ‘ is exclusively vested is merely that they shall vest the L.2000 in
 ‘ such a way as that the interest shall be payable to Mary Maxwell
 ‘ during her life, and the principal to ‘ the said trustees and their
 ‘ foresees, (that is, their successors in office,) at her death.’ The
 ‘ Lord Ordinary cannot entertain a doubt that it was to be so pay-
 ‘ able to them *as trustees*; and that, if not otherwise appropriated
 ‘ by new codicils or legacies of the truster, it must revert and fall
 ‘ back into the general mass of the trust-estate.

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‘ As to the objection of uncertainty or substantial delegation of
 ‘ the inalienable right of testing to third parties, the Lord Ord-
 ‘ nary thinks that it has been set at rest by the recent cases of Hill
 ‘ and Burns, and Crichton and Grierson, both most elaborately
 ‘ argued through all their stages, and both ultimately confirmed by
 ‘ judgments of affirmance in the House of Lords.

‘ In Crichton's case the destination of the residue was quite as
 ‘ vague and indefinite as it would have been in this case, if the sum
 ‘ had fallen short of L.600. But as it greatly exceeds that sum, the
 ‘ Lord Ordinary conceives, that the recommendation to apply it for
 ‘ behoof of meritorious servants in Glasgow is to be regarded as a
 ‘ specific instruction or expression of will on the part of the truster;
 ‘ and in that view, it is infinitely more precise than any thing that
 ‘ occurred either in Crichton's or Hill's case, or indeed in any of the
 ‘ earlier cases; and on a point thus settled by authority, it would
 ‘ be idle to go into any general argument on the grounds and reasons
 ‘ of the decisions.

‘ The greater part of the argument, and almost the whole of the
 ‘ evidence brought to shew the supposed *error* of the truster as to
 ‘ the amount of the residue, which he meant to be affected by this
 ‘ destination, appears to the Lord Ordinary to be irrelevant and in-
 ‘ admissible. Beyond all doubt, the trust-deed conveys *his whole*
 ‘ *property* for the purposes there mentioned; and it is altogether
 ‘ impossible, therefore, to suppose that he meant to die *intestate* as
 ‘ to any part of it. The disposition of the residue, accordingly, is
 ‘ of ‘ the rest and residue of my estate and effects,’ in the most ge-
 ‘ neral and comprehensive terms; and though the case is supposed
 ‘ of its falling short of L.600, the disposition recommended on the
 ‘ opposite supposition is not a disposition of L.600 or any such sum,
 ‘ but a disposition to take effect ‘ if it shall amount to L.600, or
 ‘ upwards.’

‘ It may appear (and in fact it is) extraordinary, that, with the

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‘ knowledge that the truster had of the actual extent of his funds, he should ever have contemplated the case of the residue falling below L.600. But even if no explanation could be suggested, the Lord Ordinary could not, upon this account, refuse effect to the clear words of the deliberate deed of a sane man. He is satisfied, however, with the explanation given by the trustees. The deed was executed upwards of seven years before the truster’s death, and contains full power to revoke and alter. It was quite possible, therefore, that either by *additional legacies*, or by *misfortunes*, or *extravagance* on his own part, the free residue might be so reduced, before the trust came into operation, as either to be altogether annihilated, or to fall below the sum of L.600, which he seems to have considered as the minimum upon which his scheme for the benefit of deserving servants could be set a-going.’

The next of kin *reclaimed*.

Their Lordships were unanimously of opinion that the case of *Hill v. Hood’s Trustees* ruled the present.

Judgment.

The following interlocutor was pronounced: ‘ The Lords adhere to the interlocutor of the Lord Ordinary, refuse the desire of the reclaiming note, and decern, reserving to the Lord Ordinary to determine all questions relative to expenses of process as to him shall seem just *.’

Lord Ordinary, *Jeffrey*.For Trustees, *More, Monteith*.

For Next of Kin,

*Dean of Fac. (Hope,) A. M’Neill and Robinson.**W. A. G. & R. Ellis, W.S.*and *R. & A. Kennedy, W. S. Agents.* T. Clerk.

R.

* On 27th February 1836, the Lord Ordinary pronounced the following interlocutor: ‘ Having heard parties’ procurators upon the Lord Ordinary’s interlocutor of 12th January last, and remit by the Court of 23d February, prefers the trustees, pursuers, in terms of, and for the sum therein specified, and whole trust-funds, and decerns; finds, however, that, in the peculiar circumstances and the difficulties of the case, the expenses of the unsuccessful parties must be paid out of the trust-funds; allows an account thereof to be given in, and when lodged, remits the same to the Auditor, to tax and report.’

FIRST DIVISION.

No. XCIX.

25th February 1836.

RANKING AND SALE OF CROMARTY.

PROCESS.—RANKING AND SALE.—ACT OF SED. 11TH JULY 1794.

—*Found*, 1. *That the common debtor in a ranking and sale was entitled to inspection of the official procedure and correspondence in the Minute-book of the common agent.* 2. *That the Minute-book was part of the process, and must be lodged in process.*

In the ranking and sale of Cromarty the following point was verbally Narrative. reported by the Lord Ordinary: The common debtor demanded access to the Minute-book of the common agent, founding on the Act of Sederunt July 11. 1794, wherein it is declared, by sect. 5, ‘That the common agent shall keep a Minute-book of his proceedings, and of his official correspondence, open to the inspection of all concerned;’ and pleading, that he was evidently a person concerned, in as much as he had a great interest to watch over the whole proceedings of the common agent, to see that the estate was made as productive as possible, so that the greater reversion might remain over for him: That he wished, in the meantime, to inspect the official correspondence only; but that it was necessary that he should not merely have access to the Minute-book, but that it should be lodged in process, of which it was a part.

It was answered, that the common debtor was not a party concerned in the meaning of the Act of Sederunt, which intended to allow inspection of the Minute-book to creditors alone: That, in the present case, there were peculiar reasons for refusing inspection of the Minute-book to the common debtor, who was engaged in disputes with the creditors, and whose object was to ascertain the private views of the creditors, from the correspondence therein contained: That, at all events, it was quite sufficient if it was open for his inspection, and that it was neither necessary nor customary to lodge it in process, which might lead to great inconvenience to the creditors.

The Court held that the common agent was undoubtedly entitled Judgment. to inspection of the official procedure and correspondence in the Minute-book as a party concerned, and that the said book formed a

25 Feb. 1836. part of the process, like the Sederunt-book in a sequestration, and therefore ordered it to be lodged in process.

Ranking and
Sale of Cro-
marty.

Lord Ordinary, Fullerton. Act. Dean of Fac. (Hops.) Alt. Keay. T. & W.
Ferrier, Common Agents. S. Clerk.

C. R.

SECOND DIVISION.

No. C.

25th February 1836.

CAMPBELL AND MACLEAN

against

JAMES STEVENSON AND MANDATARY.

PRINCIPAL AND AGENT.—(ELECTION OF AGENT.)—SALE.—*Circumstances in which it was found, (adhering to the interlocutor of the Lord Ordinary,) in an action by the sellers of goods against a party for whose behoof they were purchased, (1.) That the sellers, by letting the stipulated term of credit expire, while in the knowledge of the defender as the principal party to whom the goods were furnished, without making any demand on him, and subsequently taking a bill in payment thereof, from a party who acted as agent and purchased the goods from them, must be held to have elected to take the agent for their debtor, and could not claim payment from the principal party. (2.) That the sellers, by making no demand on the principal till some time after the credit expired, and by transacting with and taking a bill from the agent, did mislead the principal to settle with the agent by paying to him the price of the goods, and were barred from maintaining an action against the principal.*

Narrative.

For several years previous to 1830, Elizabeth Stevenson, sister of the defender, and afterwards John Muir, whom she married, were in the practice of ordering and purchasing goods for the purpose of being exported to the defender in Tobago. The destination of the goods thus purchased was generally made known to the parties transacting; but the venders of the goods did not, (except in the instance to be noticed,) hold any direct communication with the defender. Muir was understood to be acting as agent for the defender. The venders were uniformly settled with, either by cash or bills, by Muir, who, as he stated to one party with whom he transacted, had a small remuneration arising from the discount allowed by the seller.

Previous to the transaction out of which the present question arose, the pursuers, Campbell and Maclean, clothiers in Glasgow, had, on three several occasions, furnished goods on the order of Muir on account of Stevenson, but without communication with the latter, and had settled the price thereof by bills accepted by Muir. In September 1830, Muir ordered the pursuers to forward to the defender goods by a vessel at that time about to sail from Greenock, and the goods were forwarded to Greenock, and along with these an invoice, amounting to L.95, 12s., and a letter addressed by the pursuers to the defender in these terms: ‘*Glasgow, 28th September 1830. DEAR SIR, Our mutual friend, Mr Muir, called some time ago to say he would want an assortment for you similar to the last we made for you; and as no vessel appeared since then for your place, either from Clyde or Liverpool, till Saturday last, we have only to make up and forward, as per inclosed invoice, value, including charges, L.95, 12s., which will, we trust, arrive in good condition, and in all respects please. Your farther esteemed favours will have the best attention of your obedient servants.*’ The parties interested in the vessel from Greenock having refused to take any goods except those shipped by themselves, the goods in question were, in November, forwarded by the Mary Ann from Leith to Tobago, accompanied by the following letter from the pursuers to the defender: ‘*Glasgow, 10th November 1830. DEAR SIR, By the inclosed you will see that we intended to forward this trunk per ‘The David,’ from Greenock; but unfortunately the parties interested would not allow any goods to be shipped except what belonged to themselves, and on that account we are now obliged to forward them, to be shipped at Leith per Mary Ann, and we trust that they may yet be in good time for your Xmas sales. And soliciting a continuance of your esteemed orders, we are,*’ &c. The goods were entered in the pursuers’ books to the debit of the defender. A copy of the invoice was also sent to Muir, who, upon the 27th November 1830, transmitted to the defender an invoice of various parcels of goods furnished by various merchants, and which had been shipped on board the Mary Ann from Leith. Engrossed in which was a copy of the invoice transmitted by the pursuers, along with the goods on the 10th November, together with a letter explaining the cause of the shipment by the Mary Ann, adding, ‘the trunk of made clothes (the pursuers’ goods) was sent before the rest by the people, which occasioned a different bill of lading; but the account was handed over to me, a copy of which is sent to you, and the amount is to be remitted to me along with the rest.’ The accompanying invoice is headed, ‘Mr James Stevenson, Saddler, Tobago

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‘ To John Muir, Dr.’ The goods were received by the defender. The period of credit expired at the end of twelve months, being 10th November 1831. No demand for payment was made on the defender by the pursuers at or previous to that date. On 11th February 1832, the pursuers received from Muir a bill for L.100, drawn by them, and accepted by him for value received, payable four months after date; and that bill comprehended the price of the goods in question, together with a small sum, being a separate debt by Muir to them. Muir died bankrupt in the autumn of 1832, previous to which the pursuers had made no demand on the defender. The defender settled the whole balance on the accounts between him and Muir, including the price of the goods in question, as contained in the invoice sent by him upon 27th November 1830, by drafts on Messrs John Campbell senior and Co. of Glasgow, before any notice was given to him that the pursuers looked to him for payment of the debt.

The defender having returned to this country for a time, in 1832, the pursuers raised an action against him before the Sheriff of Ayr, ‘ concluding for L.95, 12s., with interest from the 10th November 1831, being twelve months after the goods were dispatched from ‘ this country to Tobago.’

The defender denied very broadly the agency or authority of Muir to purchase goods for him, or to bind him for the price; and pleaded farther, that he was released by the settlements which had respectively taken place betwixt him and Muir, and Muir with the pursuers. The Sheriff-substitute at first assoilzied the defender, on the ground that the pursuers had failed to prove that Muir was agent of the defender, and that Muir had been settled with as the true debtor. This interlocutor was afterwards recalled, and a proof allowed as to whether ‘ Muir acted as agent for the defender while ‘ he resided in Tobago, in ordering goods in this country and sending the same out to him.’ The Sheriff, in adhering, remarking in a note, ‘ The whole difficulty lies here in a question of fact, viz. ‘ whether Muir purchased in his own character, or as agent for the ‘ defender; and the difficulty has arisen from the looseness of trans- ‘ acting on both sides, which omitted to have that important fact ‘ specified in writing.’ The Sheriff-substitute, upon considering the proof, found that ‘ the pursuers have proven that the defender’s sister ‘ acted as his agent and mandatory in this country, in sending out ‘ goods to him, while she was unmarried, and paying the same when ‘ she got remittances; and after she was married, that Muir under- ‘ took that duty, and commissioned and sent out goods to the de- ‘ fender, and which were partly invoiced in the defender’s name, and ‘ bills granted bearing that character; therefore finds the defender

‘ liable.’ The Sheriff adhered, prefacing a note with this remark : 25 Feb. 1836.
 ‘ The impression which the Sheriff formerly felt respecting this case
 ‘ still remains, viz. that it is a question of fact rather than of law.
 ‘ The documentary evidence now produced seems to him to predo-
 ‘ minate in favour of the agency of the defender’s sister and brother-
 ‘ in-law ; and for this reason he does not think that the legal prin-
 ‘ ciples detailed and illustrated by cases in the petition * apply to
 ‘ the circumstances.’

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 Maclean v.
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 Narrative.

The defender advocated, and *pleaded* against the Sheriff’s judgment—

1. The interlocutors are erroneous in holding it to be established that Muir was the general agent and mandatary of the advocator, and possessed powers enabling him to bind the advocator, without express instructions. 2. Muir possessed no powers, and was not placed in circumstances to enable him to subject the advocator to third parties, notwithstanding payments by the advocator to Muir for furnishings made through his intervention. 3. The advocator having given no order for the goods in question, or any order to Muir to procure the goods, the action cannot be maintained. 4. The respondents having made the furnishings directly to Muir, either as upon sale to him, or upon his authority and credit, are not entitled to demand payment of the amount of these furnishings from the advocator, more especially as the amount was regularly paid by the advocator to Muir. 5. The advocator having had no communication with Muir on the subject of the furnishings, and not being aware that they were to be made until he received the general invoice, including the goods in question, and accompanying letter, in which he was debited to Muir for the amount, the advocator was entitled to consider, that the respondents had so transacted with Muir as to warrant this charge at Muir’s instance, and in his accounts, and that he, the advocator, was therefore entitled to meet the demand which Muir thus made against him ; more especially as in their previous dealings the respondents had charged and settled with Muir alone, in a manner not known to the advocator, without any communications, and without making any demand upon him. 6. Supposing Muir to have been the agent for the advocator in regard to the furnishings sued for, he was as much the agent of the pursuers, and the latter are as much bound by his actings as the former. 7. The respondents having acquiesced in the former course of settlement, and not having certiorated the advocator that he was to adopt any other course in regard to the furnishings in question,

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* See concluding paragraph of the Lord Ordinary’s note, p. 496.

25 Feb. 1836. must be held to have authorised the adoption of a similar course in this instance. 8. Supposing that Muir was acting in the capacity or character of agent for the advocator, the respondents having made their election as to their debtor, and taken a bill, which confessedly included a private debt of Muir's, from him for the amount of the debt, are not now entitled to recur upon the foreign principal for the amount of such bill. 9. Muir's assuming agency, the term for payment having been allowed to pass, and the advocator having been led to believe that either the account when it became due was paid, or if not, that the agent had been relied on alone, and this agent having died indebted to the advocator, after being credited with the remittances on account of the furnishings in question, the respondents are not now entitled to recur on the advocator.

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Stevenson's
Pleas.

Pursuers'
Pleas.

The *paraners pleaded*—1. It is established, that in ordering the goods in question, Muir acted, not on his own account, but as agent for the defender, with powers to bind him as a party transacting with the pursuers. 2. Muir having acted as the authorised agent of the defender in ordering the goods in question, and these goods having been directly invoiced to, and received and retained by the defender, accompanied by letters from the pursuers, clearly indicating their understanding that they were transacting with him, and soliciting a continuance of his 'esteemed favours and orders,' the defender could not legally or effectually discharge himself from liability for the price of the goods, in any other way than by payment to, or a settlement with the pursuers. 3. The pursuers, as sellers, having furnished the goods in question to the defender as a purchaser, and he having received and retained them in this character, is directly liable for their price as libelled. 4. The pursuers' right of action against the defender for the price of the goods in question, is not restricted or affected by the circumstances, supposing them to be true, either that, in previous transactions of a similar description, they received and accepted payment directly from Muir as agent for the defender, or that the amount of the account libelled was included in a bill granted by Muir to the pursuers, as a mere additional security for the price of the goods, and not as a settlement of the transaction between him as purchaser, and the pursuers as sellers.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, Finds 'it proved by the written and parole evidence in the inferior court, 'that during a number of years prior and subsequent to the year '1830, Elizabeth Stevenson, sister of the defender, in the first in-

‘ stance, and afterwards John Muir, to whom she was married, 25 Feb. 1836.
 ‘ were in the practice of ordering or purchasing goods for the pur-
 ‘ pose of being exported to the defender in Tobago : Finds it proved
 ‘ that it was generally made known to the merchants with whom
 ‘ these parties so transacted, that they were intended to be exported
 ‘ to the defender nominatim : Finds it proved, that in no instance
 ‘ as to which any evidence has been led, except that which is the
 ‘ foundation of the present action, did any direct communication
 ‘ take place between the merchants, venders of the goods, and the
 ‘ defender : Finds it proved, that in most of the transactions, if not
 ‘ in all of them, Muir acted and held himself out as an agent of the
 ‘ defender : Finds it proved that the settlement of the prices of the
 ‘ goods purchased from time to time were uniformly made with the
 ‘ venders by Muir, either by cash or by bills accepted by him alone,
 ‘ and paid by him, in so far as they were paid at the time of his
 ‘ death and bankruptcy : Finds it proved, that previous to the trans-
 ‘ action in question, the pursuers, Campbell and M’Lean, had on
 ‘ three several occasions furnished goods on the order of Muir, on
 ‘ account of Stevenson, but without communication with him, and
 ‘ had settled the price thereof by bills accepted by Muir : Finds
 ‘ it proved and admitted that the order on which the goods sued
 ‘ for were furnished was given by Muir : Finds it proved and ad-
 ‘ mitted, that on that occasion the goods were shipped directly by
 ‘ the pursuers to the defender, under the direction of Muir, but
 ‘ without having been sent to Muir, and that an invoice thereof was
 ‘ transmitted along with them to the defender by the pursuers, to-
 ‘ gether with the letters founded on in the summons : Finds it
 ‘ proved that a copy of the said invoice was also furnished to Muir :
 ‘ Finds that, of date the 27th November 1830, the said John Muir
 ‘ transmitted to the defender an invoice of various parcels of goods
 ‘ furnished by various merchants, and which appear all to have been
 ‘ shipped on board the same vessel, the *Mary Ann* of Leith, engross-
 ‘ ed in which is a copy of the invoice, which had been transmitted
 ‘ by the pursuers along with the goods shipped on the 10th of No-
 ‘ vember preceding, together with a letter, containing an explana-
 ‘ tion of the cause of that particular invoice having been sent by
 ‘ the pursuers, contrary to the previous course of dealing, and stat-
 ‘ ing that the amount was to be remitted to him along with the rest,
 ‘ (meaning the prices of the other goods in the whole invoice) :
 ‘ Finds it proved that the goods were entered in the books of the
 ‘ pursuers to the debit of the defender : Finds, that in neither of
 ‘ the two letters which accompanied the invoice did the pursuers
 ‘ demand payment of the price from the defender, or intimate other-
 ‘ wise than by the form of the invoice, that they held him to be their

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‘debtor, or expected payment to be made by him directly to them :
 ‘ Finds it admitted that the goods were received by the defender :
 ‘ Finds that, according to the summons in this action, the period of
 ‘ credit at which the goods were sold was twelve months, which
 ‘ period expired on the 10th November 1831 : Finds it not alleged
 ‘ that at or previous to that date, the pursuers had made any de-
 ‘ mand on the defender for payment of the price of the said goods :
 ‘ Finds, that on 11th February 1832, the pursuers received from
 ‘ Muir a bill for L.100, drawn by them, and accepted by him, for
 ‘ value received, payable four months thereafter ; and finds it ad-
 ‘ mitted that that bill comprehended the value of the goods in ques-
 ‘ tion, together with a small sum of a separate debt due by Muir :
 ‘ Finds, that Muir died in bankrupt circumstances some time in the
 ‘ autumn of that year, 1832 : Finds it not proved, and not alleged,
 ‘ that at any time previous to the death of Muir, the pursuers had
 ‘ made any demand on the defender for payment of the price of the
 ‘ goods in question : Finds it averred on the record, and not de-
 ‘ nied, that the defender had settled the whole balance of the ac-
 ‘ counts between him and Muir, including the price of the goods in
 ‘ question, as comprehended in the invoice above mentioned, trans-
 ‘ mitted by him on the 27th November 1830, by drafts on Messrs
 ‘ John Campbell senior and Company of Glasgow, before any notice
 ‘ given to him that the pursuers looked to him for payment of the
 ‘ debt ; and in this state of the case finds, in point of law,—1mo,
 ‘ That the pursuers, by letting the term of credit expire, while in
 ‘ the knowledge of the defender, as the principal party to whom the
 ‘ goods were furnished, without making any demand on him, and
 ‘ subsequently accepting of Muir's bill in payment thereof, must be
 ‘ held to have elected to take Muir for their debtor, and cannot
 ‘ now claim payment from the defender ; and, 2do, That the pur-
 ‘ suers, by making no demand on the defender during so long a
 ‘ period after the expiry of the credit, and by transacting for pay-
 ‘ ment with Muir alone, more especially with reference to the pre-
 ‘ vious course of dealing, did mislead the defender to settle with
 ‘ Muir, paying to him the price of those goods, and that they are
 ‘ therefore now barred from maintaining the action against the de-
 ‘ fender : Therefore sustains the reasons of advocacy, advocates
 ‘ the cause, recalls the interlocutors of the Sheriff, assoilzies the de-
 ‘ fender from the conclusions of the action, and decerns ; but in
 ‘ respect of the nature of the cause, and of the course of pleading
 ‘ in the inferior court, finds no expenses due.’

Note.

Note.—‘As this cause comes before the Court on interlocutors
 ‘ which proceed on proof, the Lord Ordinary conceives it to be his
 ‘ duty under the statute to find the material facts which he thinks

are proved. According to his view of the law of it, there probably was enough in the admitted facts, and the documents produced, to have brought the parties to a clear issue if it had been rightly taken. But, unfortunately, the defender put his case at first mainly on the averment that Muir did not transact as his agent at all, but always, and specially in this matter, as an independent merchant. This, no doubt, rendered a proof necessary when it was demanded; and it was not till the reclaiming petition, drawn by counsel after the judgment of the Sheriff on the proof, that the real points on which the case turns were brought distinctly into view.

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The Lord Ordinary so far differs from the learned Sheriff-depute that he thinks that the case does not depend on *fact alone*, but that it is a case of a mixed nature, depending on facts and law together; and he is of opinion that the law, as laid down in the authorities which were quoted in that reclaiming petition, and which were more fully discussed before the Lord Ordinary, is applicable to the case when it is properly sifted and reduced to simple issues on the *undoubted* facts. Nevertheless, the Lord Ordinary is of opinion that the proof is not useless; for while he thinks that it very clearly establishes that Muir must be considered as having transacted as an *agent* of the defender, it does also shew a distinct *course of previous dealing*, in which the pursuers, as well as others, were engaged with Muir, tending very strongly to explain what took place in the instance in question, and to confirm, as matters of *fact*, the legal presumptions on which, as arising upon the admitted facts, he thinks that the case must at any rate be decided.

The Lord Ordinary thinks the questions of law involved of very great importance; and he is of opinion that the judgment of the Sheriff cannot be affirmed without great danger of shaking the principles of mercantile law, which appear to be well settled, both in this country and in England.

Taking Muir to have been merely an agent or factor, it is clear that the pursuers transacted with him, for they had *no order at all from the defender*. But the name of the defender, as principal, was made known to them, and they sent the invoice in his name under the circumstances explained. It seemed to be thought in the debate that the circumstance of the principal being made known, was very favourable to the plea of the pursuers. It was so certainly in the question, whether they dealt with Muir as an *agent*, or as *principal*. But in the legal question which arises, it is very much otherwise. If an agent transacts *qua such*, not making known the name of his principal, the vender has, notwithstanding

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ing, his election to go against the agent or against the principal, when he becomes known; and so long as the stipulated credit is running, he will not be barred from this option by any settlement between the principal and agent. See Lord Ellenborough in the case of *Kymer, Bell*, i. 492. Yet, even in that case, if he lets the credit expire, at least after knowing the principal, and there is a settlement between the principal and agent, he will be held to have taken the agent as his debtor.

On the other hand, if the name of the principal is disclosed at first, and still the vender transacts with the agent, and allows the period of credit to expire without a demand on the principal, he must then be considered as having elected the agent, and left the principal at liberty to settle with him. The Lord Ordinary thinks that this is the clear result of the cases of *Paterson against Gandasequi*, 15. *East*. 62, and *Addison against the same party*, as referred to by *Mr Bell*, i. 492. The essence of that case lay in the fact that the principal was disclosed, and, in truth, he had been personally extremely active in the purchase. But, notwithstanding this, the merchants had dealt with the agents, and done that which was held sufficient to shew that they took the agents for their debtors. And Lord Ellenborough gives the doctrine of law in different forms, but in very precise terms: 'I do not find any case which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal;' and again, 'The Court have not the least doubt, that if it distinctly appear that the defendant was the person for whose use, and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant.' The case went to the jury on the facts only, with the direction in law; and as the jury were clear that the credit was given to the agent, with knowledge of the principal, the non-suit was confirmed.

The special facts are not the same in the present case. In *Gandasequi*, the goods were invoiced to the agents, and they were debited in the books; but though, in the present case, the invoice was (the Lord Ordinary thinks by accident) made otherwise, the question is, whether the facts do not establish that the pursuers, knowing the principal, elected the agent, and gave credit to him. They made no demand on the principal. They never asked for his bill. They did not even mention to him what the credit was, but they let what they now say was the period of credit expire. Then they took the bill of the agent three months after; the bill was not paid, and still no demand was made, and it was only on

‘ the death and bankruptcy of the agent that they endeavoured to
 ‘ turn on the principal. The Lord Ordinary, therefore, holds the
 ‘ case to be within the rule of law there laid down.

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‘ But there is a *second* point still more decisive. It is admitted
 ‘ that the pursuers furnished Muir with a copy of the invoice.
 ‘ When it is attended to, that in their letters to the defender they
 ‘ did not even speak of his paying the price, there can be little
 ‘ doubt that this was done just because they knew that the account
 ‘ was to be settled with the other accounts of Muir; but, at any
 ‘ rate, it put it in Muir’s *power* to settle with the defender. Now
 ‘ the Lord Ordinary holds it to be the clear doctrine of the autho-
 ‘ rities, that if a party transacting with an agent lets the period of
 ‘ credit run out, and otherwise so conducts himself, *knowing the*
 ‘ *principal*, as to mislead the principal to settle with the agent, he
 ‘ can have no claim against that principal. This is distinctly laid
 ‘ down by Lord Ellenborough, both in the case of Kymer and in
 ‘ that of Gandasequi; and it is also held expressly by Lord Core-
 ‘ house in the case of Campbell v. Shearer, May 16. 1833, and also
 ‘ by Lord Newton in the case of Young v. Smarts, Dec. 14. 1831,
 ‘ in which the very fact, which was the ground of the opinion,
 ‘ was, that the party, after knowing the principal, *took a bill* from
 ‘ the agent. The case of Hood v. Cochrane, Jan. 16. 1818, ap-
 ‘ pears to the Lord Ordinary to be also very materially applicable,
 ‘ although there was a question in that case whether Scott Mon-
 ‘ crieff and Robertson acted as factors or as merchants. Lord
 ‘ Alloway had found expressly as matter of *fact*, appearing from
 ‘ the correspondence, ‘ that the pursuer was *acquainted* at the time
 ‘ the order was sent to him by Messrs Scott Moncrieff and Ro-
 ‘ bertson, *that the goods ordered were for behoof of the defender*; and
 ‘ though it certainly does appear that some of the Judges thought
 ‘ that the pursuer had dealt with them as merchants, the English
 ‘ authorities were expressly referred to, and the doctrine of them
 ‘ fully recognised.’ The question was, to whose credit the fur-
 ‘ nisher trusted.

‘ The Lord Ordinary need not resume the facts. He can see
 ‘ no room for doubt that here the pursuers did so act as to indicate
 ‘ that they looked to the agent alone, *giving him credit*, in such a
 ‘ manner as necessarily to mislead the defender to settle with him
 ‘ precisely as he had done in all the previous transactions. It is
 ‘ not necessary to be shewn that the defender *knew* that the credit
 ‘ was so given. The presumption is rather the reverse, by the ex-
 ‘ piring of the stipulated credit at least, and no demand being made
 ‘ for a year and a half after he had a right to conclude, either that

25 Feb. 1836. ' *the debt was paid*, or that the pursuers had taken Muir as their debtor.

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' The pursuers' counsel said that they were entitled to the expenses in the inferior court, because the case was changed here, though in fact the whole points were pleaded in the reclaiming petition. But, besides that the Lord Ordinary thinks the proof extremely material, as shewing, by the previous course of dealing, that the pursuers *really did look to Muir alone*, he thinks that if no expenses be found due in this Court, any claim by the pursuers for the previous expenses must be rejected. He thinks that the case is somewhat nice, and was perplexed by the mode of pleading at first; and therefore he has found no expenses in the advocacy.'

The pursuers having *reclaimed*—*Dean of Faculty* and *Maitland* founded on the letters from the pursuers to the defender, as making out a sale by the pursuers, and purchase by the defender. These letters were important, not being accidental, as stated by the Lord Ordinary. Muir did not get the invoice, but only a copy. The invoice he sent to Tobago was not the principal one, but one of his own. As to the authority in the case of *Gandasequi*, there the agent was adopted as principal. In *Thomson*, in 1829, 9. *Barn. and Cress.* 78, and 86, Lord Tenterden held, that there must be election of the agent as the debtor, before the principal can be exempted. The payment by the defender to Muir was made within the year of credit, and before the pursuers were bound to make a demand. Besides, it was not a bona fide payment; and the pursuers transacting with Muir could not have the effect of misleading the defender, and there is no proof that the pursuers knew of remittances to Muir. *Paley, Principal and Agent*, 3d edition, p. 250-1-2; see case there cited, of *Robinson v. Read*, decided by Lord Tenterden, who observed, in reference to the liability of the defendant as principal, 'It does not appear that the defendant suffered any injury in consequence of the plaintiff's having taken the bill from the agent. He never looked into the accounts, nor inquired how the agent was using the money. There the single question is, whether the agent has paid the debt.' See also 1. *Bell*, 491-2-3.

Rutherford and *A. McNeill*.—In the former transactions there was no communication between the pursuers and the defender. They dealt with Muir. In the transaction in question there was no intimation by the pursuers to the defender that they looked to him for payment, or that they expected payment from him. No demand was made till after the expiry of the year of credit, and

Muir's death, and therefore the principal is not liable. See Kymer, 25 Feb. 1836. 1 *Campbell*, 109. The time of election is not held to be material in the English cases. It is not necessary this should be done at the precise period of furnishing. The principal settled with the agent, in consequence of documents furnished to the agent by the venders.

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Lord Glenlee.—The question is, whether the pursuers bona fide intended to charge these goods to Stevenson as principal. Muir was authorised by Stevenson to purchase goods for him. It was a mere arrangement betwixt them, under which Muir might have purchased and did purchase goods whenever he pleased, without the knowledge or special instructions, in this respect, of Stevenson. There is no evidence that Stevenson was aware of Muir's particular mode of making the purchases. He just sent the orders to Muir, to purchase and pay for the goods, but gave him no authority to pledge his name. People might know for whose behoof Muir was purchasing, and where he intended to send the goods; but there is no evidence that persons who furnished the goods considered Muir as being bona fide authorised to pledge Stevenson's credit. Whether the pursuers might not so have conducted themselves as to give Stevenson warning, if they had intended that things should be on a different footing from that on which they had previously been betwixt Stevenson and Muir, need not be inquired. Here, the circumstances, particularly the want of intimation to the defender, and the taking of the bill from Muir, shew that the latter was looked to for payment. The bill contained not only the balance due by Stevenson to the pursuers, but a small debt due by Muir to them, mixed up with the amount of the transaction in question, and not separate as it ought to have been, had any separate liability of Stevenson really existed, or been contemplated by the parties.

Opinion of Court.

Lord Meadowbank.—Lord Glenlee has put the decision on grounds quite invincible.

Lord Medwyn.—Notwithstanding this most elaborate note and interlocutor, in the view I take of the case it is an extremely simple one. So far as the pursuers are concerned, it is of no consequence what was the course of dealing with other merchants in this country, or whether they did or did not hold Stevenson to be their debtor. Some did, and some did not; but that is of no consequence. The question is, looking to their former course of dealing, when they held Stevenson as their debtor for this commission, as they unquestionably did, by entering the account in his name in their books, and sending him an invoice in his name, with the letter of advice, whether there was any thing in their conduct which led him

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to know that they did so hold him responsible, and to conduct himself accordingly;—whether he was sufficiently advertised that now they dealt with him as principal, and held Muir only as agent. There is a difficulty in satisfying me that Muir was authorised to bind Stevenson: he was only desired to send him goods; and there was no appointment of Muir as his agent, and to bind him as such. There is no evidence that any invoices were previously sent from the pursuers to Stevenson, nor that there was any direct correspondence betwixt them. The reverse seems clearly the case. The previous dealings were all with Muir, and paid for by Muir's bills. There was no notice to Stevenson that in those former transactions he had any person to settle with but Muir. I thought it singular, that if he was a mere agent without profit, Muir should undertake responsibility, instead of binding his principal; but it appeared, that on some of the transactions at least, he retained a discount of 5 per cent., allowed by the sellers as a remuneration for his trouble.

Now, did the letters of 28th September and 10th November 1830, and the invoice, indicate to him that he was to pay in any different way from the former course of dealing? They had not been previously correspondents of Stevenson. According to their own statement, a clerk to John Campbell senior and Company introduced Muir to them. They did not once ask for payment from Stevenson, or a bill. As to that, matters stood as if the goods had been already paid, or at least no claim made on Stevenson; and they never claimed from him till after Muir's death, 13th March 1832, and after they had taken a bill (11th February 1832) from Muir. Taking a bill from Muir, and giving currency to it, shews the pursuers' intention of still holding Muir as the party responsible. There was no notice to him of any intended change of dealing, which, if it existed, ought to have been intimated. In the meantime, Stevenson had paid Muir without notice. I do not embarrass myself with those nice questions, as to whether, by taking Muir's bill, they discharged Stevenson; or whether, by delay to claim from Stevenson, they elected to take Muir for their sole debtor. I think the previous course of dealing laid no responsibility on Stevenson, and there was nothing in the conduct of the parties to produce a change in this respect.

Lord Justice-Clerk.—Although I do not object to the reference to the law of England, I think there is sufficient in our own law, as laid down by Mr Bell, to authorise this decision. And farther, I think the judgment is warranted upon the principle laid down by Lord Tenterden in the case referred to,—Was the party prejudiced or not by what took place? Now there is no evidence that Muir stood in the situation of an acknowledged agent. It is probable

that Muir stated to the pursuers how he stood with Stevenson. It is clear, at all events, that they dealt with Muir, and never applied to Stevenson. The circumstance of the goods being sent by a different ship, owing to the obstacle in sending them by the vessel first intended, shews that there probably was not time to communicate with him; and it was absolutely necessary to let Stevenson know by invoice what was coming. They do not write to him, 'Remit to us;' but they send Muir a duplicate of the invoice, and an explanatory letter.

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But did the pursuers take the competent course to make good the responsibility of Stevenson? No. They allowed the year's credit to expire without communicating with Stevenson. They took a bill from Muir, which lay over till Muir died. They then turn round and attempt to go back to the original transaction. Are the pursuers entitled to go back to Stevenson? I am clear, upon the authorities, they cannot, because Stevenson had no reason to think that this was on a different footing from the former transactions. The taking the bill from Muir unqualifiedly, including the small balance due them by Muir, shews, that down to that time they did not consider any one else bound. Besides, Stevenson had in the mean time settled with Muir. I just put the case on the footing stated by Lord Tenterden, as here the party was clearly prejudiced by what took place, and cannot therefore be made liable.

The *Lords* unanimously *adhered*, and found expenses due to the defender since the date of the Lord Ordinary's interlocutor, but allowed no farther expenses.

Lord Ordinary, *Moncreiff*.
furd, A. M'Neill.
Agents. T. Clerk.

Act. *Dean of Fac. (Hope,) Maitland.* Alt. *Ruther-*
B. & A. M'Millan, W. S. and George Dunlop, W. S.

R.

No. CL

FIRST DIVISION.

26th February 1836.

RAMSAY'S TRUSTEES against Dr ADAM ANDERSON and OTHERS.

TRUST.—CLAUSE.—This was a very special case, where the Court held, that as it was very doubtful at what time the truster intended a liferent in favour of certain persons to commence, it was proper to give a rational and equitable construction to the clause. See Session papers.

Lord Ordinary, *Corehouse.* Act. *Keay, Whigham.* Alt. *Sol.-Gen. Cunninghame,*
Moncreiff. William Fraser and Eneas Macbean, W. S. Agents. D. Clerk.

C. R.

FIRST DIVISION.

No. CII.

26th February 1836.

WILLIAM SCOTT
against
 LIEUTENANT JOHN SELBIE.

PERICULUM.—MUTUAL CONTRACT.—*A sum having been consigned to await the result of an action, and the bank in which it was placed by the defender, by consent of the pursuer, in consequence of an arrangement between them, having failed,—found, that in consequence of the mutual agreement, the loss must fall on both equally.*

Narrative.

THE pursuer raised an action against the defender for payment of sums amounting to L.166, 12s., and upon the dependence of this action raised letters of inhibition and arrestment against the defender, using arrestments also against him in the hands of various parties.

By an extrajudicial arrangement proposed by the defender, it was agreed between the parties that the diligences should be withdrawn, upon the defender consigning the sum in dispute, and finding caution for interest and expenses. The bank in which the deposit was made, which was that of Messrs Kinnear, Smith and Company, appeared, from the correspondence produced, and the terms of the deposit receipt, to have been also matter of arrangement between the parties.

Messrs Kinnear, Smith and Company failed, and the pursuer having obtained decree in his favour, it came to be a question upon whom the loss of the consigned money was to fall.

The Lord Ordinary pronounced an interlocutor, in which he finds that the sum consigned ‘remained the property of the defender, ‘and at his risk; and therefore finds that he must bear any loss ‘which may be incurred by the bankruptcy of the consignees.’

Defender's
Pleas.

The defender *reclaimed*, and *pleaded*—The consignment was made in virtue of an arrangement with the pursuer, and the money was no longer at the command or disposal of the defender, therefore he is freed from risk from the date of consignment. The judgment of the Court, declaratory of a right, draws back to the commencement of the action; and therefore the pursuer must be held to have been from that time the proprietor of the money lost. Besides, consigna-

tion is in fact conditional payment. Therefore, on the whole, it is evident that the pursuer was the owner of the money, and must bear the loss, on the principle, *res perit suo domino*. 26 Feb. 1836.
Scott v. Selbie.

The pursuer *pleaded*—The risk of consigned money is always held to fall on the party who is found to be in culpa. It was at the request, and to accommodate the defender, that he had consented to change the security obtained by his diligence, to that obtained by consignment of the sum, and the defender must therefore bear the loss; *Mowat v. Lockhart*, *Mor.* 10,118. Pursuer's
Pleas.

A case may be supposed in which the risk might be rightly held to fall on the creditor, who forced his debtor to consign, by wrongly refusing to take payment. But here, the defender resisted a just demand. He ought to have paid the money, and not resisted the claim. The necessity of the consignment arose from his culpa; for he was not entitled to consign, but bound to pay; and if he had paid, the money would not have been lying in the bank, where it was lost.

The *Lord President*, and *Lords Balgray* and *Gillies* were of opinion, that as there had been an arrangement entered into, by which both parties consented to place the money in the bank, which failed, the loss must be mutual. Opinion of
Court.

Lord Mackenzie dissented, on the ground, that the agreement merely went to the substitution of one security for the other, and not to the discharge of the debt; that there was thus nothing to take the case out of the general rule, and that therefore the defender must bear the whole loss, as found by the Lord Ordinary.

The Court pronounced the following judgment: ‘The Lords having advised this reclaiming note, and heard counsel for the parties, alter the interlocutor of the Lord Ordinary reclaimed against, in so far as he has found that the sum arrested remained the property of the defender, and at his risk; and in respect of the special circumstances of the case, in which the said sum was consigned, by mutual arrangement and consent, in the hands of a bank, selected or approved of by both parties, find, that the loss which has arisen from the failure of the consignees must be borne by the parties equally; and with these findings, remit the cause again to the Lord Ordinary, to proceed further as shall be just.’ Judgment.

Lord Ordinary, *Cranstoun*. Act. *Keay, H. Pyper*. Alt. *Dean of Fac. (Hope)*
Buchanan. *Mucmillan & Grant, W.S. and Charles Bruce, W.S. Agents.*
S. Clerk.

C. R.

SECOND DIVISION.

No. CIII.

26th February 1836.

JAMES LUMSDAINE AND M'RITCHIE'S TRUSTEES
against
 SIR ALEXANDER HOPE.

TEINDS.—WARRANTICE. — SUPERIOR AND VASSAL.—(1.) *A superior having disposed certain lands with the teinds by feu-charter, wherein it was stipulated that the cumulo yearly payment by the vassal was for feu and teind duty, which was declared to be full tack-duty of the lands and teinds, of which the feuars were tenants at the time, and the superior having bound himself to relieve the vassal 'of the haill cess and public burdens payable furth of the said lands,' for which, 'and for all other burdens and exaction whatever,' warrantice is given, and there being no stipend then payable out of the lands conveyed,—found, in a question betwixt the superior and vassal, that the clause was not effectual to give the vassal a right of relief against future augmentations.*

(2.) *A superior having conveyed certain lands with the teinds by feu-charter, wherein he expressly bound himself, his heirs and successors, 'not only to relieve' the vassal of 'the minister's stipend and 'reparation of manes that may be required furth of the said lands 'and teinds thereof, in all time coming;' and there being no stipend due out of the lands at the time; but part of the stipends having been afterwards allocated upon the lands, on a subsequent augmentation taking place,—found, in a question betwixt the superior and vassal, that the clause was sufficient to give the vassal a right of relief against any such augmentations of stipend.*

TEINDS.—CUMULO FEU AND TEIND DUTY.—*Found, that the cumulo feu-duty payable to the superior, and which was both for stock and teind, is liable to be allocated upon for stipend, to the extent of one-tenth.*

Narrative.

THE Trustees of the late Mr John M'Ritchie are proprietors of the greater part of the lands of South Callange, in the parish of Ceres; Bonnybank, part of South Callange, being the property of Mr James Lumsdaine. Sir Alexander Hope is superior in both parcels. South Callange, of which Bonnybank forms a part, was originally feued from Sir Thomas Bruce Hope in 1716. The first vassal was Walter Thomson, in whose right, in so far as regards the principal

part of South Callange, M'Ritchie's Trustees now stand, as does 26 Feb. 1836.
 Mr Lumsdaine in regard to Bonnybank. The charter (of South
 Callange) bears to have been granted 'for the good service done
 ' to me by Walter Thomson younger, tenant in Souther Calling,
 ' and for certain onerous causes and considerations;' and Sir T. B.
 Hope thereby 'dispones, and in feu-farm and heritage lets, and by
 ' this present charter perpetually confirms to my lovite, Walter
 ' Thomson elder, tenant in Suther Callange, and failing of him by
 ' decease, to Walter Thomson younger, his son, and his heirs and
 ' assignees whatsoever, heritably and irredeemably, all and hail
 ' my town and lands of Souther Calling, with houses, biggings,
 ' with teinds parsonage of the said lands above disposed, with the
 ' pertinents, and free ish and entry.' The reddendo stipulates
 a yearly payment of L.91 : 7 : 4 Scots, 12 bolls bear, 1 dozen
 poultry, and carriages 'at the terms of payment used and wont,
 ' in name of feu and teind duty for the said lands above disposed,
 ' with the teinds and pertinents; and in respect they pay the full
 ' tack-duty, therefore the heirs of the said Walter Thomson
 ' younger shall be only obliged to pay L.40 Scots, in lieu of the
 ' composition for their entry to the said lands, to which the same is
 ' hereby restricted.' There then follows an obligation of thirlage,
 from which teind and seed are excepted, and then the follow-
 ing proviso: 'And further, the said Walter Thomson, elder and
 ' younger, are hereby bound and obliged to pay the hail cess and
 ' public burdens due and payable furth of the said lands, of which
 ' they shall have allowance out of the first end of their money feu-
 ' duty, upon reporting discharges thereof, and delivering up the
 ' same yearly to us timeously.' The reddendo closes with the
 words, 'and that for all other exaction whatsoever.'

The lands of North Callange were also originally feued from Sir
 Thomas Bruce Hope in 1716. The first vassal was Archibald
 Christie, in whose right Mr Lumsdaine now stands. The charter
 bears to have been granted 'for ane certain sum of money presently
 ' advanced;' and Sir Thomas Bruce Hope thereby dispones to
 ' Archibald Christie and his spouse, in conjunct fee and liferent, all
 ' and hail my town and lands of Norther Calling, with houses,
 ' parts, pertinents and pendicles of the samen lands, together with
 ' the teinds, parsonage and vicarage, of the said lands included, and
 ' to remain with the stock in all time coming.' The lands are de-
 clared to be held feu for payment of L.389 : 18 : 8 Scots, 2 chal-
 ders bear, 1 dozen poultry, 1 chalders oatmeal, and carriages; 'and
 ' it is hereby expressly provided, that I shall be bound to enter the
 ' first heir succeeding Archibald Christie gratis, without any com-
 ' position, and the other heirs succeeding are hereby bound and

Lumsdaine and
 M'Ritchie's
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 Hope.
 Narrative.

26 Feb. 1836. 'obliged to pay to me, my heirs and successors, L.100 Scots, in lieu of the composition for their entry to the said lands.' The reddendo is summed up thus: 'And that for all other burden and exaction whatsoever that may be demanded furth of the said lands and teinds.' The clause principally founded on by the parties in the present question is in these terms: 'And I bind and oblige me, and my heirs and successors, not only to relieve the said Archibald Christie and his said spouse, and their forebears, of the minister's stipend, and reparation of manse that may be required furth of the said lands and teinds, in all time coming, but also to warrant this, my charter, to be good and sufficient to the said Archibald Christie and his said spouse, and their forebears, at all hands, and against all deadly, as law will.'

Lumsdaine and
M' Ritchie's
Trustees v.
Hope.

Narrative.

At the date of these charters of South and North Callange no stipend was payable out of any part of the lands, either of North or South Callange, Sir Thomas Hope having, in a process of locality 1708, obtained decree exempting his lands. In 1795, the first allocation of stipend was made upon these lands, and they were allocated upon, by separate schemes, in 1815 and 1826. The stipend allocated upon the lands, under the localities of 1795 and 1815, was paid by the superior; but when a part of a third augmentation was laid upon these lands in 1827, the superior declined to make any farther payment, on the ground that he was not liable for the payment of stipend to a greater amount than one-tenth part of the cumulo feu and teind duty payable to him by the vassals for the lands and teinds, which even the portion of stipend now allocated on the lands exceeded.

Vassals' claim
of relief as to
South Cal-
lange.

The augmented stipend having been allocated upon the vassals, the scheme of locality was *objected to* by the vassals, in so far as regards SOUTH CALLANGE, on the ground that the fair import of the obligation was, that the vassal should be relieved of the minister's stipend; and accordingly, from 1716 to 1826, the superiors had relieved the vassals of the minister's stipend, and of all other burdens payable furth of the said lands; and, on the other hand, the vassals have paid the full feu-duty, which was equivalent to the tack-duty or annual value of the lands and teinds at the date of the said feu-charter; and they founded on *M'Donald v. Heriot's Hospital*, 12th Feb. 1828, (*Sh. Teind Cases*, p. 156,) as affirmed in the House of Lords, 4 W. S. 98, where it was held, that 'from the terms of the feu-contract, and in respect of the uniform practice of the Hospital having paid all along the stipend, that there is sufficient evidence of the understanding of the parties, and therefore that the Hospital is bound to relieve Major M'Donald of the stipend pay-

‘able from his lands.’ Further, the feu-duty is expressly declared payable both for the lands and teinds, and the vassal cannot be required both to pay teind-duty to the superior, and likewise the same teind-duty as stipend to the minister. 26 Feb. 1836.

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To which the superior *answered*—The charter of South Callange contains no warrandice against minister’s stipend; and it has been repeatedly decided, that warrandice against the payment of cess and public burdens does not confer a right to be relieved even of stipend payable at the time for the lands, and far less of augmentations of that burden. He founded on *Plenderleath v. Marquis of Tweeddale*, 31st Jan. 1800; *Alexander v. Dundas Blair*, 9th June 1812; *Earl of Hopetoun’s Trustees v. Copland*, 8th Dec. 1819. Indeed, a clause of relief from ‘cess and other public burdens’ must be held as restrictive, and shews that the parties did not intend that the vassal should have relief of minister’s stipend. Usage does not apply, as no stipend was payable for nearly a century; and when the payment first commenced, its amount was less than the proportion admitted by the superior to be properly chargeable upon the feu-duties; and when, by augmentations, it came to exceed the proportion, it was discontinued. He admitted, that as the feu-duty payable for the subjects contained in the charter is a cumulo duty for both lands and teinds, the proportion effeiring to the teinds is liable to be allocated for minister’s stipend, and that it will now fall to be allocated accordingly.

Superior’s
Pleas as to
South
Callange.

Mr Lumsdaine, as proprietor of NORTH CALLANGE, claimed relief from payment of stipend, on the ground, that by the express stipulations in his charter, the clause to relieve the vassal ‘of the minister’s stipend, &c. that may be required furth of the said lands and ‘teinds thereof in all time coming,’ had no meaning in the absence of all existing stipend, unless as applicable to future stipends, and usage shewed the intention of the parties. Vassals’ claim
of relief as to
North Cal-
lange.

The superior’s plea, that in order to free the vassal from augmentation of stipend, there must, in so many words, be express warrandice against such augmentation, and in support of which he founded on the cases *Plenderleath*, *Alexander*, and *Hopetoun’s Trustees*, (*supra* citat.) was answered and set at rest by the principle clearly laid down by the majority of the Consulted Judges in the analogous case of *Cunningham v. Cuthbertson*, 27th Jan. 1829, (*Sh. Teind Ca.* p. 175,) where their Lordships held, that in none of the cases relied on by the party who stood in the situation in which the superior, Sir A. Hope, here does, ‘did it appear that the warrandice was intended to relieve the disponee of augmentation of ‘stipend. But wherever this is clearly the intention of the parties,

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‘and a clause of warrandice, sufficiently ample for the purpose, is inserted in the conveyance, either by an express warrandice against augmentations, or by a clause admitting no other construction, the Court has given effect to it as the contract between the parties.’ In Cuninghame's case, too, an important specialty, which also occurs here, had stress laid upon it by the Court. ‘It may be noticed too, (say the majority of the Judges,) that these lands paid no stipend at the time. The clause, therefore, could only apply to augmentations, if it had any meaning at all, in so far as regarded ministers' stipends. It must have contemplated stipends to be imposed.

Superior's
Pleas as to
North Cal-
lange.

To this the superior *answered*—The rule was, that in order to found a claim against the superior, of relief from payment of augmentations of stipend allocated subsequently to the date of the vassal's right, it is necessary that the charter should contain warrandice in express terms to that effect, or equivalent expressions which may be explained by subsequent practice; and besides the cases quoted by him as applicable to South Callange, he founded on Colquhoun v. Smollet, 21st Jan. 1798, (*Mor. Syn.* 1808–14, p. 761); Petrie v. Lindsay Carnegie, 27th Jan. 1813, (2. *Connell*, 479, 1st edit.); and Hamilton v. Calder, 13th June 1823, *F. C.*; in which it was held, that the clauses of warrandice were not sufficient to prohibit the vassal from payment of the augmented stipends. There is no form of words in which warrandice must be expressed in order to be effectual, but it must be so expressed, or explained by usage, that no doubt can exist of the intention of the parties, and (in a question with a singular successor like Sir A. Hope) to make the claim of relief not merely a personal obligation on the representatives of the granter of the feu, but one of the relative rights and obligations of the contract of feu between superior and vassal.

A subordinate question was also raised by the parties, viz. Whether the cumulo feu-duty, which is here payable to the superior both for stock and teind, is liable to be allocated upon for stipend, to the extent of one-fifth or of one-tenth?

Vassals' Pleas
as to amount
of cumulo feu
and teind duty.

The vassals (M^r Ritchie's Trustees) *pleaded*—That as it appeared from the feu-charter that the cumulo feu-duty was the full tack-duty payable by the tenants of the lands at its date, and as there can be no doubt that the rate of all teinds, where they are valued jointly with the stock, is a fifth part of the constant yearly rent payable for the lands, stock, and teind, it is not easy to conceive why a different rule should be adopted in the present case. A different rule was laid down in the case of Graham of Kinross, 13th Feb. 1793, 1. *Connell*, 501. But there, says Sir John Connell,

Mr Graham, in his argument, which prevailed with the Court, stated 'no objection to the general rule that a fifth part of the 'cumulo feu and teind duty should be taken as teind; but a specialty was founded on, viz. that there had been a subvaluation 'of the teinds of the Presbytery of Dunfermline in 1630, which 'comprehended the teinds of the lands feued out, and that, according to that subvaluation, the teinds were only valued at a 'tenth part of the feu-duty.' The finding of the Court, that 'where 'a cumulo sum is paid to the petitioner (Mr Graham) in name of 'feu and teind duty, a tenth part thereof is to be taken as the 'amount of the teind-duty, shewed that the judgment went on the 'specialty.'

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Answered for Sir Alexander Hope—The general rule is as settled by the case of Graham of Kinross. On referring to the Session papers in that case, it appeared that Mr Graham, in reclaiming against the Lord Ordinary's interlocutor finding him liable in one-fifth of the cumulo duty, prayed the Court to 'find, that when 'there is a subvaluation of the teinds, the proportion of the cumulo 'duty taken for teind ought not to exceed the amount of the teind, 'according to such subvaluation.' The respondents in that case, however, disputed both the extent of the lands in the subvaluation, and also that the lands in question were included in it at all; and farther maintained, that any such subvaluation had been departed from by a contrary use of payment; and the Court, without ordering any inquiry whatever to be made into the disputed facts upon which the specialty thus rested, appears to have disregarded the alleged subvaluation, and to have proceeded upon the general ground. Besides, it appeared from the Session papers, that one-tenth of the cumulo duty was less than the amount of the alleged subvaluation as stated by Mr Graham, and therefore the amount for which the Court found him liable was even less than what he himself stated in the prayer of his petition, shewing still more strongly that the Court left out of view the specialty, and decided upon the general ground.

Superior's
Plea.

The Lord Ordinary having ordered and advised minutes of debate, and heard parties, pronounced this interlocutor and note:

'The Lord Ordinary having considered the revised minutes for 'James Lumsdaine, Esq. and M'Ritchie's Trustees, the vassals and 'objectors, and for the Honourable Sir Alexander Hope, superior 'and respondent, and heard parties thereon, Finds, primo, That the 'superior is not bound to relieve the vassals in the lauds of South 'Callange of stipend paid from these lands, except quoad the teind- 'duty stipulated in the character of feu, and that the proportion of

Lord Ordinary's Interlocutor.

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' the cumulo feu and teind duty thereby is one-tenth of said cumulo ;
' and quoad ultra repels the objections for M'Ritchie's Trustees,
' but finds no expenses due to either party : Finds, secundo, That
' the superior is bound to relieve the vassals in the lands of North
' Callange of the stipend allocated upon these lands, and sustains the
' objections for Mr Lumsdaine accordingly : Finds the superior (re-
' spondent) liable to Mr Lumsdaine in the expenses of the discus-
' sion quoad North Callange.'

Note.

Note.—' The result of all the authorities is, that there are no
' precise words in which an obligation to relieve a vassal of stipend
' must be laid on the superior, but that the constitution of such an
' obligation depends entirely on the intention of the parties, the ex-
' istence of which intention is to be inferred or rejected according
' to the whole of their expressions, as applied to the circumstances
' of the case. The apparent inconsistencies of the decisions are not
' inconsistencies in the adopting of the rule, but in its application
' to special circumstances.

' Now, the feu-charter of South Callange, though it conveys both
' teinds and lands, makes no mention of stipend whatever, but merely
' gives the vassal allowance out of the tack-duty of ' the haill cess
' and public burdens due and payable furth of the said lands,' for
' which, ' and for all other burdens and exaction whatever,' warran-
' dice is given. These words certainly do not necessarily import
' an exemption from stipend ; and as there was no stipend exigible
' from the lands at the time, it is probable that it was not one of
' the burdens in view. There are several cases where much stronger
' words and circumstances have been found insufficient to lay the
' obligation of relief on the superior. On the question, whether
' the proportion due at common law of the cumulo feu and teind
' duty is to be a fifth or a tenth, the case of Graham of Kinross is
' the safest precedent.

' But, in the case of North Callange, the superior binds himself
' expressly, ' not only to relieve the said Archibald Christie, and his
' foresaids, of the ministers' stipend, and reparation of manses, that
' may be required furth of the said lands and teinds thereof in all
' time coming,' but to warrant this very charter ; and as there was
' no stipend due out of the lands at this time, these words could
' have no meaning if they did not apply to future stipends.

' No stipend was allocated upon either of these two lands till
' 1795 ; and, on this occasion, as also in the next locality in 1815,
' the superior relieved the vassals. This fact is of some consequence
' where there are words to which it can, with any probability, be
' ascribed ; and therefore it aids the construction put by the Lord
' Ordinary on the charter of North Callange. But it cannot

‘create a permanent obligation in South Callange, where there is
 ‘such a total absence of words to infer a right of relief, that what
 ‘took place on these two occasions may be ascribed to inadvertence.
 ‘But these payments warranted the vassal of South Callange in try-
 ‘ing the question, and therefore no expenses are given against him.’

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 M‘Ritchie’s
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 Hope.

All parties having *reclaimed*, the Court, in the first place, heard counsel in regard to the finding as to South Callange, and the point raised upon the import of the decision in the case of Graham of Kinross; and held, that it was quite impossible to go back upon the previous decisions, all so fully discussed in the case of Cuning-
 ham referred to, and held the subordinate point settled by the case of Graham.

Opinion of
 Court.

The Lords unanimously *adhered* to the finding as to South Cal-
 lange, and found the reclaimers liable in expenses since the date of
 the Lord Ordinary’s interlocutor, which they modified to L.5, 5s.

Judgment.

In support of Sir Alexander Hope’s reclaiming note as to North Callange, the *Dean* referred to the case of Cuningham, as attended with the distinction that teinds were not there conveyed.

Lord Glenlee.—It is impossible to read this charter without seeing that it was really and truly the intention of the parties that the vassal should be free from all that might hereafter be laid upon the lands in the shape of payments for minister’s stipend.

Opinion of
 Court.

Lord Meadowbank.—And I have no doubt that that intention was carried into effect.

Lord Medwyn.—The clause can refer to nothing but any subsequent augmentation of stipend that might afterwards be made to affect the lands, as none affected them at the date of the feu-right.

Lord Justice-Clerk.—I arrive at the same conclusion, and hold that the effect of this clause is to relieve these lands from the burden of stipend to be laid upon it in time coming, since the date of the charter. It is not necessary to refer to the case of Cuningham; but that case settled, that if we can deduce from the deed what the intention of the parties was, we must give effect to it.

The Lords unanimously *adhered*.

Judgment.

Lord Ordinary, Cockburn.	For M‘Ritchie’s Trustees, <i>More</i> .	For Lumsdaine,
Rutherford, Ivory.	For Sir A. Hope, <i>Dean of Fac.</i> (Hope,) and Hon. C. Hope.	
James Hope, W. S. Agents.	M‘Ritchie, Bayley & Henderson, W. S. Thomson Paul, W. S. and Teind Clerk.	

R.

SECOND DIVISION.

No. CIV.

27th February 1836.

THOMAS MANSFIELD, (FARQUHARSON'S TRUSTEE,)
against

LIEUTENANT-COLONEL JOHN CAMPBELL.

CONTRACT.—DAMAGES.—RELIEF.—*Circumstances where a purchaser of a landed estate, who became bound to pay the price at stated periods, and failed in performance, and where the seller, in reliance upon the purchaser's stipulation, intimated to an heritable creditor on the estate sold, that his bond would be paid at a particular term;—and the bond not having been so paid up,—found, in an action of relief against the purchaser by the seller, for damages found due to the creditor, who had not got payment of his bond, that the purchaser was liable in relief as for breach of contract.*

Narrative.

ON 1st May 1829, Colonel John Campbell of Kilmartin addressed to Mr Mansfield, as trustee for Mr Farquharson of Finzean, a missive of offer of purchase of the estate of Blackhall and Invery, in these terms: 'On behalf of myself, and as authorised by the trustees of Kilmartin, I hereby offer to purchase from you, as trustee for Archibald Farquharson, Esq. of Finzean, the estates of Blackhall and Invery, at the price of L.42,000, payable, L.15,000 at Whitsunday first, which is to be my entry to the estates, &c. to bear interest from said time till paid; L.15,000 at Martinmas next, to bear interest from Whitsunday first; and the remaining L.12,000 at Martinmas 1830, to bear interest from Martinmas 1829. Your answer agreeing to this shall conclude the bargain, but subject to the approval of the Court of Session.' Mansfield answered, 8th May 1829, 'I have received your offer to purchase the estates of Blackhall and Invery, at the price of L.42,000, and, as trustee of Finzean, I hereby declare my acceptance of the same.' A minute of sale was signed by Colonel Campbell and Mr Mansfield, on 24th November 1829, whereby Mansfield became bound, upon receiving payment of the price, or security, 'to grant a valid disposition to Colonel Campbell and the trustees of Kilmartin, their heirs or assigns whomsoever, or any destination of heirs the said purchaser may prefer;' and Colonel Campbell became bound to pay the price at different periods, as stated in the offer of 1st May 1829. On 3d August 1829,

Mansfield intimated to Alexander Low, an heritable creditor on 27 Feb. 1836: Blackhall, that his bond for L.15,000 would be paid up on the 20th December 1829, being the Aberdeen money term. Mansfield also wrote to Colonel Campbell, on 23d September 1829, that, by 'the missive of sale, L.30,000 of the price is payable at Martinmas next, with interest from Whitsunday last. As this is a large sum, I am anxious to be in a situation to pay away the money as soon as it comes into my hands, and you will therefore oblige me by saying if I may reckon upon receiving the above sum at or about the term, or when I may expect it.' It did not appear that Colonel Campbell answered this intimation. Low's agent in the country, in writing Mansfield, on 9th October 1829, said, 'Mr Low will positively expect the money at the above-mentioned term, 20th December 1829.' Mansfield wrote Low's country agent, on 14th December 1829, 'I have written to Mr Crombie on the subject of the money required for Mr Low, and I do not anticipate any difficulty in arranging for payment of it.' Again, he wrote, on 17th December 1829, 'I have no doubt, from Mr Crombie's regularity in business, that the money will be ready on the 21st. I made the intimation to pay, at his request, on the understanding, that if the purchasers were not ready with so much of the price, we were to provide Mr Low's money otherwise; and I am quite ready to go into any arrangement with Mr Crombie for this purpose.' In the proceedings which subsequently ensued, Colonel Campbell denied that Crombie acted for him in this matter, he being the agent of Sir Alexander Ramsay, another large heritable creditor on Blackhall. Colonel Campbell having been unable to arrange matters with the Kilmartin trustees, for investing the price of lands to be sold by them in the purchase of Blackhall, failed to pay Mansfield the instalments of the price due at Martinmas 1829, so that Mansfield was not enabled to implement his intimation to Low. On 24th December 1829, Mansfield wrote to Mr Thomas Baillie, Colonel Campbell's agent in Edinburgh, that as Colonel Campbell and the trustees of Kilmartin had failed to pay the part of the price due at Martinmas, and as, relying on the faith of that sum being paid, intimation was made to Low that his debt would be paid at this time, and as Mr Low had made intimation to him that he held him liable in damages, 'I must now notify to you, that I hold Colonel Campbell and the trustees of Kilmartin bound to relieve me of all expenses or damage which I or the trust-estate of Finzean may sustain by the non-payment.' Mr Baillie answered, 'I hereby hold that intimation made to me to be the same as if made to Colonel Campbell, so far as you are concerned; but I must reserve every claim and right of relief at the instance of the

Mansfield, &c.
v. Campbell.

Narrative.

27 Feb. 1836. 'Colonel against the Kilmartin trustees.' Upon 17th June 1830, Mansfield again intimated to Low that his bond for L.15,000 would be paid on 20th December 1830; but it was not paid at that time, and not until June 1831, through the non-payment of the price of Blackhall by Colonel Campbell.

Mansfield, &c.
v. Campbell.

Narrative.

Low brought an action, in October 1832, against Mansfield, as Finzean's trustee, for L.319:15:8, as the alleged amount of damages and expenses incurred by him in consequence of the non-implementation of Mansfield's engagement to pay up his bond; in which action the Lord Ordinary, (Moncreiff,) 20th November 1835, sustained the claim of damages, reserving any question as to the amount of any of the particulars of the claim; and his Lordship stated his views of the claim in a note *.

In 1833, Mansfield brought an action of relief against Colonel Campbell, on the ground that his (Mansfield's) proceedings with regard to Low's debt had been authorised by the minute of sale, and

* 'Note.—The Lord Ordinary can see no room for doubt that the pursuer has a good claim to reparation of the actual loss which he fairly and necessarily sustains.

'But comparing the cases of *Duff v. Chapman*, Feb. 19. 1755; *Hynd v. Loudon*, 30th May 1826; *Ramsay v. Goldie*, 22d June 1826; and *M'Adam v. Campbell*, July 25. 1787; he does not think that the penalty of the bond can be rendered available to the pursuer for any thing beyond the fair expense incurred in measures *bona fide* adopted for enforcing payment of the principal or interest. He can find no authority for extending it to a claim of damages emerging from extraneous circumstances, and made up of loss, so peculiarly arising as in the present case.

'Neither does he see any other ground in law on which the pursuer is entitled to a preference for this claim of damages, to the exclusion or injury of Sir Alexander Ramsay and Mrs Russell, the second heritable creditors. It was stated, that Mr Mansfield gave the notice to Mr Low, by or with the advice of Mr Crombie, who was the agent of Sir Alexander Ramsay, &c. The Lord Ordinary presumes that this is the fact, though he has been unable to find proper evidence of it in the process, or any thing more than indications that it had taken place. But supposing it to be so, the Lord Ordinary cannot see that that would afford any good ground for impairing the legal rights of heritable creditors. If the advice was given, it was evidently a *bona fide* advice for the general interest, and still it lay with Mr Mansfield to act upon his own judgment and his own responsibility; and the Lord Ordinary is of opinion, that no blame is imputable to him for what he did. If there were no relief, it would be simply a casual misfortune to the trust, like the loss of a cause or any thing else.

'It was necessary to decide these points, in case the Court should form a different opinion from the Lord Ordinary on the case of Mansfield against Campbell. But if the interlocutor in that case be adhered to, they will be of little or no importance.

'The Lord Ordinary certainly thinks, that the pursuer's claim cannot be sustained to its full extent; and at present he is not at all satisfied of the necessity or use of a great deal of the expense included in the account. But he will hear parties before or after a report on this subject.'

that any damages and expenses which had arisen had been caused by the Colonel's failure to pay the price according to stipulation, and concluding for the amount of Low's claim in so far as it should be sustained.

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Colonel Campbell, in defence, stated, that in making the purchase, it was understood that the trustees of Kilmartin were to buy the greater portion of the estate of Blackhall, to be entailed on the Kilmartin heirs of entail, and that he should hold the remainder in fee-simple, or sell the same, Farquharson's trustee being bound, by the missive of sale, to convey the property, by such dispositions as might be necessary, to the Colonel or his assignees; that Mansfield made the intimations to Low at his own risk, and without the consent or authority of Colonel Campbell; and that, in his defences against Low's action, Mansfield admitted that these intimations were given by him, 'by the special advice, and on the suggestion of Mr Crombie, trustee for Sir Alexander Ramsay, who held an heritable security over Blackhall;' that in consequence of the Kilmartin trustees not being prepared in time to complete the purchase of their portion of the estate, the Colonel was unable to pay the price at the time stipulated; but after some delay, these trustees purchased from Mansfield a part of the estate for L.23,000, and the Colonel, with consent of Mansfield, sold the remainder to General Burnett, for L.21,250. In June 1831, Mansfield received the full price, with upwards of L.4000 of interest; and thus, if there had been a failure to pay, ample reparation had been made, by payment of the highest rate of interest; and that it was Mansfield's duty, before giving the intimations, to be satisfied that he would be in possession of funds sufficient to clear off the bonds.

The record was closed upon the summons and defences; but a variety of correspondence betwixt the parties, and the proceedings in a submission of these matters, which, for a time, depended before the late Mr Skene, were produced and founded on.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and having made avisandum, and considered the merits thereof, in connection with the relative action of Low against Mansfield, Finds, that the defender having concluded a bargain for the purchase of the estate of Blackhall, the same having been exposed to sale by the pursuer, as trustee for creditors, and having become bound to make payment of the price by the instalments, and at the terms specified, it was incum-

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bent on him to make all necessary arrangements for completing the transaction, and making payment of the price, according to the stipulated terms: Finds, that the pursuer was entitled to rely on the defender's obligation to this effect, and to act upon such reliance according to what appeared to him to be for the benefit of the trust-estate under his management: Finds it established that the pursuer did, in consequence, give notice to Alexander Low, Esq. who held the first security for L.15,000 over the estate, that the debt would be paid upon the 20th December 1829, and that that notice was accepted and acted upon by the said Alexander Low: Finds, that the pursuer, in further reliance on the defender's obligation, did afterwards give notice to the said Alexander Low that the debt would be paid upon the 20th December 1830: Finds, that the defender failed to make payment of the instalments of the price, either at the terms stipulated between him and the pursuer, or at any terms prior to the said 20th of December 1829, or 20th December 1830: Finds, that by and through such failure on the part of the defender, the pursuer, as trustee, and the trust-estate under his management, have suffered loss and damage, in so far as they have been found liable to the said Alexander Low for loss and damage occasioned to him by and through the inability of the pursuer to pay the debt to him, at the times successively appointed, and according to the notices given: Therefore, repels the defences, and finds the defender liable in damages; but in respect that the amount of the damage sustained by the pursuer has not yet been ascertained in the other process, before further answer appoints the cause to be enrolled.'

Note.

Note.—' The Lord Ordinary cannot think that this case is to be solved by saying, that where a bond is payable at a fixed day, and is not paid, the debtor is not generally made liable for the consequential damage or inconvenience which the creditor may suffer. It is a special case. The estate was under trust. It was sold specially for the payment of debts. Low's debt was a primary heritable security, and was bearing 5 per cent. interest. It could not be paid up without a long notice of six months, except by the creditor's consent. On the other hand, the defender was bound in the purchase to pay L.15,000 at Whitsunday 1829, and L.15,000 at Martinmas 1829; and he had, of course, a right to have insisted that the money should be then accepted. But the lands could not be disencumbered, and the title given, without the heritable debts being paid up; and, if payment of the second instalment had been made even at Martinmas 1829, without any previous notice having been given to the heritable creditor, the money would have been left in the trustee's hands for a long period, at

‘ bank interest, to the very serious loss of the trust-estate. It is 27 Feb. 1836.
 ‘ quite clear, therefore, he was entitled, and warranted to give
 ‘ the notice to Mr Low, for the earliest time which he would ac- *Mansfield, &c.*
 ‘ cept after Martinmas 1829, and it is impossible to imagine that *v. Campbell.*
 ‘ the trustee would have given the notice if he had not had the
 ‘ firmest reliance that the money would be paid by the defender in
 ‘ due time. *Note.*

‘ The Lord Ordinary therefore thinks, that a party who has so
 ‘ made a voluntary purchase of a bankrupt estate, is by no means
 ‘ entitled to break through the engagement for the payment of the
 ‘ price, and convert the purchase-money into a permanent loan in
 ‘ his own hands, pleading that all he is bound for is the legal inte-
 ‘ rest. Where actual damage is proved, so directly as it is in this
 ‘ case, to have arisen from the failure, the Lord Ordinary conceives
 ‘ that that damage must fall on the proper party by whom it has
 ‘ been occasioned.

‘ The record made up upon the summons and defences has been
 ‘ too loosely closed. Even the undoubted fact, that the sale was
 ‘ concluded on the 1st May 1829, does not appear from it, though
 ‘ it is stated in the other processes. But the first term of payment
 ‘ being Whitsunday 1829, shews plainly that the sale was conclu-
 ‘ ded before that time, though the minute of sale was not completed
 ‘ till a later period.

‘ The defender attempted to plead, that because the price, with
 ‘ interest, had been accepted of, this claim was barred. But the
 ‘ pursuer gave full notice of this claim, as soon as the protest or
 ‘ intimation by Low was received.

‘ It was also said in the debate, that the pursuer was not in a si-
 ‘ tuation to grant a disposition. There is no such statement in the
 ‘ defences. But, at any rate, the defender never put himself in a
 ‘ situation to maintain that plea.’

The defender having *reclaimed*, The *Solicitor-General* *pleaded*—
 That all the damage had arisen in consequence of Mansfield's hasty
 notice to Low; and founded on Ersk. iii. 3. 86, to shew that no da-
 mage which is remote or indirect should enter into the question,
 and that a creditor, in such circumstances, can demand on more, no-
 mine damni, through a debtor's failure to make punctual payment,
 than the reimbursement of the costs of suit, or the expense of dili-
 gence truly disbursed in recovering his debt.

Rutherford, in answer, did not dispute the law laid down in
 Erskine as between debtor and creditor, but denied its application
 to the present case.

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The cause was delayed for a farther production of documents which had been before the Lord Ordinary. At the final advising,

Lord Justice-Clerk.—I have now no hesitation in adhering. The terms of payment were fixed by a regular missive—payment was not made as stipulated—and Mansfield having been unable to perform his undertaking to Low, as intimated, gave notice to Colonel Campbell that he held him responsible for any damage.

Lord Glenlee.—I agree. In the course of the transaction Colonel Campbell never stated that there would be any objection to the payment of the price.

Lord Meadowbank.—I had, at first, some little difficulty, believing that there might be an understanding that the price was not to be paid till a part of the lands had been sold; but the correspondence shews that there was no such understanding.

Lord Medwyn.—I think that we must lay out of view whether there was a profit realised upon the resale of the lands by Colonel Campbell. We must also lay out of view the objection to completing the title to the property purchased. That is now obviated, and damages were given by payment of the difference of interest. In truth, payment of the price was not delayed till a clear progress of titles should be given. That never was the ground on which payment was not made. The missive shews that the price was to be payable at stated periods: a good progress was to be exhibited, and the encumbrances to be paid. The price was of course to be applied to do this. Moreover, the purchaser was actually in possession.

Now, what is the nature of this claim by law, for which relief is sought by Mansfield? It is not the ordinary case of debtor and creditor, in a loan of money or merchant's account, where the debtor has failed to pay. I have no occasion to question the law laid down by Erskine, as in a case betwixt debtor and creditor. The observations are undoubtedly sound; and if this were a case of that kind, I could not concur in the views of the Lord Ordinary. But this is a case not of debtor and creditor simply, but of buyer and seller. It is a case of breach of contract; non-implement of a special agreement.

The only doubt that occurred to me, was whether there was a proper justification to Mansfield to give notice to Low of his intention to pay up his bond, more especially after the first failure to do so. It was certainly his interest, and therefore his duty to do so, if only bank interest could be got for the price, while the estate was paying high interest to Low. But I am now satisfied that there was. If Colonel Campbell, when he found that the Kilmartin trustees would not come forward with the price, had communicated

to Mansfield, he, no doubt, as he had given previous notice to Low, would have arranged differently. But although Colonel Campbell was informed by Mansfield, on 23d September 1829, that part of the price would be expected at Martinmas, he makes no answer to that intimation.

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This is clearly a case of breach of contract, and the loss or damage immediately arising from it must be borne by the party who is to blame.

Lord Justice-Clerk.—The opinions we have expressed confirm your Lordship's doctrine.

The Court unanimously *adhered*, and found additional expenses. Judgment.

Lord Ordinary, *Moncreiff*.
hame,) *Jo. Wilson*.
R. Clerk.

Act. *Rutherford*, C. *Innes*. Act. Sol.-Gen. (*Cuning-*
Thomas Innes, W. S. and T. *Baillie*, S. S. C. Agents.

R.

SECOND DIVISION.

No. CV.

1st March 1836.

COLONEL RODERICK MACNEIL, PETITIONER,
against
WILLIAM DOUGLAS, W. S.

PROCESS.—SUMMARY APPLICATION.—COLLEGE OF JUSTICE.—

A writer to the signet having refused to redeliver certain documents placed in his hands, in reference to a proposed loan by his client, until he got payment or security for his account of expenses connected with the transaction,—summary petition to the Court of Session, to compel restitution of the documents, found to be incompetent.

WRITER'S HYPOTHEC.—*Question as to an agent's right of hypothec, or retention of titles or documents, placed by a borrower's agent in his hands, in reference to a proposed loan.*

In July 1835, the petitioner's agents advertised for a loan of L.6000, for which heritable security was to be granted. The respondent, Mr Douglas, in consequence, applied to them for a note of particulars. Upon the general information obtained, the respondent intimated to the petitioner's agents, that his client was willing to give the loan, provided 'full and satisfactory information should be af-

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‘forded, and the title be found in every respect sufficient.’ The respondent was thereafter furnished with, 1st, Copy bond by Colonel Macneil, and certain gentlemen, as his cautioners, to the Bank of Scotland, for L.6000; 2^d, Extract bond and disposition in security by Colonel Macneil and his cautioners; and, 3^d, Sasine thereon. The respondent having expressed difficulties as to the validity of the security, under the form of the transaction proposed by the petitioner’s agents, it was agreed that the opinion of the Dean of Faculty should be taken upon a joint case, in name of the petitioner and of A B, the proposed lender, ‘on the understanding and agreement that the whole expense of consultation should be exclusively defrayed by the petitioner.’ The case was prepared by the petitioner’s agents, but revised by the respondent, and was revised a second time, in consequence of alterations, by the agent for the cautioners. The respondent attended various meetings with the other agents at the consultation. The mode of completing the transaction recommended in the opinion of the Dean not being satisfactory to the cautioners in the bond for the Bank of Scotland, the petitioner and his cautioners took a second opinion, which was sent to the respondent, along with the new case, and the titles or documents formerly sent to him. The respondent, after considering the matter, expressed himself dissatisfied with the proposed security, and refused to go through with the loan, except on certain conditions; and having refused to redeliver the documents connected with the transaction in his hands, until he got payment, 1st, Of the loss of interest alleged to have been sustained pending the negotiation by his client; 2^d, Of his own account of expenses, the petitioner applied by ‘petition’ to the Court of Session, praying their Lordships to decern and ordain the said William Douglas instantly to deliver up to the petitioner the certified copy of the bond, the extract registered bond, the infestment following thereon, the second memorial, with opinions relative to the loan proposed to be made to the petitioner, together with all other papers, deeds or documents in the possession or custody of the said William Douglas, the property of the petitioner, or put into the hands of Mr Douglas by the petitioner or his agents, relative to the proposed loan, or to the heritable property of the petitioner.’

The respondent, without having any wish to stand upon preliminary objections, *pleaded*—1. The summary application was incompetent, not being connected with any depending process, and not being of the nature of a petition and complaint for any wrongful act done by the respondent as a practitioner in Court. Such summary applications were competent in the inferior courts, but were not conform to

practice in the Supreme Court. 2. That he was entitled to retain the documents until paid, or secured in payment of his account of expenses; *More's Notes on Stair*, p. 132, and cases there cited. 1 Mar. 1836.

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At the moving of the petition and answers, (27th Feb.) the Court took up the objection to the competency.

McNeill, for the petitioner.—The respondent might have declined the jurisdiction of the Sheriff: there was no proper ground of complaint against him here, as for a wrongful act, and therefore the only course open was by petition for restitution of the property.

Robertson.—He might have brought an action of exhibition.

The Court having allowed the case to stand over till this day, Judgment. refused the petition as incompetent, and found expenses due.

Act. *McNeill*, Patton. Alt. *P. Robertson* and *G. Bell*. James *Robertson*, S.S.C.
and *W. & J. B. Douglas*, W. S. Agents. F. Clerk.

R.

SECOND DIVISION.

No. CVL

2d March 1836.

JAMES DONALDSON AND JAMES PINKERTON SEN.
against
THE MANCHESTER FIRE AND LIFE ASSURANCE
COMPANY.

INSURANCE.—*B.* effected an insurance with a Scotch company on 'grain &c. his own, or in trust, in all or any of the granaries, warehouses, lofts or cellars in Glasgow, Port Dundas, and in the vicinity of these places.' *A.* effected an insurance with an English company, 'on goods, his own, in trust, or on commission, in a certain storehouse in Glasgow, belonging to him, specially described.' It was a condition *inter alia* of *A.*'s policy, 'that if any assurance be effected with this company on buildings or goods at the same time that they are assured with some other company, or if they should be subsequently assured with some other company, the policy granted by this company will be void, unless the circumstance is noticed in the policy, or by indorsement thereon.' A fire broke out in *A.*'s storehouse, when a quantity of wheat belonging to *B.*, and deposited there by him, was destroyed. Certain other policies effected by *A.* were indorsed on his policy, but *B.*'s policy was not so indorsed, or

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noticed in A's policy. In a joint action by A and B against A's insurers, for their proportion of the loss on the wheat,—held, that the pursuers were entitled to recover.

JAMES DONALDSON and James Pinkerton senior, merchants, Glasgow, brought an action against James Brierly, chairman, and others, of the Manchester Fire and Life Assurance Company, to recover the sum of L.408 : 1 : 11, as the proportion for which the company was liable of the sum of L.1746, 13s., being the alleged value of parcels of wheat belonging to Pinkerton, and deposited by him in the premises of James Donaldson, whereon Donaldson had effected a policy of insurance against fire with the Manchester Assurance Company. The summons set forth, that the premises of Donaldson were consumed by fire, and the wheat deposited therein destroyed, or greatly injured; and concluded for L.408 : 1 : 11, as the proportion of the loss due by the defenders under the policy.

The defenders pleaded, that the pursuers were not entitled to recover under the policy; and further, that Donaldson had discharged them of their liability under the same.

The following issues for trying these questions were adjusted by the Second Division of the Court: 'It being admitted that the defenders granted to the pursuer, Donaldson, the policy of insurance upon certain warehouses and goods therein contained, and that the said policy was current on the 20th of November 1829:

'It being also admitted, that, on the said 20th November 1829, the said warehouses, the property of the said pursuer, and the goods therein, were partially destroyed by fire:

'Whether the pursuer, Pinkerton, on the said 20th November 1829, had in the said warehouses certain wheat, amounting in value to not more than the sum of L.1746, 13s., destroyed by the said fire? And, whether the defenders, under the said policy, are indebted and resting owing to the pursuers, or either of them, in the sum of L.408 : 1 : 11, or any part thereof, as their proportion of the loss upon the said wheat, and interest thereon from and since the said 20th November 1829? Or,

'Whether, on or about the 16th day of January 1830, the pursuer, Donaldson, discharged the defenders of their liability under the said policy?

The case came on for trial on the 15th March 1833, when, of consent of parties, a verdict was entered for the pursuers for the sum of L.404 : 0 : 11, being the amount of the sum sued for, under deduction of L.4, 1s., the agreed proportion of the proceeds of part of the said wheat not entirely destroyed, corresponding to the sum

insured thereon by the said policy ; subject to a special case to be adjusted by the parties for the opinion of the Court, upon the facts admitted and given in evidence on the trial, which were in substance as follow :

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On the 16th January 1828, Messrs Tassie, the agents of the defenders at Glasgow, addressed the following letter to the pursuer, Donaldson : ‘ *Glasgow, 16th January 1828.* JAMES DONALDSON, Esq. On the other side we hand you a copy of a postscript to a letter received from the Manchester Assurance Company, dated 24th November 1825, in answer to inquiries made by you relative to liability of the office with regard to your policy of insurance with them.’ (*Annexed to the above letter.*) ‘ In reply to Mr Donaldson’s inquiry, I beg to say, that an insurance on stock, his own, in trust, or on commission, will cover any thing under his care, whether he has made advances on them, has been instructed to insure, or otherwise.’ On the 25th December 1828, the pursuer, Donaldson, effected a policy of insurance with the defenders, which describes the subject of the insurance in these terms : ‘ On goods hazardous or not hazardous, his own, in trust, or on commission, in his old store, consisting of five stories and garrets, with back jam behind of one story, which adjoins a building occupied as a wright’s shop and bakehouse, situate in a lane between Buchanan, and Mitchell Streets, Glasgow, L.5000. On goods hazardous or not hazardous, his own, in trust, or on commission, in his new store, adjoining to the west end of the above, and communicating with a back building of two stories, situate behind, and common to both stores, L.5000.’

The policy acknowledges payment of the first premium of L.12, 10s., and witnesseth, that, on payment of the said sum annually, ‘ the funds and property of the company, applicable by the deed of settlement of the company to the payment of moneys assured by fire policies, shall, according to the provision of such deed, and subject to the conditions and regulations hereupon indorsed, be subject and liable to pay, reinstate, or make good to the said assured,’ &c. any loss that may occur not exceeding the amount of the sums assured.

Among the conditions and regulations above referred to, as indorsed on the policy, are the following :

‘ Persons assuring property with this office must give notice of any alteration, either in the building, or of the trade or goods in the premises assured, or of any removal, and cause such alteration or removal to be indorsed on their policies ; and, if the risk be increased thereby, must pay such further premium as may be required on account of such increased risk, otherwise they will not be entitled to recover in case of loss ; and if any assurance be ef-

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‘fected with this company on buildings or goods at the same time
‘that they are assured with some other company, or if they should
‘be subsequently assured with some other company, the policy
‘granted by this company will be void, unless the circumstance is
‘noticed in the policy, or by indorsement thereon. This being
‘done, the company will pay such proportionate part only of any
‘loss subsequently arising, as the sum assured by this company on
‘the buildings or goods bears to the whole amount of the sums as-
‘sured on such buildings or goods.’ Upon the back of the said
policy the following memorandum was indorsed: ‘Besides the sum
‘insured by the within policy, there is insured on goods,

	Old Store.	New Store.	Total.
‘ In the Atlas, -	L.2900		L.2,900
‘ ——— Alliance, -	5000	L.500	7,500
‘ ——— Palladium, -	2500	2500	5,000
‘ ——— Scottish Union, -	6000	4000	10,000
			L.25,000

‘ Entered in the office books, 20th January 1829.

(Signed) ‘ JAMES AND THOS. TASSIE, *Agents.*’

On the 20th of November 1829, a fire broke out in the premises belonging to the pursuer, Donaldson, whereby the same, with the wheat deposited therein, belonging to the pursuer, Pinkerton, were destroyed. This event being communicated to the different insurance offices interested in the loss, they appointed agents to meet at Glasgow to examine into the evidence of the claims, and to adjust and settle the loss. The defenders appointed Joseph Green to meet with the other agents at Glasgow for that purpose. The Scottish Union sent Mr Smith, their secretary; and Mr Toplis from London attended on the part of the Alliance, Palladium, and West of England offices.

Different meetings of the authorised agents were held in the pursuer, Donaldson’s, counting-room. Donaldson, on 14th December 1829, prepared and presented to them a detailed state of the loss occasioned by the fire; specifying the various goods then in his premises, their owners and their values. That state included a claim on behalf of the pursuer, Pinkerton, for the value of his wheat, and also a claim for Messrs Brock of Glasgow. The committee of agents rejected the claims both of Mr Pinkerton and of Brock.

Mr Green, on January 5. 1830, wrote a letter to the defenders, from which the following is an extract: ‘ We also refused to admit Brock’s and Pinkerton’s claims at all, they both having floated policies in their own names covering their stores, and the

‘ offices interested with Donaldson having no notice of any excep- 2 Mar. 1830.
 ‘ tion, nor, indeed, the offices who granted the floating policies.
 ‘ Brock has already got his pro rata payment from the Imperial.’

On January 9. 1830, an amended state of the loss and claims was prepared and transmitted to the committee of agents by the pursuer, Donaldson, which state did not include any claim for Pinkerton’s wheat, or for Messrs Brock. That state was approved of by the agents; and on January 10. 1830, Mr Smith, secretary of the Scottish Union, addressed to Mr Green the following letter: ‘ Agreeably
 ‘ to my promise, I now send you a statement of the different propor-
 ‘ tions relative to Donaldson’s claim, by which you will find the
 ‘ Manchester Office has to pay - - - L.8553 5 8
 ‘ Subject to discount of one per cent., - - - 85 10 0

L.8467 15 8

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A state or appropriation of the gross sum of the loss among the different offices accompanied this letter, by which the West of England Insurance Company was substituted instead of the Atlas.

The defenders then paid their proportion of the loss, as stated in this scheme of appropriation, to the pursuer Donaldson, in return for which he granted and subscribed the following document: ‘ Glasgow, 16th January 1830.—Received from Messrs The Manchester Assurance Company, through Messrs James and Thomas Tassie, their agents here, the Manchester Bank’s draft on Masterman and Company, of 14th January current, at seven days’ date, for L.8467 : 15 : 8, being their proportion of a claim made by me for loss sustained by fire.

(Signed) ‘ P. Pro. of JAMES DONALDSON.
 ‘ JAMES THOMSON.’

In November 1828, a policy of insurance was effected by Pinkerton with the West of Scotland Assurance Company, and the premium was paid from 11th November 1828 to Martinmas 1829. By that policy the sum of L.10,000 was insured on ‘ grain and
 ‘ other goods not hazardous, his own, or on trust, in all or any of
 ‘ the granaries, warehouses, lofts or cellars, in Glasgow, Port Dundas, and in the vicinity of these places.’ The fifth clause of the conditions of the policy was in the following terms: ‘ V. Except
 ‘ in the cases of policies granted for short periods, the charges for
 ‘ premium and duty on insurances made with this company are to
 ‘ be calculated from the day on which the same may be effected
 ‘ until the quarter day then next ensuing, and for one year or for several years, from such quarter day as may be agreed on; and unless
 ‘ the future payments for the renewal of such policies be made with-

2 Mar. 1836. ‘ in fifteen days of the time limited for their expiration, the insurance shall cease. Policies for any period less than a year will terminate at six o’clock in the evening of the day mentioned therein.’

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Besides the documentary evidence put in, the pursuers then proved, by the secretary to the Scottish Union, that the pursuer, Donaldson, had a policy with them, current at the time of the fire; the meeting with Green and Toplis to adjust the loss: That meetings were held in Donaldson’s counting-room, and that some of the sufferers from the fire, and among others Pinkerton, were present: That the witness had heard of Pinkerton having had an insurance with the West of Scotland Company, a floating policy as he believed: That he could not say it was exhibited, but that he got a copy of it at Glasgow, and made a note of it at the time: That, on seeing that policy, Green and Toplis decided, that the pursuer, Pinkerton, had no claim under Donaldson’s policy: That this was in consequence of their seeing that policy; and that they considered that he, Pinkerton, should recover under it: Witness made a report to his directors, as usual; and presumed that Pinkerton was made aware of the ground on which his claim was rejected, as he attended a meeting: Witness considered that Pinkerton was actually insured with the West of Scotland Office: That, if insurance was made by a party on stock, his own, in trust or commission, he certainly considered that it extended to goods under one’s care, and that such policies are usual: That the letter of 16th January 1830, from witness to Green, which was shewn to him, did not include Pinkerton’s claim: All the offices concerned are there enumerated: It was understood that the settlement at Glasgow was to be a final settlement: Donaldson gave in two claims: He gave in an amended one; and there was a discussion about Pinkerton’s loss: The loss of Pinkerton was included in the first claim: He could not say if it was in the second; and certainly his office did not include it, and the settlement with the other offices did not include it: At the time of the settlement, it was objected to before the money was paid, by Donaldson asking more than they allowed: After the decision of the agents, Pinkerton and Donaldson at first complained of it: Other parties’ claims were rejected, who claimed under Donaldson’s policy, and were told to claim upon other offices; and that they did so and recovered from these offices; but that, notwithstanding these objections, the money was paid to Donaldson: They had rejected other claims, as being covered by other policies like Pinkerton, and that the parties got payment from these other offices.

The agent for the Scottish Union in Glasgow, in November 1829, proved, that he assisted at and attended meetings as to the loss, all those before, and some after Green came: That Donaldson

included in his claim a loss for Pinkerton's wheat; but it was rejected, as the witness understood, on the ground that he had a floating policy with the West of Scotland Company, under which they understood he could recover: To the best of his recollection, he did not see Pinkerton on the subject: He did not know of his remonstrances after Mr Smith came to Glasgow: He cannot say if he saw all the agents together; but as far as he knows, they were all of the same opinion: Pinkerton's wheat was not included in the sum paid by the Scottish Union Office: The witness did not attend all the meetings after Mr Smith came.

The manager of the West of Scotland Insurance Office proved that Pinkerton had a policy with their office, previous to the fire in November 1829: That it commenced on the 11th November 1828, and was current for a year: The premium for the second year had not been paid before the date of the fire, and never was paid at all: A new policy was opened immediately after the fire: A claim was made by Pinkerton about the month of January following; but no particular ground stated; but it was understood on the general ground, that the fire had occurred within the fifteen days after the expiry of the policy: He presumed that Pinkerton wished to avail himself of the 5th clause of the conditions of the policy which was read, but that his claim was rejected by the directors of the office, because the policy was not in force at the date of the fire: He had the minute-book of the directors with him, from which he read the minutes of a meeting of directors of the 11th January 1830, referring to the claim made by Pinkerton, which was mentioned in letters to the directors, but delayed till another meeting; also the minutes of a meeting of directors of 21st January 1830, when the claim was considered: The minutes stated, that the claim appeared to be made under the general policy on grain, 'in all or any of the warehouses in Glasgow:' The policy expired on 11th November 1829; but that fifteen days were allowed for its renewal: In this case it was not renewed, but cancelled, and a new one entered into: The policy provided, that unless payment should be made within fifteen days, the policy ceased, and reference was made to the special insurance by Donaldson to Pinkerton: The minutes then directed a case to be prepared for the opinion of counsel, to be stated to a future meeting: The opinion of counsel was reported to a meeting held on the 25th January 1830, and the claim was rejected on the 9th February: The rejection was intimated to Pinkerton, by a letter dated the 11th February 1830, in the witness's handwriting, and put in as evidence, which stated the ground of the rejection to be, that the policy was not in force, and did not continue for fifteen days, as the premium had not been paid: He knew that the receipt for the renewal of the old policy

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instructed Donaldson to insure, or to give him the benefit of his existing insurance; but, on looking at the postscript to the letter of the defenders' agents of the 16th January 1828, upon which Donaldson's insurance confessedly proceeded, we observe it there distinctly stated and held forth, that 'the insurance will cover any thing under his care, whether he has made advances on them, or *'has been instructed to insure, or otherwise.'* Whatever might have been requisite, therefore, in this respect, at common law, or where there was no special undertaking, we are of opinion that the defenders are barred, in this case, from objecting to the want of such evidence, by the terms of their own engagement.

In these circumstances, we are of opinion that the condition in Donaldson's policy, as to indorsing thereon any other policy effected on the same goods, cannot apply to such a floating policy as appears to have been held by Pinkerton, when his wheat was deposited in Donaldson's storehouse; as Donaldson could have no knowledge of all the policies of this kind, which might be held by the various depositors to whom his stores were constantly open; and as, by the special agreement of the defenders, they were answerable for every thing in these stores, whether he had been instructed to insure or not.

It would rather appear, indeed, that if this condition could be held to void Donaldson's policy as to the goods belonging to Pinkerton, it must equally void it as to all the other goods in the same storehouse. The words are quite general,—that if any other subsisting insurance on goods covered by this policy is not indorsed on it, *'this policy shall be void.'* But, beyond all doubt, the goods deposited by Pinkerton were included in the description of goods covered by Donaldson's policy, being 'all goods, his own, *in trust, or on commission,* in his new store,' &c. And this had been farther interpreted by the defenders' agents to extend to 'any thing under his care' within those premises. If the condition, therefore, was to be enforced according to its *letter*, the whole policy was void; and the defenders ought not to have paid the L.8961, for which they have actually settled. But if this settlement was just, and according to the *true meaning* of their engagement, we apprehend that there is no ground upon which they can now refuse to extend it to the goods in question.

It appears, indeed, pretty plainly from the evidence in the special case, that it was *not* upon this ground that payment of Pinkerton's loss was withheld when the rest was settled. The only two witnesses examined at the trial as to what took place at the discussions with the defenders' agents when the claim was rejected, concur in stating, that the ground of the rejection was, that they believed and assumed, that Pinkerton was *entitled to recover the whole amount un-*

der his floating policy; while it is now certain that that policy had previously expired, and was no longer in existence. And it being also clear, that even if it had been indorsed on Donaldson's policy, Pinkerton might have let it expire without injury to his claim on the defenders.

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We are therefore of opinion, that the pursuers are entitled to recover the sum specified in the verdict.

Opinion of
Consulted
Judges.

Addition to above Opinion by Lords Gillies, Balgray, Mackenzie, Fullerton, Moncreiff and Jeffrey.—We do not think that Pinkerton's claim can be affected or impaired by the circumstance of Donaldson giving up that claim when objected to, or taking payment, or granting receipt for the amount of the loss thus restricted. It is to be observed, that he grants a receipt only, and not a discharge; but the material consideration is, that by this time the loss had been incurred: the rights of the different parties having interest in the policy had vested; and the claim of Pinkerton, as one of those parties, had been distinctly brought under the view of the defenders and their agent. In that situation, though Donaldson, as holding the policy, had power to receive payment, and to discharge such claims as were thus satisfied, we think he had no power to discharge Pinkerton's claim, *without payment*, and thus to abandon a right truly vested in another, without his privity or consent; and as there is no evidence that Pinkerton in any way authorised such a sacrifice, we are of opinion that the terms of the settlement with Donaldson afford no just ground of defence.

Addition by Lords Gillies, Corehouse and Cockburn.—From the information laid before the Court, we understand that, by the law of England, a condition in a policy, with regard to the indorsement of other insurances, similar to that which occurs in the present case, does not apply to floating policies; and as the defenders are an English company, we concur, chiefly on that ground, in the opinion that the pursuers are entitled to recover.

Lord Balgray.—I concur in this addition.

The Court, in respect of these opinions, confirmed the verdict, Judgment. and found expenses due.

Lord Ordinary, Medwyn. Judges at Trial, Lord Justice-Clerk, Boyle, Cringletie.
Act. Dean of Fac. (Hope,) and H. J. Robertson. Alt. Buchanan. Campbell
& Macdowall, S.S.C. and Cuninghame & Walker, W. S. Agents. T. Clerk.

R.

FIRST DIVISION.

No. CVII.

3d March 1836.

JANE AND ISABELLA HALDANE
against
ALEXANDER DONALDSON.

REPARATION.—LAW-AGENT.—*An agent, acting both for the borrower and lender of a sum of money, who neglected to inform the lender that a distillery, on the security of which the loan was made, was already heavily burdened with preferable securities,—held liable to the lender, to the extent of the sum lent, and interest thereon, on the subject subsequently, from depreciation in value, proving inadequate to meet the prior securities.*

Narrative.

IN 1823, the late Henry Haldane brother of the pursuers, by the advice of the defender, his agent on this, and, as it would appear, on some former occasions, invested L.2000 in the following manner: Archibald Dunlop held a piece of ground, on which he had built a distillery, in lease from the burgh of Haddington, and had, in 1818, borrowed L.2000 from Mr Cunninghame, on a bond and assignation of the said lease in security. Mr Cunninghame wishing to call up this money, it was proposed that Mr Haldane should pay the L.2000 to him, and obtain a translation of the fore-said assignation of Mr Dunlop's lease. Accordingly, in a letter, dated 5th November 1823, from the defender to Mr Dunlop, he says, 'When will the L.2000 be wanted? I think I shall get it from Mr Haldane. At least, he told me some weeks ago that he had the needful, and wishes a good security.' The defender, who was Mr Dunlop's ordinary agent, drew out the necessary deeds, but took no steps for making the right an effectual real right in the person of Mr Haldane, by intimation to the Magistrates of Haddington, or putting Mr Haldane in actual or constructive possession. The bond and the original assignation of the lease, it may be observed, in favour of Mr Cunninghame, was a first security, and intimation had been made to the Magistrates, but no possession taken by Mr Cunninghame. In 1826, Mr Dunlop obtained a feu-disposition from the burgh of Haddington to the piece of ground he held in lease, under the burden of the said lease. Haldane died in December 1826, leaving a will in the English form: and some discussion having arisen, whether the bond was carried by the will to the pursuers, or went to the

heir-at-law; Mr John Haldane, the brother of the pursuers, asked the defender for the necessary information, in order to take the opinion of counsel. In a letter which occurred in the course of the correspondence, dated 17th October 1827, the defender says, writing to Mr John Haldane: ‘ I mentioned to your brother, (the late Henry Haldane,) that, in my opinion, he no longer held any security beyond Mr Dunlop’s personal obligation, and that Mr Dunlop would pay him up the money at the ensuing Martinmas, if he wished it; but he said that he was quite satisfied with Mr Dunlop’s own security. Under the circumstances now stated, I do not think this can be viewed in any other light than a personal bond.’ A memoir, which was also drawn up at this time by the defender, at the request of Mr John Haldane, contained the following passage: ‘ A principal object with Mr Dunlop in this transaction, was to enable him to borrow a considerable sum on a better security than he could previously give, and with this to pay off some debts secured in the same manner as Mr Haldane’s. This he accomplished; and he intimated to all who held securities, that he would discharge them at the ensuing term of Martinmas. I was authorised to intimate to Mr Haldane that Mr Dunlop would pay him at that time, or to tell him that Mr Dunlop would keep the money, if this was more convenient to him; and he was quite satisfied with his personal security. I think it was in going to a funeral (some time perhaps in August or September 1826) that I made this communication to Mr Haldane. I explained to him the change in Mr Dunlop’s situation, and told him that I no longer thought he had any security over the distillery. I do not distinctly recollect his answer; but it was to this effect, that as he had no occasion for the money, and was quite satisfied with Mr Dunlop’s own security, he would rather wish him to keep it; and I think he desired me to thank Mr Dunlop for his kindness in the business. I communicated his answer to Mr Dunlop. This, as far as I recollect, was all that passed. There was no written communication on either side. Mr Haldane expressed himself quite satisfied, and appeared to be obliged to Mr Dunlop for keeping the money, though it was explained to him that the security was lessened.’

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Narrative.

In consequence of a family arrangement, an assignation of the sum and corresponding security was granted in favour of the pursuers by the heir-at-law. The assignation was not prepared by the defender; but the pursuers allege it was transmitted to him, to be intimated to Mr Dunlop; and the security is there mentioned as an heritable bond, by which term it was also mentioned in some of the letters of the defender. The pursuers allege, that in consequence of representations from the defender, similar to those

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which he averred he had made to the deceased Mr Haldane, that the real security had been evacuated by the change in Mr Dunlop's right, they employed him to lend out their money on undoubted heritable security. The defender accordingly wrote a letter to Mr Dunlop in the following terms: '*Haddington, 3d November 1827.* My Dear Sir, The Miss Haldanes, who are now in right of your bond to Mr Cunninghame, are quite satisfied to have you for their debtor; but it occurs to them, that if the money is to lie in your hands, that they should have the same kind of security as he got. That you may have time to determine whether you will do this, or pay up the money, they will wait your answer till the first of January. Yours sincerely,' (Signed) 'ALEX. DONALDSON.' The defender, though, by his own admission, perfectly aware that prior securities had been constituted over the properties in 1826, amounting to L.18,000 or L.20,000, does not appear to have made any farther communication of the fact than what might be gathered from the memoir above quoted. Dunlop having agreed to retain the money, granted a bond and disposition in security to the pursuers, in February 1828, which was prepared by the defender. The credit of Dunlop at this time, and for some time afterwards, seems to have been perfectly good, as, in 1829, Mr John Haldane lent him L.12,000 on the joint promissory-note of himself and two others, and the defender lent him L.1000 for a client, about that time, on a similar security. Even in 1831 the defender lent L.500 of his own money, on Mr Dunlop's own promissory-note.

Mr Dunlop became bankrupt in 1831, and, after that, his heritable property fell so considerably in value, that by a report lodged, in 1804, in the process of ranking and sale, the premises were estimated at L.10,000 only. The reporter, however, stated their value, in 1825, at the sum of L.25,000. By other reports it appeared, that, in 1826, the buildings were considered to be worth upwards of L.30,000, and that they had cost not less than L.40,000. The interest was paid on all the heritable debts for a year after the bankruptcy. In 1834 the whole subjects were put up to public roup at the upset price of L.10,000; but no offerer appeared. In these circumstances the pursuers raised the present action against the defender, for payment of the L.2000, with interest from the time that it ceased to be paid, on the pursuers assigning the bond and disposition in security; or otherwise, concluding that the defender should be bound to make good the whole loss and damage arising from the defender not having obtained a valid security.

The pursuers averred that the defender was the ordinary agent of

the family, and that they had employed him to get an effectual and a first security; that they had been prevailed upon by the defender to renounce and cancel the security on the lease, and take the other in lieu of it; that neither the pursuer nor their brother, Mr John Haldane, ever saw the memoir drawn by the defender, as it was sent to the agent in Edinburgh, and recovered out of his hands to be produced in process; that they were not made aware of the existence of prior securities. These averments were denied by the defender, who maintained that he acted solely as the agent of Mr Dunlop, and had been paid by him, and that he was not the family agent of the pursuers; that he had sent the memoir to Mr John Haldane, and that he had informed the pursuers of the existence of the prior securities.

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Narrative.

The pursuers *pleaded*—The defender having been professionally employed, first by the late Mr Henry Haldane, and then by the pursuers as his successors, to invest, or see invested the sum of money in question, on a valid and preferable security over Mr Dunlop's heritable property, and having wrongfully failed to discharge the duty committed to him, is liable in reparation to the pursuers. Indeed, on the principles of the following cases, the circumstance, that Mr Donaldson was the only agent in the transaction, would have rendered him liable, without special employment; *Struthers v. Lang*, 2d Feb. 1826, *F. C.*, and House of Lords, 28th May 1827, 2 *W. & S.* 563; *Rowand v. Stevenson*, 6th July 1827, *F. C.*, affirmed in House of Lords, 14th July 1830, 4 *W. & S.* 177; *Brown v. Cuthill*, 28th Mar. 1828, 4 *Murray's Rep.* 474. He is separately liable in reparation to the pursuers, on the single ground that, at the date of preparing the heritable bond in the pursuers' favour, he wrongfully misrepresented, or wrongfully concealed from the pursuers the extent of encumbrances then existing over the subjects, in consequence of which the pursuers were induced to allow their money to remain in Mr Dunlop's hands, which they would not otherwise have done; *Graham v. Steuart and others*, 4th Mar. 1831, *F. C.* And it is no justification of his professional neglect to say that he was not paid by the pursuers; for it has been decided, that even where an agent acts gratuitously, he is not the less liable in reparation of the consequences attendant on his carelessness; *Currie v. Colquhoun*, 17th June 1823. He is bound to make payment to the pursuers of the whole sum contained in the bond by Mr Dunlop, with the interest due on it, on receiving from the pursuers an assignation to their whole right under that bond. At all events, the defender is bound to pay the pursuers the whole amount of loss and damage arising through the imperfection or insufficiency of the security; *Sime v. Clark*, 2d Dec. 1831, *F. C.*

Pursuers'
Pleas.

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Haldanes v.
Donaldson.Defender's
Pleas.

The defender *pleaded*—The pursuers' claim, in so far as it is founded on the defender's alleged failure to complete the security, is groundless, in respect that, in that transaction, he never was employed as the agent of Mr Haldane, or of any person except Mr Dunlop; *Wilson v. Riddell*, 20th June 1826: Nor can the defender be liable, because the late Mr Haldane did not complete his security by entering into possession of the distillery,—that gentleman having, during his lifetime, as well as the pursuers, as his representatives, allowed the money to remain in Mr Dunlop's hands on his personal security solely. The claim is also groundless, in so far as it is founded upon the alleged want of intimation to the landlord, in respect that the original assignation of the lease in security of the debt was formally intimated to the landlord by Mr Cunninghame, and that all his assignees were entitled to the benefit of that intimation; *Yeoman v. Elliot*, 2d Feb. 1813, *F. C.* The pursuers also, it must be observed, voluntarily, and without the knowledge or consent of the defender, extinguished their prior security over Mr Dunlop's right of lease, by which possibly they might have obtained a preference over the intermediate securities. The defender can in no way be liable, as every thing which he was employed to do in reference to the matter was executed in the most correct and unobjectionable manner; for even assuming an employment to have been given by the pursuers, the whole extent of that employment was merely that he should prepare formally and regularly the written deeds; which were all correct. Besides, he was not employed by the pursuers to select a security, but specially restricted to take it from Mr Dunlop; and in addition to this, the pursuers directly, or through their brother as their manager, took the additional security in the full knowledge of the prior securities, which can be proved, but is apparent from the circumstance of their having received the memoir which was drawn up by the defender. The claim is also groundless, in respect that it has not, *hoc statu*, been ascertained that there is any inadequacy in that security: at all events, at the time the security was granted, the subjects afforded an ample security to the pursuers, or at least were then, and long afterwards, fairly and *bona fide* held by all concerned to do so; and the defender, even had he been acting as the law agent and adviser of the pursuers, would not have been responsible for subsequent and unforeseen depreciation in the value of Mr Dunlop's property.

The Lord Ordinary pronounced the following interlocutor and note:

Ord.
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tor.

' The Lord Ordinary having considered the revised cases for the
' parties, together with the closed record, productions, and whole
' process, decerns in terms of the libel; finds the defender liable

‘ in expenses of process, and remits to the Auditor to tax the account thereof when lodged, and to report.’ 3 Mar. 1836.

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Note.

Note.—‘ In the circumstances of this case, there is no reason to suppose that the defender intentionally sacrificed the interest of the pursuers, or their brother, Mr Henry Haldane, to that of his client, Mr Dunlop; but it is thought that he is bound, notwithstanding, to indemnify them for the loss they have sustained in consequence of negligence and error in his professional conduct. It is plain that, in negotiating the loan by Mr Haldane, he acted in the double capacity of agent both for the borrower and lender,—a delicate situation, in which more than ordinary care and circumspection are necessary. On that occasion he neglected to complete the security in the way in which it ought to have been done. He neither intimated to the granters of the lease the assignation by Cunninghame to Haldane, nor did he put the assignee either into actual or constructive possession. The first omission exposed Haldane to the danger of Cunninghame’s bankruptcy, and the second to that of Dunlop’s bankruptcy. The first omission was quite inexcusable; the second was neither justified, as is alleged, by the terms of the assignation, nor by the decision in the case of Yeoman, in 1813.

‘ Mr Dunlop having obtained a feu-right of the subject of his lease, but under the burden of that lease which had been conveyed to Henry Haldane, the defender erroneously informed Haldane that his security was thereby evacuated. He says that Haldane, on that occasion, expressed his intention to let the money remain on Dunlop’s personal security,—an averment of which there is no evidence, and which, if proved, would not now be material. After Henry Haldane’s death, the pursuers, by a compromise with their eldest brother, obtained right to the bond and assignation from Dunlop. Whatever may have been the intention of Henry Haldane, it is clear that the pursuers desired to have an heritable security from Mr Dunlop, and that the defender acted for their behoof in attempting to obtain it, though again in the double capacity of agent for borrower and lender. The defender avers that he informed the pursuers that the security created by the assignation of the lease was evacuated by the feu-right; and it appears from his letter of the 3d November 1827, that he applied to Mr Dunlop for a new security to them ‘ *of the same kind which their brother got* ;’ which can be construed in no other sense than a first security over the subjects. Accordingly he did obtain an heritable bond from Mr Dunlop, on which he expedite an indentment. But on that occasion, though perfectly aware, as he admits, that the property had in the meantime been encumbered to the amount of nearly L.20,000, which rendered it a security

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‘altogether unfit for a permanent investment, and which no prudent man of business, acting for the pursuers, would have accepted, he concealed that fact from them, and exposed them to the loss which has since occurred.

‘No sufficient excuse has been stated for this conduct on the part of the defender. He says the pursuers relinquished their security under the lease, without his knowledge or consent; but they are not to blame on that account, as he himself had informed them that that security was destroyed,—information singularly unfortunate, for even at that moment, it rather appears, he might have repaired his original neglect, and rendered it available. Another defence is, that he did give them information that Mr Dunlop had granted securities over his feu; because, in his memoir to Mr John Haldane, he had stated that the feu-right was obtained to enable Mr Dunlop to borrow money, and to pay off certain debts. But this communication, even if shewn to the pursuers, which they deny, and which is not proved, was much too vague and imperfect to put them on their guard, for it neither specified the sums borrowed by Mr Dunlop, nor the nature of the securities he had granted. Still less is it relevant to plead that the pursuers did not employ him to select a security, but restricted him to take one from Mr Dunlop. Even if that had been the case, it was his duty to have explained to them distinctly that Mr Dunlop had no longer the power to give them an effectual security, having borrowed on the distillery to the great amount above mentioned. It is plain that the defender, misled by the apparent prosperity of the distillery—at best a hazardous speculation—and by the supposed resources of Mr Dunlop, had considered the real security as of little moment, and become incautious and negligent with regard to it.’

The defenders *reclaimed*. At advising,

Opinion of
Court.

Lord Balgray.—It is clear that the pursuers intended to have a valid security for the money lent by them; but they in reality got none. I cannot approve of the defender's conduct on the second occasion: he was then acting as agent for both parties: he was the agent for the borrower, and was, of his own personal knowledge, perfectly aware of the situation of his affairs; and it was therefore his duty to have communicated what he knew to the lender, for whom he was also acting as agent.

Lord President.—The defender committed a great blunder, from the commencement of these transactions, in acting for both parties. He ought to have refused to act for the lender, as he was the agent of the borrower. In regard to the heritable security, for that on the lease is now comparatively immaterial, I think he should have told the lenders what he of his own personal knowledge knew:

he should have made them aware that there was L.20,000 already secured on the distillery, and allowed them to judge whether they would then go into the transaction.

Lord Gillies.—I concur. I agree in the views on which the interlocutor of the Lord Ordinary is founded. It appears to me clear, from the passage in the letter from the defender to Mr Dunlop, quoted by his Lordship in his note, that the defender acted as the pursuers' agent, and that the pursuers wished to lend only on condition of getting good heritable security. They certainly did get this kind of security; but they were posterior to two others, who were preferably secured to the amount of L.20,000. I do not mean to say that the subject was thus burdened above its value; but this I will say, that the pursuers should have been allowed to judge of that; and it was the duty of the defender, as their agent, to have mentioned to them the number and amount of the debts preferably secured, to enable them to form their judgment. This, however, he omitted to do. I am sorry for him; but I think the Lord Ordinary's interlocutor well founded.

Lord Mackenzie.—I concur. The loss may probably have occurred from the fluctuation of the value of the distillery. No property is more liable to fluctuation, and therefore it was the more perilous to lend money on a subject of that kind, after it had been already burdened to a large amount, as it was in fact subjecting the money lent on the postponed security to all the effects of the fluctuations. Certainly, before such a step was taken, the consent of the parties should have been asked, as they must be held to have wished an ordinary unexceptionable security.

The Court adhered, giving additional expenses.

3 Mar. 1838.

Haldanes v.
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Court.

Judgment.

Lord Ordinary, Corehouse.

Act. Keay, Penney.

Alt. Dean of Fac. (Hope,)

Sol.-Gen. (Cunninghame,) Marshall.

John Court, S. S. C. and Gibson &

Donaldson, W. S. Agents. S. Clerk.

C. R.

FIRST DIVISION.

No. CVIII.

3d March 1836.

PAGET BAYLY, PETITIONER,

against

EDWARD SWAN, RESPONDENT.

SANCTUARY.—Petition of a debtor incarcerated in the Abbey jail, for debt contracted within the Sanctuary, to be transferred to another jail, in order to pursue a process of cessio, refused.

8 Mar. 1836.

Bayly v.
Swan.

Narrative.

THE petitioner, a prisoner in the Abbey jail of Holyroodhouse, for a debt to the respondent, contracted whilst living in the Sanctuary, presented a petition to be removed to the Canongate jail, that he might thereby be enabled to pursue a process of cessio. He stated that this was the proper course of proceeding, founding on the argument in the case of Dunlop, 11th July 1799, *Mor.* 11,800; and the opinion given in 2 Bell's Com. p. 574. The respondent answered, that to grant the prayer of the petition would be to interfere with the jurisdiction of the Sanctuary, and to deprive the incarcerating creditor of the only means of enforcing his debt, on the efficiency of which he was entitled to rely; that there was no authority for such a proceeding; on the contrary, the decisions were against it.

On advising petition and answers, the Judges were doubtful whether they had the power to transfer prisoners from the jail where they were legally incarcerated; but they were of opinion besides, that it would deprive persons in the Sanctuary of all credit, if, when they were incarcerated in the Abbey jail for debts contracted within the Sanctuary, for which alone they could there be imprisoned, they could, against the wish of the incarcerating creditor, be transferred to a common jail, where they were open to the diligence of all their creditors; and that, in the case of Dunlop, there was no authority for such a proceeding.

Judgment.

The Court unanimously refused the petition, with expenses.

Act. J. Shaw Stewart.

James P. Falkner, S.S.C. Agent.

Alt. G. H. Pattison.

James Martin, S.S.C. Agent.

D. Clerk.

C. R.

FIRST DIVISION.

No. CIX.

4th March 1836.

MRS JANET STEWART OR IRVINE

against

PATRICK CRICHTON AND OTHERS.

PROCESS.—TRUST.—MULTIPLEPOINDING.—*A creditor who had lodged a claim, and was ranked on the estate of his debtor, by trustees appointed to distribute the property amongst the creditors by a trust-*

deed, to which almost all the creditors, himself excepted, had acceded, having raised an action of multiplepounding, in the name of the trustees, but contrary to their wishes, as well as of the 200 acceding creditors, in order to obtain a judicial decision on his claim,—found, that the action was incompetent.

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THE circumstances in which this process of multiplepounding was brought, will be found in the note added by the Lord Ordinary to his interlocutor of the 3d February 1836: ‘ General Stewart died deeply involved in debt. His sister served heir to him cum beneficio inventarii. She executed a trust-deed, to which it is said almost, if not all, the creditors, to the number of about 200, have acceded; the trustees have realised the property, and it is in the course of distribution, agreeably to a scheme which has been submitted to the consideration of eminent counsel. The real raiser of this multiplepounding, acting for the trustees of one creditor, lodged a claim, and was ranked by the trustees on General Stewart’s estate; but he refused to sign the deed of accession, and it rather appears, from the correspondence produced, that he had not acceded rebus ipsis et factis.

Narrative.

‘ The questions are, 1st, Whether this single creditor is entitled not only to have his own claim tried in a court of law, but whether he can set aside the trust altogether, and throw the whole funds into Court, to be judicially distributed. 2d, If he is entitled, whether this can be done by a multiplepounding raised in the name of the trustees, but without the consent, and contrary to the wishes of them, and of the 200 acceding creditors. There can be no doubt, that if he has not acceded, he has a direct action against the trustees for his debt, and if they do not choose to pay in full, he may force them to count and reckon for their intromissions. But this by no means involves the necessity of making all the creditors parties, or defeating the process of distribution under the private trust, though perhaps it may possibly lead to that result. If General Stewart were alive, and was a trader, the private trust would not have prevented a sequestration, and as it is, the estate might have been brought into Court by a ranking and sale. But the proceeding which the non-acceding creditor has adopted, is of a different description. Without constituting his debt, or raising diligence upon it, he brings a multiplepounding in the name of the trustees, founding upon the trust-deed as their title, and setting forth the powers which it confers upon them, and he subsumes in their names that it is necessary the funds realised should be distributed under judicial authority, and that they should be exonerated of their intromissions. Now, it is settled law, that

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‘ the real raiser of a multiplepointing cannot impeach, in his sum-
‘ mons, the title of the nominal raiser, or set forth in his name facts
‘ inconsistent with that title. The conclusion for exoneration in
‘ this process is a striking illustration of the propriety of that rule.
‘ The nominal raisers are acting under a trust-deed, by which they
‘ are not only authorised, but bound, 1st, To realise the funds, and
‘ afterwards to apply them in payment of the debts, according ‘ to
‘ the rights and preferments’ of the creditors, conform to a scheme
‘ of division to be prepared under their own authority, and to whom,
‘ in the deed of accession, there is a submission of all questions
‘ which may arise among the acceding creditors in the ranking. It
‘ is plain, therefore, that they would not have been entitled, with-
‘ out the consent of all the acceding creditors, to stop short before
‘ they had performed half their duty, to throw the whole trust af-
‘ fairs into Court, and to create all the tedious and expensive liti-
‘ gation, which it was the very object of the trust to prevent. As
‘ this would have been clearly incompetent in an action raised at
‘ the instance of the trustees themselves, so it also must be incom-
‘ petent in an action raised in their name and without their consent.
‘ The real raiser may perhaps be able to attain his object in another
‘ shape, but it is thought that he cannot do so in this shape. If
‘ the multiplepointing were sustained, the very first step must be
‘ to cite the 200 acceding creditors, a number of whom are already
‘ cited, and the expense of these citations, by no means inconsider-
‘ able, would fall on the fund in medio, and afterwards they would
‘ all be obliged to lodge separate claims, or be at the expense of
‘ executing assignments to trustees for their behoof, a heavy burden
‘ on a multitude of creditors, many of whose claims, it is said, do
‘ not exceed ten shillings. But if the raiser tries his own case in
‘ an ordinary action, the trustees are at once brought into the field,
‘ and it becomes a simple competition with them, acting for all the
‘ other creditors.

‘ Further, it may be observed, there is no double distress here,
‘ nor the least prospect of it. There is but one creditor who de-
‘ mands a judicial decision on his claim: all the rest have bound
‘ themselves to abide by the judgment of the trustees, which they
‘ consider by far the cheapest and most convenient mode of wind-
‘ ing up the affairs of the deceased.

‘ The Lord Ordinary has thought it right to state his views at
‘ length, because the process of multiplepointing, of the greatest
‘ utility where it is properly applied, has recently been attempted
‘ in cases to which it is totally inapplicable; and as it is sometimes
‘ styled a congeries of actions, there seems to be a notion that it

' may supersede every other form of action. See *Ronaldson v.* 4 Mar. 1836.
' *Johnston, &c.* Dec. 11. 1834.'

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The Lord Ordinary pronounced the following interlocutor: ' The
' Lord Ordinary having heard counsel for the parties, sustains the
' objections to the competency of the action; dismisses the same,
' and decerns: Finds the real raisers liable in expenses, and remits
' the account thereof, when lodged, to the Auditor to tax the same,
' and to report, reserving to the real raisers to bring such other ac-
' tion as may be competent.'

The defender *reclaiming*, the Court, in the special circumstances Judgment
of the case, unanimously *adhered*.

Lord Ordinary, *Corehouse.* Act. D. M'Neill. Alt. Sol.-Gen. (*Cuninghame,*)
Moncreiff. James Robertson, S.S.C. and James Gordon, W.S. Agents. D.
Clerk.

C. R.

FIRST DIVISION.

No. CX.

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JAMES COWAN JUNIOR
against
JAMES FARNIE AND OTHERS;
AND
JAMES FARNIE AND OTHERS
against

MESSRS MOWBRAY AND HOWDEN.

LAW-AGENT. — MANDATE. — PROCESS. — EXPENSES. — *Circumstances in which it was held, 1st, That the presumption of a mandate to an agent to pursue an action in the Court of Session, arising from the possession of the title-deeds, was redargued; that the action must be dismissed, in so far as the pursuer disclaiming the mandate was concerned, and that the defenders had no claim against the disclaimer for expenses. 2d, That the agents, who had, without proper authority, though acting bona fide, used the name of the disclaimer as one of the pursuers of the action, were liable to him for his expenses arising after his disclamation, and to the defenders for all their expenses, reserving to the agents any claim of relief competent against the other pursuers.*

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In 1828, an action of declarator of an exclusive right to an area or close adjoining certain subjects in Burntisland, was brought against James Farnie and others by James Cowan senior, for himself as liferenter by reservation of the said subjects, and as mandatary for two of his children, fiars, as also in the names of his other children, James, Thomas, Elizabeth and Helen Cowan, the other fiars. The titles libelled on were, first, An instrument of sasine in 1794, on a resignation by Mrs Cowan in favour of herself and husband; and, 2d, An instrument of sasine in favour of their six children nominatim, on a disposition by Mr and Mrs Cowan in 1819, whereby, 'for the love, favour and affection' they had to their children, they disposed the property in favour of the said children nominatim, reserving their own liferent. On this deed infestment was taken by the children in March 1823, subsequent to their mother's death. In August of that year, all the six children subscribed a ratification of this deed, written on it by Mr Howden. Messrs Mowbray and Howden, who acted as agents for the pursuers, produced those titles and certain other deeds in the course of the process. Various proceedings took place in the action, in the course of which some of the pursuers who had left the country having failed to produce mandates, the defenders were assoilzied quoad them, with expenses. In 1830 the record was closed. On 25th July 1831, the defender's agent wrote to James Cowan junior, informing him that he had got a decree of expenses against his brothers, and begging to know where they were to be found, and when he might expect payment of the amount, which was specified. To this letter James Cowan junior returned an answer on 10th August, in which he says, 'You are perfectly aware I have no interest in the action of declarator. I never granted my mandate authorising you or any other person to act in my name in any such proceeding.' On 12th November following, in consequence of notice from his agent, informing him that arrestments had been lodged in the hands of the tenants, in consequence of a process at 'your late father's instance against Lundie and others,' James Cowan junior, after a correspondence with Messrs Mowbray and Howden, lodged, in March 1832, a minute, stating that he had not authorised the action; that he had given no mandate to institute it; and that he had in no way homologated or approved of the procedure. This minute was allowed to be seen by the defenders, who, however, did not put in any answer. (22d May 1832.) 'The Lord Ordinary, in respect of the foregoing minute for James Cowan junior, disclaiming the appearance made for him in this action, dismisses the same, in so far as he, the said James Cowan, is concerned, and decerns; and before answer as to the

‘ claim of expenses made by the defenders against the said James Cowan junior, allows an account thereof to be given in, and remits to the Auditor to tax the same, and to ascertain what part thereof, if any, has been occasioned by the appearance made for the said James Cowan junior, and to report.’ And thereafter the account of expenses having been duly taxed, and the case having again come before the Lord Ordinary, he was pleased to pronounce the following interlocutor: ‘ (15th February 1833.) The Lord Ordinary having heard counsel for the parties, and considered the report of the Auditor in respect of the disclaimer for James Cowan junior, and that none of the other pursuers now appear to support the conclusions of their libel, assoilzies the defenders from the whole conclusions of the action; finds the whole pursuers, conjunctly and severally, liable to the defenders in expenses; approves of the Auditor’s report upon the account, and, in terms thereof, modifies the same to the sum of L.79 : 0 : 5 sterling, with the dues of extract, and decern accordingly: Farther, allows the decret for expenses to go out and be extracted in name of Alexander Hutchison, writer in Edinburgh, agent for the defenders, and disburser thereof.’

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James Cowan junior *reclaimed*, and the Court ordered minutes of debate. The pursuer *pleaded*—That the principle upon which the Lord Ordinary had proceeded, of fixing upon him a liability for the expenses of an action of which he had never heard, until after these expenses had been incurred, was unjust; the presumption of mandate, inferred from the appearance of counsel, is not a fiction of law, but a presumption which might be redargued. The consequence of holding the presumption absolute would be monstrous, as, in the case of a declarator of marriage or legitimacy, the status of a party might be fixed for ever in a judicial proceeding, of which the party might be wholly ignorant. In the present case, no attempt was made to establish that a mandate was ever obtained, or that any communication of any kind had taken place with him as to the action. The possession of the title-deeds, which would have been a very strong fact if he had been sole pursuer, and the custodier of these titles, ceased to be of importance, when it was considered that these deeds were not in his custody, but in that of his father, the liferenter by reservation, and the supply of information was equally unimportant, as it was afforded by parties who fell naturally to be cognisant of the facts, and who had an interest in proposing them. There is here no question as to whether advocates require written mandates; and therefore the authorities quoted on that head are inapplicable. The point to be proved is,

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not that an advocate appearing in Court does not require a written mandate to instruct his right to make that appearance, but that the presumption that he has a mandate cannot be redargued, and that effect will be given to it, contrary to the truth, in cases where obligations are made to arise out of the acts done without authority. The cases quoted by the defender do not at all establish this doctrine. In the cases of King, Ballantyne, Hamilton and Wallace, quoted by the defender, the principle established amounts to this, that where a party has been cited as defender in a case, and appearance made for him, he will not be allowed to quarrel the diligence proceeding on an extracted decree of court on a naked denial of the authority of his advocate, or an offer to prove by the oath of the advocate, without other and more satisfactory evidence, that he had no warrant. The rule as contended for, and under the limitation stated to exist in the law of France, (Pothier, Cont. de Mandat. c. 5,) has received effect in the case of Anderson, given in the Session papers, in the case of Hamilton, Nov. 25. 1813, *F. C.*, and in the subsequent case of Wallace, 31st May 1821. The argument, as to the pursuer representing his father, and being so liable for his debts, is founded on a mistaken point of fact: the subjects in which the pursuer had a right of fee were inherited by his mother, and by her disposed to the petitioner.

Defenders'
Pleas.

The defenders *pleaded*—That the pursuer had an interest in, and was to derive benefit from the present action, if it should be successful: that he was resident in Scotland, and proprietor of heritable subjects there: that his title-deeds were delivered to agents duly licensed to act in this Court, and that the purpose to which these titles were to be applied, was to benefit the property belonging to the pursuer: that these titles were at least allowed to remain in possession of some party who employed Messrs Mowbray and Howden for his behoof: that the doctrine of Erskine, iii. 3. 33, that a mandate to appear judicially for a party to a suit is presumed, with respect to a procurator before an inferior court, from his being possessed of that parties' writings, is supported by numerous decisions; Wedderburn v. Nisbet, 14th July 1610, *M. 7326*; King v. Seaton, 10th Jan. 1694, *M. 12,247*; Campbell, 29th May 1821; Macdonald v. Kelly, 5th July 1821; Bryan v. Murdoch, 13th Nov. 1824; Stair, i. 12. The same rule has been established in the Supreme Court, and it will be remarked, that none of the authorities draw any distinction between the case of counsel appearing for a pursuer and a defender. Mr Erskine, after the passage already quoted, stating that the possession of the parties' writings is evidence of a mandate in the inferior court, says, 'And as to an advo-

'cate, from his bare appearance in Court for him.' This is supported by Spottiswoode, page 7; Mackenzie's Works, ii. 228; Stair, i. 12. 12; Bankton, iv. 3. 26; Ballantine v. Edgar, Dec. 7. 1676, *Mor.* 348; Stuart, Feb. 3. 1681, *Mor.* 353; Melville v. Perth, Dec. 7. 1693, *Mor.* 355; Butler v. Gordon, July 31. 1708, *Mor.* 356; Marchmont, June 7. 1715, *Mor.* 358; Forbes, Feb. 28. 1708; Hamilton v. Marshall, Nov. 25. 1813; Wallace v. Miller, 31st May 1821. In the case quoted by the pursuer, as extracted from the Session papers in that of Hamilton, it is enough to observe, that all that was done by the Court was merely to pass the bill, or, in other words, to have the case more deliberately expiscated on the expedite letters. Without entering into the inquiry, whether a decree on the merits would constitute a decree in foro, although the authorities go to that length fully, the defenders submit that it is impossible, consistently with justice, not to find that they are entitled to be indemnified for the expenses that they have incurred.

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On the supposition that the pursuer, James Cowan senior, was this party's father, then, as he takes the property titulo lucrativo, and has drawn the rents, he must be as much responsible to the defender, as his father, if alive, would have been; and further, he has no substantial interest to resist decree if his allegation be true, because, on that supposition, he has an unquestionable right of relief against Mowbray and Howden, whose solvency is undoubted. Besides, if he was employed by the other co-proprietors, or any of them, then he or Mowbray and Howden have their right of relief against them and the heritable subjects in question.

At the advising, after these minutes were given in, the Court, (5th July 1833,) on the motion of Farnie and others, who had repeatedly written to Mowbray and Howden, requesting them to shew their mandate, but had received no answer, ordered intimation to be made to these gentlemen.

The case came out for advising again, (13th November 1833,) when *Monteith* appeared for Mowbray and Howden, and stated, that as they were no parties to the cause, they deemed it inexpedient to make any statement which might, by possibility, compromise their interests in future proceedings; but they would be prepared to prove their authority, if it should be found necessary, when convened in a proper action.

Immediately thereafter, Farnie and others (20th November 1833) raised an action of relief against Mowbray and Howden, craving to be relieved of all damages and expenses, &c. arising from the unauthorised use of James Cowan junior's name.

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Pleas for
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The *Court* sisted procedure, in the case between Cowan and Farnie and others, till defences should be given in, in this action.

Defences were given in by Messrs Mowbray and Howden, who *pleaded*—In instituting and conducting the action, so long as they continued to act as agents in the cause, the defenders acted in the bona fide discharge of their professional duty. It is not alleged that they had not sufficient authority from Cowan senior to raise the action in his name, or that the other members of his family did not concur in it. All that is pretended is, that they had no authority from James Cowan junior as an individual. It is no doubt true, that now that it does not appear worth while to support the action, James Cowan junior is pleased to repudiate it; but he did not do so until the late stage of the procedure which has been referred to. The defenders, under the circumstances, were fully justified in believing that he was aware of the action, considering the interest he had in the subjects, the titles of which were put into the defenders' hands by the other joint proprietors, his immediate relations. If the defenders in that action had called for a written mandate from James Cowan junior at the commencement of the cause, the present defenders have no doubt it would have been granted at once; but they failed to do so; and it is submitted, that they have no right now to turn round on the foresaid defenders, and attempt to make them responsible for the non-production of what they never called for, and what, not having been called for, the present defenders were not under any obligation to produce.

It will be remarked, that, on their own shewing, the present pursuers have suffered no damage in consequence of the name of James Cowan junior having been included in the summons; because, in the *first* place, The action was perfectly competent in the names of the other pursuers, who confessedly had granted authority to raise it; *secondly*, There was no additional expense incurred in consequence of his name being inserted as pursuer; and, *thirdly*, The present pursuers have actually obtained a judgment, not only against the other pursuers of that action, but also against James Cowan junior, for these expenses.

It will also be kept in view, that the decree for expenses against the other pursuers on the record is final, and was allowed to go out in name of Alexander Hutchison, the defender's agent in the case.

In these circumstances, the present action ought to be dismissed, with expenses.

The case of Farnie against Mowbray and Howden came before Lord Fullerton. The record was closed upon summons and defences, and was reported to the Court by his Lordship.

Both cases were again enrolled in the First Division rolls, and 4 Mar. 1886.
remitted to Lord Corehouse, to be proceeded in.

Lord Corehouse reported the cause to the Court, with the following note :

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‘ This case is reported, because, if the decision shall turn on
‘ the abstract point of law raised in the pleadings, it will be of
‘ wider application, and greater importance, as a precedent, than any
‘ which has lately occurred.

‘ It has been settled law for two centuries at least, that no party
‘ in this Court is entitled to require production of the mandate or
‘ authority, in virtue of which the procurator of his opponent ap-
‘ pears, that person being within the kingdom of Scotland. Spottis-
‘ woode states the practice as early as 1627, and he is confirmed by
‘ Stair, Bankton and Erskine. But if Cowan’s plea is sustained,
‘ every party, with that exception, is exposed to the danger of hav-
‘ ing the whole procedure in a cause, at any stage of it, and even
‘ after sentence, annulled by the bare disclamation of his opponent,
‘ and of losing all the expense he has incurred in the suit, with no
‘ means of redress, but an action of relief against, perhaps, an insol-
‘ vent attorney. To impose the burden of proving employment on
‘ him, as in a question with his opponent, would, in most cases, be
‘ to require an impossibility ; for, if fraud is intended, no trace of
‘ employment will of course be suffered to exist.

‘ As the production of a mandate cannot be required by the oppo-
‘ site party, it seems in equity to follow, that the party for whom
‘ the procurator professes to act, should, in the first instance, at least,
‘ be bound by his actings. It is against him that the injury, in the
‘ first instance, is committed, and therefore he should be first called
‘ upon to seek redress. He has also the best means of obtaining it,
‘ knowing exactly what passed between himself and the procurator,
‘ or if any thing passed between them at all. By this course the
‘ danger of collusion, between the party who disclaims, and the
‘ attorney disclaimed, is prevented, or greatly lessened, which, were
‘ it otherwise, might easily be practised with scarce the possibility of
‘ detection. In like manner, if a fraud is contemplated against the
‘ attorney, or an advantage taken of a bona fide mistake on his part,
‘ the attorney has better means of defending himself against that
‘ attempt.

‘ It is true that there is a danger on the opposite side to be guard-
‘ ed against. A conspiracy may, possibly, be formed to bring for-
‘ ward an unauthorised attorney to sue or defend, that a judgment
‘ in foro contentioso may be obtained against a party ignorant of
‘ the proceedings. With regard to this, it may be remarked, that
‘ there is much less chance of its occurrence, because it would infer

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‘ a heinous crime, exposing all concerned to the highest arbitrary
 ‘ punishment known in the law. But if it did occur, undoubtedly
 ‘ an action of reduction would lie to set aside the proceedings, and
 ‘ to recover damages and expenses. In that action, however, the
 ‘ party injured would be the pursuer, and bound in that character to
 ‘ establish his case, not by a simple disclamation, but by compe-
 ‘ tent evidence. Further, it may be conceded, that if the party,
 ‘ bound in the first instance by the actings of the unauthorised
 ‘ procurator should fail to obtain redress from the funds of that per-
 ‘ son, on account of his insolvency, it may be incumbent on the
 ‘ opposite party, quoad ultra and subsidarie, to relieve him. It is
 ‘ understood that this is the practice in the courts of England, as
 ‘ will be immediately pointed out.

‘ The pursuer, Cowan, seems to be sensible that these conse-
 ‘ quences follow from the rule, that the procurator is not bound to
 ‘ produce his mandate; for he says, that it applies only to the ad-
 ‘ vocate, in contradistinction to the agent, and that the agent may
 ‘ be called upon, at any time, to shew by what authority he acts.
 ‘ That is plainly a mistake; for the rule obtained before the sepa-
 ‘ rate profession of an agent existed, and while the advocate alone,
 ‘ or with the assistance of his servant, for whom he was responsible,
 ‘ conducted every part of the cause. And certainly no case can be
 ‘ quoted where the Court was required to sist process until a party
 ‘ had time to inquire and examine whether the agent of his oppo-
 ‘ nent had authority or not, or an order demanded that the agent,
 ‘ in contradistinction to the advocate, should produce his mandate.

‘ The view of the law now taken seems fully confirmed by the
 ‘ cases which have been cited. In *Ballantine v. Edgar*, it is ex-
 ‘ pressly laid down in a very strong case, that if an advocate ap-
 ‘ pears without warrant, it will not weaken the decree, though it
 ‘ subjects him in damages. It is said that the party disclaiming
 ‘ there was a defender, who had been cited, and who is therefore
 ‘ distinguishable from a pursuer disclaiming, as the latter may have
 ‘ had no notice whatever of the proceedings. The answer appears
 ‘ sufficient: 1st, That the law is stated by the Court, in the most
 ‘ comprehensive terms, as equally applicable to pursuer and de-
 ‘ fender; and, 2dly, That there is no good reason for the distinc-
 ‘ tion, because a defender, though cited, may have intended that
 ‘ decree should go in absence, by which no expense is incurred,
 ‘ and against which he has the privilege of being reponed; where-
 ‘ as, by the unauthorised appearance of a procurator, it may become
 ‘ a decree in foro, and he may be saddled with enormous costs. It
 ‘ is also said, that the party disclaiming in that instance restricted
 ‘ his proof to the oath of his advocate; but what proof can be more

‘ complete, if both the mandant and the mandatary admit the non-employment, the latter doing so upon oath, and the other party offering no proof or presumption that there was a mandate ?

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‘ More than a century afterwards the same doctrine was laid down as explicitly, and with still greater authority, in *Hamilton v. Marshall*. Lord Meadowbank holds the point to have been settled from the time the College of Justice was opened, and Lord Robertson points out the evils which would necessarily follow on any other principle. That a reduction might still be competent was admitted on all sides, and the nature of the thing requires that it should be so. But the reduction, while it lays the onus probandi on the pursuer, does not stop the decree or other proceedings from operating, in the meantime, as between the parties in the cause ; nor will it relieve the pursuer of the reduction from discussing, in the first instance, the agent who has culpably, or from negligence, proceeded without a sufficient warrant. Far less does it lead to the inference, that a party, by a simple disclamation, which is the case here, can at once slip out of the cause, and leave the question to be tried between his opponent and his own ostensible agent, and that entirely at the expense of his opponent, necessarily ignorant of all the circumstances of the cause.

‘ The case of *Wallace* is no authority on the other side. It is true that a bill of suspension was passed, but the letters were afterwards found orderly proceeded. There might have been reason to suspect that the charger fraudulently sisted the trustee, that he might obtain expenses from the creditors, the original suspender being bankrupt ; and it is necessary to observe, that any such fraud or collusion would at once annul the proceedings, and subject the party in expenses. The unreported case of *Anderson* occurred in similar circumstances. It seems, from the account given, to have gone no farther than the passing of a bill of suspension, as there might be reason to suspect that the charger fraudulently sisted the trustee merely for the sake of getting expenses from the sequestrated estate.

‘ It is thought, therefore, that all the authorities and decisions are in favour of the rule in question, that the mischievous consequences, represented as flowing from it, are imaginary, the remedy of reduction being always competent, or even suspension, if there is reason to suspect collusion between the agent and the party against whom he ostensibly acts ; and it may be also a subsidiary claim, at the instance of the party injured against his opponent, the agent not being responsible. On the other hand, if the rule were not observed, the magnitude of the evil, alluded to by Lord Robertson in *Marshall’s* case, would be immense. To take but

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‘ one instance : Suspensions are daily presented in mala fide, and
‘ for no purpose but delay. But that delay might be obtained with
‘ impunity, after years of procedure both in the Bill-Chamber
‘ and in the Court, by a mere disavowal of the proceedings on the
‘ part of the suspender, while the charger was left to seek his relief
‘ from an insolvent agent, selected, perhaps, solely on the ground
‘ of his insolvency, a person who looked forward to a cessio, in
‘ which his unwarranted appearance would be attributed to inno-
‘ cent mistake or misapprehension, in a story concerted between
‘ himself and the suspender. On the other hand, when this sus-
‘ pender and this agent are left to contest the matter between them-
‘ selves, the real state of the facts must be disclosed, and the danger
‘ of collusion prevented.

‘ Lord Meadowbank, in the case of Marshall, referred to the law
‘ of England as having adopted the same rule, and the observation
‘ appears to be correct. It is stated, (1. *Keble*, 89,) that ‘ if an
‘ attorney, without warrant, appears, this is a good appearance as
‘ to the Court, and the attorney is only liable to an action.’ Chief-
‘ Justice Holt is reported to have said, (1. *Salkeld*, 86,) ‘ The course
‘ of this Court is, where an attorney takes on him to appear, the
‘ Court looks no farther, but proceeds as if the attorney had suffi-
‘ cient authority, and leaves the party to his action against him if
‘ it turns out otherwise.’ And again, (1. *Salkeld*, 88,) ‘ An attor-
‘ ney appeared and judgment was entered against his client, and
‘ he had no warrant of attorney ; and now the question was, if the
‘ Court should set aside the judgment ? Et per cur. If the at-
‘ torney be able and responsible, we will not set aside the judg-
‘ ment. The reason is, because the judgment is regular, and the
‘ plaintiff ought not to suffer : for there is no fault in him ; but if
‘ the attorney be not responsible or suspicious, we will set aside
‘ the judgment ; for otherwise the defendant has no remedy, and
‘ any one may be undone by that means.’

‘ The Roman law, and the Commentary of Donellus upon it, have
‘ been cited certainly to little purpose, that very author distinctly
‘ explaining, that the procurator for the defender may be required,
‘ in initio litis, either to produce his mandate, or to find caution judi-
‘ catum solvi ; while the procurator for the pursuer is, in most cases,
‘ required absolutely to produce his mandate, and in every other
‘ case to find caution that his actings shall be ratified by the party.
‘ If the French law at present is accurately stated by Cowan, and
‘ if there is no security either from the register, which every pro-
‘ curator is required to keep of his actings, and to make patent
‘ when demanded, or in some other way, it is thought that the rule,
‘ that the procurator is bound to produce no authority to act, while

‘ at the same time all his actings may be annulled by a simple dis- 4 Mar. 1836.
 ‘ avowal, is not founded on reason or expediency.

‘ But it rather appears to the Lord Ordinary that this case may Cowan v.
 ‘ be decided on the special circumstances attending it, without going Farnie and
 ‘ into the general question at all. The action now before the Court, Others, &c.
 ‘ at the instance of Farnie against the agents, is closed upon the Note,
 ‘ summons and defences. It is stated for the defenders, and not de-
 ‘ nied by the pursuer, that Cowan, the father, was originally the pro-
 ‘ prietor of the subjects to which the action related; that he after-
 ‘ wards disposed the fee to his children, including James Cowan,
 ‘ reserving his own liferent; that Cowan senior, and certain of his
 ‘ children, personally instructed the agents to raise this action, and
 ‘ stated to them that James concurred; and indeed without his con-
 ‘ currence the action could not have been effectually carried on. It
 ‘ is farther stated by the defenders, and not denied in this record,
 ‘ that the titles of the subjects were put into their hands by the other
 ‘ joint proprietors, that is, by the other brothers and sisters, exclu-
 ‘ sive of James Cowan. As in a question, therefore, between the
 ‘ agents and Farnie, the agents appear to have instructed their em-
 ‘ ployment; because, even in an inferior court, and a fortiori in this,
 ‘ the production of titles is a sufficient mandate, which does not admit
 ‘ of being redargued, more especially when there is no allegation
 ‘ whatever on the record that they were improperly obtained. And
 ‘ this is the express decision in *King v. Seton of Barns*, Jan. 10.
 ‘ 1674, where ‘ Barns alleged the decret was truly in absence, see-
 ‘ ing the procurator compearing had no mandate. *Answered.* His
 ‘ producing writs relative to the cause presumes a mandate. *Replied.*
 ‘ These writs were in his hands upon another account. The Lords
 ‘ found it sufficiently instructed that he was his ordinary procura-
 ‘ tor, and had a mandate in this cause.’

‘ It is true, in the original cause between Cowan and Farnie,
 ‘ Cowan alleges that he left the title-deeds with his father; that his
 ‘ father put them into the hands of Burns, a writer, with a view to
 ‘ raise money, and that it was from Burns that the agents obtained
 ‘ them. But it may be remarked, 1st, That it was his own fault that
 ‘ he entrusted them to his father as custodier; and if the custodier
 ‘ exceeded his powers, it is he who must be responsible to third par-
 ‘ ties; and, 2dly, It is not enough to allege that the writs came into
 ‘ the agent’s hands for another purpose, for the possession of writs,
 ‘ without proof of the giving,’ as Lord Stair observes, is a sufficient
 ‘ mandate. But what appears conclusive upon the subject is, that
 ‘ after James Cowan was explicitly informed, on the 25th of July
 ‘ 1831, that the action was in dependence, at the instance of himself
 ‘ and his brothers and sisters, and that decree absolutor had been

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Note.

‘ obtained against some of them, he did not disclaim the action, nor
 ‘ make any inquiries concerning it for a long period; nor was the dis-
 ‘ claimer lodged till the 8th of March afterwards, being a period of
 ‘ nearly eight months. During all that time he took no steps to
 ‘ have his title-deeds, the authority of the procedure, withdrawn from
 ‘ process. Without inferring, what is by no means improbable, that
 ‘ he was waiting to take benefit by the suit if it proved successful,
 ‘ and to disclaim it if otherwise, there was at least such a culpable
 ‘ negligence as to entitle Farnie to hold by his decree, leaving
 ‘ Cowan to obtain relief from the agents, who, in this case, are ad-
 ‘ mitted to be perfectly responsible. Whether, even in a question
 ‘ between Cowan and them, the same facts would not furnish a suffi-
 ‘ cient defence, may well be doubted; but that question, in the shape
 ‘ into which the case is now put, is not properly before the Court.’

Opinion of
Court.

When the case first came to be advised, after it had been before Lord Corehouse, the *Dean of Faculty*, for Cowan junior, stated, that the Lord Ordinary had misapprehended certain facts very material in the case; that he had wrongly assumed that Cowan was cognizant of the case all along, and waiting to take advantage of the judgment, if it should turn out favourably, there having been, in point of fact, no procedure in the action at all for two years previous to the lodging of the disclaimer; that, in like manner, his Lordship had misapprehended the fact as to the title-deeds, which were not placed by any act of Cowan junior's, or by the act of any party for whom he was responsible, into the hands of Messrs Mowbray and Howden, but, in fact, got by them from Burns, the heritable creditor, upon their receipt. So as to the disclaimer which was said to have been late. But Hutchison's letter, which was the first communication as to the action, was answered within a few days; and Cowan junior knew so little of the matter, that he mistook Hutchison for the agent for the family instead of the opposite agent; that therefore, whatever might be the law in the case supposed by Lord Corehouse, the present case did not come under it; that the letters and defences of Messrs Mowbray and Howden proved perfectly well that they had had no authority; that the Court had now all the parties before them; and as it was plain that these gentlemen had occasioned the expense, they should suffer.

Rutherford, for Farnie and others, concurred, and complained of the want of all communication on the part of Messrs Mowbray and Howden as to the true state of matters.

Monteith, for Mowbray and Howden, argued, that the authorities adverted to in the note of Lord Corehouse clearly proved that the possession of the title-deeds constituted a mandate; and that the

avement in the defences, as to the deeds having been put into the hands of Messrs Mowbray and Howden by some of the family, was not contradicted.

Lord Gillies.—Look to your receipt to Burns for the titles. All the material titles you got from him.

Monteith.—But there are a great many titles, and titles of essential importance in the case, which came direct to Mowbray and Howden; and supposing we prove that we got Cowan senior's authority to get the titles out of Burns's hands, we are in the same situation as if he had given them.

Lord President.—Cowan senior will not do. Cowan junior is not said to have had any thing to do with it.

Lord Gillies.—I do not quarrel the general law laid down in the able note of Lord Corehouse, but the law is inapplicable here. Lord Corehouse presumes that Cowan junior was waiting for the result; but the fact is different, and so is the presumption arising from the possession of the title. No doubt that Mowbray and Howden were rash in going on without any authority. A distinction applies in this case, which has not been adverted to by the Lord Ordinary or the parties, and that is, that where appearance has been made by counsel for a party, it may bind him as to a judgment on the merits, but it by no means follows that he is to pay expenses.

Lord Mackenzie.—I am influenced by the reasoning in the note, but think the explanations given sufficient to remove the presumption against the party. In my opinion, the presumption in favour of the mandate, arising from the appearance of counsel, is not indefeasible; and it appears that there truly was no mandate here. As to the distinction as to expenses, I see no ground for it. Expenses must follow the fate of the cause.

Lord Gillies.—The Court has an absolute jurisdiction as to expenses. They may, in any case, decide that a party should not get expenses; and surely it is a very good reason for withholding them, that the party against whom they are sought to be awarded had nothing to do with the case.

Lord Balgray.—I think that in this case there has been a disclaimer tempestivè made, and I concur.

Monteith.—But your Lordships are not adverting to the offer on the part of my clients to prove the delivery of the title-deeds, which give rise to a constructive mandate, according to the authorities quoted by Lord Corehouse. Unless your Lordships are prepared to negative these authorities, you cannot decide against me in the face of the offer to prove.

Lord President.—But you do not offer to prove enough.

Lord Gillies.—And the proof is contrary to the written evidence arising from the receipt.

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Court.

But after some discussion, Mowbray and Howden were appointed to give in a minute, 'stating specially the title-deeds which they allege to have been put into their hands as implying a mandate, and at what time, in what manner, and by whom these deeds were so delivered.' From this minute it appeared, that Mowbray and Howden had obtained possession of the titles libelled on in the declarator, in order to produce them therein, according to the instructions of Cowan senior, from a Mr Burns, with whom Mowbray and Howden had previously deposited them, as additional security for a loan which these gentlemen had transacted with him, at the request, and for the behoof of Cowan senior and some of his sons. The receipt granted by Mowbray and Howden to Mr Burns, on obtaining the titles, contained an obligation to return them on demand, 'free from any claim of hypothec or otherwise.' It appeared also, that the various other deeds produced in the course of the process, making a regular series of titles, from 1715 downwards, were given to Mowbray and Howden by Cowan senior, in person, at the time when he instructed them to raise the process of declarator.

On the case again being advised—

Dean of Faculty.—The case of Mowbray and Howden is nowise better than before. It is plain that Mowbray and Howden got the deeds from Burns, as they were wanted by the agent for the opposite party. Cowan junior had nothing to do with the giving over of the titles.

Keay complained, that while his clients had acted from the beginning in optima fide, mala fides was imputed to them.

Lord Gillies.—No such thing. Your clients are of the highest respectability.

Dean of Faculty and Rutherford disclaimed all imputation of mala fides.

Keay.—Well, at all events, they are said to have acted unprofessionally. Now, what did they do out of the usual form? Is it to be held that no agent can conduct a case without a written mandate? Mandate is in this case made out as in ninety-nine out of a hundred cases. The authorities are clear that possession of titles is a constructive mandate. Authorities must be all overturned if it is to be held that there was no mandate here. Old Cowan gives us the titles, or authority to get them from Burns, which is the same thing. Young Cowan must be responsible for acts of the custodier of his titles. If he did not interfere he should have done so.

Lord Balgray.—Cowan senior was a liferenter by reservation. How could one of a number of fiars interfere with the right of custody? Cowan senior fell to have the custody. It is perfectly plain

that Cowan junior had nothing to do with the action, and that Mowbray and Howden, whose error it was, must suffer for the effect of their rashness. I impute no blame to them: all that can be said is that they were too rash.

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The other *Judges concurred*.

Opinion of
Court.

Keay.—Then your Lordships are of opinion that James Cowan junior is to be assolizied?

Lord Gillies.—We are.

Keay.—Then there comes an ulterior question. If Cowan junior was not truly liable, then Farnie and others should not have contested the point of his liability. The litigation which they went into with him, on the question of constructive mandate, should not have been gone into. It is now found, that their proper course was by action against Mowbray and Howden. They failed to take this course, and they thereby occasioned great expense. Can they saddle Mowbray and Howden with it?

Rutherford.—We could not help ourselves. We corresponded immediately, on the disclaimer, with Mowbray and Howden. They gave us no sort of information—would take no step—would make no admission, and failed to pay. Now, if we had let Cowan junior off, how could we be sure that they would not prove, in a question with us, that Cowan junior did give them a mandate? If they had found a mandate, in what a predicament should we have been? The whole is imputable to the fault of Mowbray and Howden, and they must suffer for it. They would not speak when we wrote to them—they would say nothing when we called them into Court.

Lord President.—It seems to me quite clear, that Mowbray and Howden must pay the whole expenses.

The other *Judges concurring*, the Court pronounced the following judgment: ‘The Lords having resumed consideration of the conjoined actions, and of the reclaiming note for James Cowan junior, complaining of an interlocutor of Lord Corehouse, of date 15th February 1833, and heard parties by their counsel, recall the interlocutor reclaimed against, in so far as it decerns against the said James Cowan junior for the sum of L.79 : 0 : 5 of expenses, and for the dues of extract: Find, that the said James Cowan junior is not liable in any part of the expense of the action at the instance of James Cowan senior and others, disclaimed by him, and quoad ultra adhere to the said interlocutor: Find John Mowbray and Andrew Howden, jointly and severally, liable to James Farnie and others, for payment of the said sum of L.79 : 0 : 5 of expenses, with the interest thereof from and after the said 15th February 1833, the date of the foresaid interlocutor: Find them also, jointly and severally, liable to the said James

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‘ Farnie and others, for the expenses of process in the original ac-
‘ tion, and in the conjoined actions, from and after the date of the
‘ said interlocutor, and appoint an account thereof to be given in :
‘ Find them also liable, jointly and severally, to the said James
‘ Cowan junior, in the expense by him incurred in the said pro-
‘ cesses, from and after the date of his disclamation of the foresaid
‘ action, and in the expense of the said disclamation, and appoint
‘ an account thereof to be given in ; reserving to the said John
‘ Mowbray and Andrew Howden any claim of relief competent to
‘ them against James Cowan senior and others, pursuers of the ori-
‘ ginal action, and to them their defences, as accords ; and remit the
‘ said several accounts of expenses, found due as aforesaid, to the
‘ Auditor of Court, to tax the same, and to report.’

Lord Ordinary, Corehouse.

For James Cowan jun. *Dean of Fac. (Hope.) Patton.*

George Ritchie, W. S. Agent.

For Farnie and Others, *Rutherford, Shaw.*

Alex. Hutchison, S. S. C. Agent.

For Mowbray and Howden, *Keay, Mon-*

teith. Party, Agents.

S. Clerk.

C. R.

SECOND DIVISION.

No. CXI.

5th March 1836.

HIS MAJESTY'S ADVOCATE, IN NAME OF HIS MAJESTY, AND
IN BEHALF OF THE COMMISSIONERS OF WOODS AND FORESTS,
against
CAMPBELL'S TRUSTEES.

PROCESS.—(SUMMONS, CALLING OF.)—*A summons was raised in name of the Lord Advocate, in behalf of the Commissioners of Woods and Forests: before the summons was called in Court, the act 5. and 6. Will. IV. c. 58, was passed, vesting in the Lords of the Treasury the powers formerly competent to the Commissioners of Woods and Forests, as pursuers of the action: the summons having been called in name of the original pursuers, and the Lords of the Treasury, and the Lord Advocate, as their mandatary, having thereafter craved by a minute to be sisted as pursuers in the said action,—found that this could not competently be done, and action dismissed.*

tive.

His Majesty's Advocate, in behalf of his Majesty and of the Commissioners of Woods and Forests, founding on the statute, 3. and 4.

William the Fourth, cap. 69, raised an action against the defenders, trustees and executors of the late James Mure Campbell, for setting aside a last will and testament executed by Mr Campbell, who left a valuable succession, on the head of deathbed, and as in prejudice of his Majesty's right of ultimus hæres.

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The defences were, 1st, That the statute founded on gave no authority to raise an action in name and behalf of his Majesty, nor of the Commissioners of Woods and Forests, to interfere with the interests of the Crown as ultimus hæres, but merely empowered the Commissioners to sue and be sued in name of the Lord Advocate; and, 2^{dly}, That the action having been thus incompetently raised, had not been called until after the passing of the statute, 5. and 6. William IV. c. 58, by which, if the Commissioners ever had the power, they had been divested; for by section 1. of that act it is declared, 'that all powers and authorities for the ascertaining and recovering, and for the management, superintendence and care of all rights and interests of his Majesty, his heirs and successors, in right of his Crown in Scotland, as ultimus hæres, or in cases of bastardy, or by reason of any forfeiture whatsoever, shall be, and are hereby declared to be vested in the Lord High Treasurer, or the Commissioners of his Majesty's Treasury, or any three or more of them for the time being, in the same manner, and to the same extent, as such powers and authorities were vested in the Lord High Treasurer, or the Commissioners of the Treasury for the time being, prior to the passing of any of the said recited acts, any thing in the said acts, or either of them, to the contrary notwithstanding.'

Narrative.

After the defences were lodged, a minute was put in for the Lords of the Treasury, and the Lord Advocate, as their mandatary, stating, 'That since the summons was executed, the act 5. and 6. William IV. cap. 58, had been passed, whereby it is declared and enacted, that the management of the rights and interests of his Majesty, as ultimus hæres, or in cases of bastardy, are vested in the Commissioners of his Majesty's Treasury: That it therefore became now necessary to sist the said Commissioners of the Treasury in the present action; and he therefore craved the Lord Ordinary to sist the said Lords Commissioners of his Majesty's Treasury, and the Right Honourable the Lord Advocate, as their mandatary, pursuers in the aforesaid process of reduction, in lieu of the Right Honourable John Archibald Murray, his Majesty's Advocate, for and in name of the Commissioners of his Majesty's Woods, Forests, Land Revenues, Works and Buildings.'

The Lord Ordinary pronounced the following interlocutor and note, in regard to the title to pursue:

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Lord Ordinary's Interlocutor.

' The Lord Ordinary having considered the summons and defences, and the minute tendered for the Commissioners of his Majesty's Treasury, and for the Lord Advocate, as mandatar for them, and heard parties' procurators thereon, allows the said minute to be received; holds the said Commissioners and their said mandatar sisted as pursuers; finds, that they are entitled to carry on the action; repels the preliminary defences; and in respect that the defenders have given notice of their intention to bring this judgment under review, finds the defenders liable in expenses.'

Note.

Note.—' The Lord Ordinary is of opinion, that when the action was originally raised, the title was in the Commissioners of Woods and Forests; and that they being superseded by a subsequent statute, which gave the title to the Commissioners of the Treasury, the correct course of proceeding was to call the summons in the names of the original pursuers, and then to substitute the one set of public officers for the other, by a minute sisting them, which is what was actually done.'

The defenders *reclaimed*.

Opinion of
Court.

Lord Glenlee was of opinion that the interlocutor was wrong. By the act passed subsequently to the raising of the summons, the title to pursue had been changed and put in the persons of other parties: the instance had therefore fallen. It was impossible to proceed by allowing the Lords of the Treasury to sist themselves as pursuers in an action brought into Court by a party whose title had by that time ceased to exist, if it ever did exist. You might as well raise a summons in July in name of a man, and if he should die before November, then call it in his son's name.

Lord Medwyn.—I do not think that the Commissioners of Woods and Forests had right originally to raise this action. They have authority to protect the lands and revenues of the Crown in Scotland, but not to set aside settlements executed in the situation of this now sought to be reduced. When a summons is raised in name of a party who deceases before it is called in Court, it is not a depending action. It is not so until it is called. A son cannot call an action raised in name of his father: he must bring a new action in his own name. If the parties here ever had power to bring this action, they have been divested, and are in *pari casu*. When a defender dies, the case is different: the pursuer goes to the King's signet, and gets a warrant to bring his successor into Court. This summons ought to be dismissed as incompetent.

Lord Meadowbank did not think the Commissioners of Woods and Forests ever had any title; but, at all events, if they had, they had been divested.

The Lord Justice-Clerk.—I go on the ground that this process was deceased and gone before the Lords of the Treasury craved to be sisted as pursuers, and hold, as the pursuers were a public board, that expenses must follow.

The Lords ‘recall the interlocutor of the Lord Ordinary; find, ‘that the proceedings under the summons here in question have been ‘incompetent; dismiss the same accordingly; find expenses due ‘to the defenders.’

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Judgment.

Lord Ordinary, Cockburn. Act. Solicitor-General, (Cunninghame,) A. Murray jun.
Rod. Mackenzie, W. S. Agent. Alt. Rutherford, More. W. & D. Allister,
W. S. Agents. R. Clerk.

R.

SECOND DIVISION.

No. CXII.

5th March 1836.

ROBERT SMITH, WITH CONSENT OF A. P. HENDERSON,
against
JOHN LITTLE.

INHIBITION.—PROCESS.—(EXPENSES.)—*A party having raised an inhibition to secure payment of the expenses of a process; and having obtained a decree for expenses, which was allowed to be extracted in name of his agent; and having afterwards raised a process of reduction of a deed ex capite inhibitionis in his own name, with the concurrence of his agent, ‘for all interest he had in the premises,’—found that he was entitled to follow out the inhibition in that manner.*

IN 1832, James Smith, as indorsee, or in right of George Muir, raised an action before the Magistrates of Glasgow, against the pursuer, Robert Smith, Muir also appearing as a party pursuer. The interlocutors of the Magistrates in that process were brought under review by advocacy; and upon the 24th June 1834, the Lord Ordinary remitted the case to the Magistrates, with instructions to recall their interlocutors, and found Muir liable in expenses. Upon this decree the present pursuer raised an inhibition, proceeding on the narrative, ‘that the said George Muir, knowing that the pursuer ‘would obtain final decree against him in the said action for payment ‘of the expenses incurred therein, intended to sell, alienate and put ‘away his lands, heritages and others, to the prejudice of the pur-

Narrative.

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Narrative.

'suer.' Thereafter, on the 21st November 1834, the amount of expenses having been taxed, an interlocutor was pronounced, approving of the Auditor's report modifying the sum to L.33 : 16 : 2, and ordaining Muir to make payment to Alexander Pirie Henderson, the pursuer's agent, of the amount, with the dues of extract. The action having afterwards proceeded before the Magistrates, the pursuer Robert Smith was assoilzied, and found entitled to L.29 : 11 : 11 of expenses.

Subsequently to the pursuer's inhibition, Muir granted an heritable bond over certain subjects belonging to him in Rutherglen, in favour of the present defender; for setting aside which, *ex capite inhibitionis*, the present action was instituted by the pursuer Smith, with consent of Henderson, his agent, 'for all interest he had in 'the premises.' In defence it was *inter alia* pleaded, 1st, That as the inhibition libelled on was diligence used at the instance of the pursuer Smith, exclusively on the narrative of the Lord Ordinary's interlocutor, finding expenses due to Smith, whereas the decree libelled on was a decree at the instance of Henderson, a different party, the diligence had entirely fallen, not having been in any manner transferred to Henderson, and being extinguished quoad the pursuer Smith by default of any decree in his favour. 2dly, That supposing the benefit of the inhibition to have been transferred to Henderson, and the decree to have completed and ascertained the amount of the security afforded by the diligence, this action was not so libelled as to permit reduction of the defender's security, in respect that on this assumption the diligence and decree ought to have been libelled on as belonging to Henderson, and the conclusions of the action laid at his instance, and not at the instance of Smith, with his consent only.

The defender founded on the following authorities: *Fraser v. Keith*, 16th Dec. 1668, *Dict.* 1953; *Reids and Campbell v. Napier*, 3d July 1651, *Mor.* 6993; *Stewart v. Earl of Galloway*, 16th Feb. 1770, *Dict.* 7004.

The Lord Ordinary repelled these defences, adding, in a note: 'The question raised in the first defence is, whether a party, who has inhibited in security of his expenses, be prevented from following out the inhibition by an action of reduction in his own name, because the expenses were decerned for in name of his agent. This point is not known to have been decided; for the cases referred to by the defender certainly do not touch it. The Lord Ordinary has repelled the plea, because he holds, that though decree be allowed to go out in an agent's name, and the debtor be ordained to pay to him, the expenses as between the debtor and the party are still due to the party, who continues liable for them to

‘ the agent, though payment to the latter be payment to the former. 5 Mar. 1836.
 ‘ This disposes of the two *first* defences.’

The defender having reclaimed, the *Dean of Faculty* founded on *Horsburgh v. Davidson*, (*M.* 6985,) and pleaded, that the diligence was not assigned to Henderson.

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Lord Glenlee.—The object of the inhibition was to prevent injury to any decree he might obtain. Here the party obtained a decree, which was allowed to be extracted in the name of his agent; but still the decree was in his own favour, although payment was to be made to his agent for him. If the pursuer had brought his action alone, without the concurrence of his agent, there might have been an objection, for the defender might have said he was only bound to pay to the agent; but this is obviated by the concurrence.

Opinion of
Court.

The other Judges being of the same opinion the *Court adhered to* the interlocutor, so far as it repelled the first and second pleas in defence, and remitted quoad ultra to the Lord Ordinary.

Judgment.

Lord Ordinary, *Cockburn*. Act. *M'Neill, Shaw*. Alt. *Dean of Fac. (Hope)*
Pyper. John Cullen, W. S. and John Nairn, S.S.C. Agents. T. Clerk.
 R.

SECOND DIVISION.

No. CXIII.

8th March 1836.

DANIEL FISHER, S.S.C.

against

JOHN FRANCIS URE, AND WALTER M'GIBBON, HIS
 TUTOR.

PRESCRIPTION, (TRIENNIAL.)—PROCESS.—PROOF.—*In an action for payment of a writer's accounts, against the representative of his employer, a provincial writer, circumstances in which it was found, that the pursuer was entitled to found on other accounts than those libelled on, in order to elide the plea of triennial prescription.*

SINCE the year 1814, the late Mr Alexander Ure, writer in Glasgow, usually employed the pursuer to conduct the law business of himself and his clients in the Courts of Session and Admiralty, till his death in November 1830. Recently before that event the pursuer had rendered to Ure an account-current, brought down to

Narrative.

8 Mar. 1836.



Fisher v. Ure
and M'Gib-
bon.

the 31st July 1830, which included the various accounts of the several clients of Ure. The pursuer had also, on 25th October of the same year, written to Ure for payment. After Ure's death, some correspondence took place relative to the accounts between the pursuer and the parties who succeeded to the different parts of Ure's business. In the meantime the pursuer, unwilling to press Ure's representatives for immediate payment of the balance due, delayed raising any summons, and endeavoured, by direct correspondence with the parties for whom business had been done in Ure's employment, to recover payment; and in this way part of the balance due was liquidated. The pursuer, being unable to obtain a final settlement, raised the present action against Ure's representatives, in June 1833, founding upon the old accounts, the latest of which is in 1826, and not on the account-current as it stood at Ure's death, and concluding against them for the balance arising on the accounts, and including in the summons two other parties for whom business had been done, and concluding against them jointly and severally for their proportions.

The pursuer recovered payment from third parties of the accounts which were current towards the close of Mr Ure's life, and in which business was going on during the last three years; but he did not recover some of the older ones, so that the present action concluded only for payment of those particular items of the account-current which had not been paid, taking no notice of those which had.

In defence, Ure's representatives pleaded prescription.

The pursuer pleaded, that when an Edinburgh agent has performed business in the Supreme Courts for various parties, on the employment of an agent in the country, and the account is current to nearly the death of the country agent, the defence of the triennial prescription is not rendered competent to the representatives of that agent, by the fact that particular parties for whom the business was done have paid their accounts to the Edinburgh agent, although thereby the claim may be extinguished against the country agent for the articles of business performed during the three years immediately preceding his death.

Lord Ordinary's Interlocutor.

' The Lord Ordinary having considered the closed record, finds
' it instructed, by the documents produced, that recently before
' the death of the late Alexander Ure, which happened on the
' 23d of November 1830, an account-current was rendered to
' him by the pursuer, for business done upon his employment, consisting of various branches, according to particular accounts referred to and rendered: and that by a letter of the said pursuer, so late as the 25th October 1830, recovered from the re-

'positories of the said Alexander Ure, it is established that, of that
 'date, he had demanded payment or settlement of the balance of the
 'account-current so rendered: Finds, that the latest articles in the
 'said account-current, which was brought down to the 31st July
 '1830, being in the years 1829 and 1830, no prescription had run
 'thereon at the death of the said Alexander Ure: Finds it esta-
 'blished by the written evidence in process, and not denied by the
 'defender, that, posterior to the death of the said Alexander Ure,
 'certain of the particular accounts which constituted the later ar-
 'ticles were settled with the pursuer, by payments made by third
 'parties, who were separately liable for them; but finds, that such
 'payments could operate no change on the liability of Ure's re-
 'presentatives for payment of the balance of the account-current
 'as it stood at the death of Alexander Ure, except as entitling
 'them to deduction of the payments so made, or of the amount of
 'the accounts thus settled, from the whole claim under the said ac-
 'count-current: Finds it not averred by the defender, John Francis
 'Ure, and his tutor ad litem, that the balance of the said account-
 'current, or the balance of the accounts as now sued for, has been
 'paid since the death of the said Alexander Ure, but on the con-
 'trary instructed by the writings produced, that no settlement
 'thereof has been made by them: Therefore finds the constitution
 'and subsistence of the debt, recently before the death of Alexander
 'Ure, sufficiently instructed: And, in respect that there is no
 'avermment of payment since his death, finds, that the plea of trien-
 'nial prescription is elided in the case of the said defender, John
 'Francis Ure, and repels the same accordingly: But, before fur-
 'ther answer, remits the account sued on to the Auditor to be taxed:
 'Sustains the plea of prescription as maintained by the defender,
 'Dr Malcolm M'Lean, in respect that he does expressly aver that
 'he paid the debt to a party entitled to receive it; but allows the
 'pursuer, if so advised, to give in a minute of reference to the
 'oath of the said defender: And, in respect of the doubtful nature
 'of the case, finds no expenses due to the pursuer, but reserves
 'the question of expenses in the case of Dr M'Lean.'

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Note.—'This case is rendered somewhat more difficult than it
 'would otherwise be by the form of the summons; for the pur-
 'suer, instead of libelling his summons on the *account-current* as it
 'stood at the death of Mr Ure, giving credit for the payments
 'made by the Steam-Boat Company since that time, has struck
 'these articles out of the account altogether, and brought his ac-
 'tion only upon the old accounts, the latest of which is in 1826.
 'But, though this gives a formal probability to the plea of triennial
 'prescription, the Lord Ordinary conceives that, when that plea is

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‘ raised, it is not incompetent for the pursuer to meet it by explain-
 ‘ ing the real state of the account at Mr Ure’s death, and bringing
 ‘ out the substance of the question between the parties. The Lord
 ‘ Ordinary thinks that this case is nice, and in one point somewhat
 ‘ delicate in the law of prescription. He will endeavour to state
 ‘ shortly the process, upon the decided cases, by which he thinks,
 ‘ on the whole, that the result in the interlocutor must be arrived
 ‘ at: 1. It is clear law, that a country agent employing an agent
 ‘ in this Court to conduct processes for other parties, is himself
 ‘ debtor to that agent for the expense incurred. The consequence
 ‘ of this must be, that when such a country agent entrusts an Edin-
 ‘ burgh agent with various litigations, the expenses of these may
 ‘ become articles of one account against him, in the same manner
 ‘ as if he were the party engaged in various law-suits. 2. By the
 ‘ case of Elder, &c. v. Hamilton or Gray, May 15. 1833, it is de-
 ‘ termined that the separate accounts of such different branches of
 ‘ law business must, in the question of triennial prescription, be
 ‘ considered as one continuous account; so that, if the last article
 ‘ is not beyond the three years, the whole account is saved from
 ‘ prescription, whatever may be the dates of the particular proceed-
 ‘ ings comprehended, at least if there be no complete break of three
 ‘ years in the course of the currency of it. 3. By the cases of
 ‘ Syme v. Douglas, Heron and Company, Jan. 15. 1789; Leslie
 ‘ v. Mollison, Nov. 15. 1808; the case of Elder, and other cases,
 ‘ it is settled that the presumption of the act 1759 is, not that the
 ‘ debt alleged to be prescribed has been paid during the currency
 ‘ of the account, but that it has been paid after the closing of the
 ‘ account. 4. By the cases of Mollison, Elder and Broughton v.
 ‘ Weston, Feb. 24. 1826, it appears to be fully ruled, that where
 ‘ such an account of furnishing or business is current and outstand-
 ‘ ing at the death of the debtor, by the last furnishing or proceed-
 ‘ ing having been either posterior to the death, or recently preced-
 ‘ ing it, there is no presumption of payment in the deceased’s life-
 ‘ time: so that, as prescription had not then run, the question with
 ‘ his representative, upon the years of prescription being allowed
 ‘ to run posterior to the death, must resolve into the question,
 ‘ whether the debt was paid *after the death*. And it appears to have
 ‘ been distinctly held, that it will not bring the case within the sta-
 ‘ tutory prescription, or exclude the inference of resting owing,
 ‘ that the heir may aver or swear that he *does not know* whether the
 ‘ debt was contracted or not, or whether it was paid by the deceased
 ‘ or not, or even, in general terms, that he believes that the de-
 ‘ ceased paid that and any other debt. The case of Mollison, in
 ‘ particular, which was decided upon a deposition of the defender,

' went fully up to these points. The Court just construed the de-
 ' position as importing that the defender could not aver payment
 ' *since the close of the account.* 5. According to the practical rule
 ' adopted in the case of *Broughton v. Weston*, there is no neces-
 ' sity for any reference to oath, if the substance of the statement
 ' on the record imports an admission by the heir that *he* has not
 ' paid the debt. Having in view these points of the law decided,
 ' let it be considered what the present case is. The defender says
 ' in words that he does not admit the employment, or that the busi-
 ' ness was done. This may be easily said. The defender is a pu-
 ' pil who can know nothing at all about the matter, and to whose
 ' oath it would be absurd to make any reference. But the employ-
 ' ment and the business may be proved otherwise; and here the
 ' pursuer has recovered out of the repositories of the deceased all
 ' the accounts from year to year regularly rendered, being *four-*
 ' *teen* in number. The last is balanced with interest down to the
 ' 31st July 1830; and the original of Mr Fisher's letter of the 25th
 ' October 1830 is also recovered. These accounts, therefore, be-
 ' ing held by the deceased, with demands of settlement coming
 ' down to within less than a month of his death, the Lord Ordinary
 ' conceives that there can be little difficulty as to the constitution
 ' of the debt in the *employment* and the *business* done. Perhaps Mr
 ' Fisher should have produced some of the letters of instructions,
 ' and some of the papers in the causes. But the rendered accounts
 ' lying in the repositories of the deceased appear to supersede the
 ' necessity of this. As the last article of the account-current so
 ' rendered, immediately before the deceased's death, appears to be
 ' on the 2d of June 1830, there certainly was no prescription at
 ' his death, in November following. The account was brought
 ' down to 31st July 1830, and the present action appears to have been
 ' raised on the 13th June 1833, on the notion that that was within
 ' the three years from the close of the account. It may be doubtful
 ' whether that will do, because, with the exception of the article
 ' of L.6 : 11 : 10, on 2d June 1830, in the abstract of the accounts,
 ' there is no article in the particular accounts later than July 1829.
 ' And it is in this point that the Lord Ordinary thinks the most ma-
 ' terial difficulty in the case lies. There would be a possibility
 ' left that the accounts might have been paid by the deceased after
 ' the date of the last article, if it were not for the other facts proved
 ' and admitted. The whole accounts were rendered after the ac-
 ' count closed, and had certainly not been settled on the 25th Oc-
 ' tober 1830. But it is farther clear, that all the accounts for the
 ' business of the Steam-Boat Companies were paid by those par-
 ' ties themselves, *long after* the death of Mr Ure. It is certain,

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‘ therefore, that *they* had not been paid before. But, as *they* had
‘ not been paid before, which constituted the latest articles of the
‘ account-current, there is no possibility of presuming that the ac-
‘ count had been paid or settled at all. The Lord Ordinary thinks,
‘ therefore, that the case is just brought to this, according to the
‘ decisions, that at the death of Mr Ure there was a subsisting debt
‘ which had suffered no prescription; and that if that debt had re-
‘ mained in the same state in which it then was, the case would
‘ have been the same in principle with those which have been cited,
‘ as well as with that of Napier v. Balfour, June 2. 1835. But
‘ there is a peculiarity. The later part of the account has been
‘ paid since by other parties; and the defender, on the authority of
‘ the case of Beck v. Learmonth and Company, Nov. 30. 1831,
‘ says, that in consequence of that payment this case must be taken
‘ on the older accounts simply, the latest article in which is in 1826.
‘ There seems to be no doubt, that if this be the legal state of the
‘ case, prescription must be sustained, and must lead to absolvitor,
‘ reference to the oath of the defender being out of the question.
‘ But the Lord Ordinary thinks that this would be a very unjust
‘ result, and that there is a great difference in principle between
‘ this case and that of Beck. In that case Beck was alive, and it
‘ was *he himself* who had paid the later account. It would there-
‘ fore have been very dangerous to refuse his plea of prescription
‘ on the old account. But how stands the present case? At Ure’s
‘ death there was one account not prescribed. The pursuer, ap-
‘ parently for the purpose of saving Ure’s family, though he made
‘ his claim on them, and received letters from Mr M’Gibbon, whom
‘ he understood to be the person acting for them, distinctly ac-
‘ knowledging the debt, made exertions to obtain payment of what-
‘ ever he could *from the clients*. He succeeded in obtaining the
‘ payments, by which his claim has been greatly reduced. But it
‘ would be a singularly hard measure of justice to say that, by ha-
‘ ving done so, he has exposed himself to a plea of prescription,
‘ which could not have been stated at Ure’s death, and could not
‘ have been stated if these payments had not been obtained. The
‘ difference in principle evidently is, that here there was no pay-
‘ ment by the *party defender* or his *ancestor*. As to *him*, the ac-
‘ count really stands as it did, except that he must have credit for
‘ the sums recovered aliunde; and that the form of the summons
‘ ought not to alter this state of the case upon the defence. No-
‘ thing was said in the debate about the defender Young.’

Defender’s
—“s.

The defender *reclaimed*. *Rutherford* and *M’Neill* pleaded—That
the pursuer was not entitled to change his ground of action, by re-

ferring to a general account-current afterwards produced. It might be that the pursuer would have had a competent action, if he had libelled on the account-current at first; but having chosen to libel on special accounts, all of which were ex facie prescribed at Ure's death, he could not now be allowed to alter his libel by referring to other accounts. In the case of a bill, it had been found incompetent to refer to other evidence as eliding a plea of prescription; and, in the present case, it was as much a change of the ground of action as in the case of a bill. In support of this, he referred to the case of *Dickie v. Gutzmer*, 27th Feb. 1828. This case was the same in principle as that of *Beck v. Learmonth*. The latest items of the account were paid, and so fell to be struck out, and could not be allowed to form items so as to constitute an account-current, and so elide prescription.

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Lord Glenlee.—Taking the summons as it stands, I do not think there is just ground for the objection. This is an action for payment of accounts, which is different from an action proceeding on a bill; and the accounts are produced in modum probationis. The pursuer is entitled to shew, that by interruptions, or other particular circumstances, prescription does not apply; but he is not bound to libel upon all these acts and circumstances. It is enough to shew that these exist. It would be extraordinary to hold that the pursuer was bound to engross all these in his libel. It may be necessary to state them in reply to the defence of prescription; and I think it is quite competent to do so. If the pursuer has shewn that prescription does not apply, the objection, in point of form, may be got the better of. The ground on which the Lord Ordinary holds that prescription does not apply, is, that there was a continued account with Ure, which contained items to a later date than prescription could be applicable to. The Lord Ordinary seems to have held the latest article to be on 2d June, but it now appears to be July. Ure was in the situation of keeping an account-current with Fisher, who has since got payment from the clients of the latest articles in that account-current. If these payments had been made during Ure's life, I think there might have been some ground for holding that this case was like that of *Beck v. Learmonth*. But here these payments were all got after Ure's death, and therefore I conceive the question as to the prescription of particular accounts to remain the same as it stood at his death. If a cautioner had been liable, and payment of part been got from him, it would be absurd to say that prescription was applicable to the balance. I am now satisfied as to these articles in the accounts in

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July, for which Ure was liable. If the latest item had been 2d June, I should have had difficulty in following the Lord Ordinary on the grounds on which he arrived at his conclusion.

Lord Justice-Clerk.—I could not follow the views of the Lord Ordinary, but I approve of the interlocutor so far that I think the plea of prescription sufficiently obviated. But the circumstances having been fully explained, I am satisfied the accounts pursued for are not prescribed.

Lord Meadowbank.—I concur entirely with Lord Glenlee.

Lord Medwyn.—I am clear that the accounts in this case are due, and I am glad the Court concur in the opinion of Lord Glenlee. I have great hesitation in differing from his Lordship; but I think the principle is carried too far. It appears to me to be going a step beyond the former cases of *Leslie v. Granger's Executors*. *Leslie's* case was a question of a writer's account. But the account in that case was current during the life of the client, and continued, and was taken up by his executor. I have great hesitation in holding, that where an account is actually paid, it can be included so as to rear up a current account. Could Mr Fisher have libelled as against Dr M'Lean? It had been found that he could not. It was clear that two articles (L.106 and L.71) of the accounts had been paid and taken away. Before these, the last article in the abstract is in July 1826. I have great hesitation, therefore, in holding that three years have not elapsed, even prior to Mr Ure's death. I am quite sure that the accounts are due; but I must observe that M'Gibbon is here no party: he could not bind the pupil, and could not acknowledge debt, even if constituted.

Rutherford.—Your Lordships then are of opinion that the Lord Ordinary has gone too far in finding the debt constituted. The case must therefore go back, with the right on my part entire to state every objection.

Judgment.

The Lords 'recall the interlocutor complained of: Find, that the
' form of the summons does not preclude the pursuer from founding
' on other accounts than those libelled on, in order to elide the plea
' of triennial prescription; and remit to the Lord Ordinary to hear
' parties further as to the actual condition of the debt, and reserve
' all questions as to expenses.'

Lord Ordinary, Moncreiff.

Act. Dean of Fac. (Hope,) Forsyth, Sandford.

Party, Agent. Alt. Rutherford, M'Neill, Paterson.

John Cullen, W. S.

Agent. F. Clerk.

R.

SECOND DIVISION.

No. CXIV.

8th March 1836.

MRS STEWART OR HERRIOT AND OTHERS, (HERRIOT'S
TRUSTEES,)

against

CAPTAIN JAMES FYFFE AND OTHERS.

TRUST.—*By a trust-settlement, two of the number of trustees were declared a quorum while two should be in life ; their number having been reduced to two—circumstances in which found, that an agent for the trust, making advances to one of these trustees, was not entitled to transact with that trustee as sole trustee, although the other resided permanently in England.*

JAMES FYFFE married Jean Stevens, daughter of the late Alex- Narrative.
ander Stevens, architect in Edinburgh, who bound himself, by his daughter's marriage-contract, to secure her in a certain provision. This obligation was implemented by her brother, the late Alexander Stevens, conveying to her certain subjects in Leith, under the express exclusion of Captain Fyffe's *jus mariti* and right of administration. Alexander Stevens, brother of Mrs Fyffe, was possessed of considerable property, heritable and moveable, which, by a trust-settlement, he conveyed in trust to his wife, (if she survived him,) his wife's brother, Mr Stout, merchant in Lancaster, his sister's husband, Captain Fyffe, and the late Mr John Rhind. By this deed, Mr Stevens gave his wife a liferent of the whole of his property, heritable and moveable, while he directed that the fee should be equally divided among his children, if he should die leaving children; whom failing, (as actually happened,) he directed the trustees, upon the death of his widow, 'to apply the free annual 'produce of my heritable and moveable estate to the aliment, main- 'tenance and support of Jean Stevens, spouse of the said James 'Fyffe, my sister, and the aliment and education of her children of 'the present or any subsequent marriage, in such way and manner 'as shall appear to my said trustees best suited to the comfort and 'advantage of her and her family; and it is farther declared, that 'after the decease of the said Jean Stevens, my sister, my said trus- 'tees shall convert my whole subjects and effects into cash, and di- 'vide the free proceeds thereof equally among the children pro- 'create, or to be procreate, of the body of the said Jean Stevens, 'of her present or any subsequent marriage, equally betwixt them, 'share and share alike; whom failing, before majority or marriage,

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& effects to my own nearest heirs or assignees whatsoever.'

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In the event of the liferent opening to Mrs Fyffe, and the fee to the children, it was declared that the defender, Captain Fyffe, ' shall have no concern with the rents and annual proceeds of my ' means and effects, heritable or moveable, in virtue of his jus mariti, courtesy of Scotland, or any other title whatsoever; and that ' the same shall neither be liable to the deeds, nor subjected to the ' diligence of the creditors of the said James Fyffe, or any future ' husband of the said Jean Stevens.' It was farther declared, in relation to the trustees therein named, that ' any two of them shall ' be a quorum, while two are in life;' and it is likewise declared that the ' trustees, and the survivor or survivors of them, shall have ' power, if they think proper, to assume any person or persons, to ' be joined with themselves in the management of the affairs committed to their care by this deed.'

Stevens died in May 1825. The trust was accepted by all the trustees. Mr Rhind, one of their number, was appointed factor; under which factory he acted till his death, in 1826. In that year, Mrs Stevens, the widow, the testator, died. The remaining trustees were Mr Stout, resident in England, and Captain Fyffe. Mrs Fyffe and her children were entitled to her brother's property, in terms of his trust-deed. In 1826, another succession opened to the family of Captain Fyffe, by the death of his eldest brother, Baron Fyffe of Vienna, who left a settlement, disposing, inter alia, ' to ' my brother, Captain James Fyffe, his wife and children, two-third ' parts of all his houses, shops and tenements lying in Union Place, ' Picardy Place, Broughton Street and Drummond Street.'

In the year 1827, Mr James John Fraser, W. S. was appointed agent by Captain Fyffe under the trusts, especially under that of Mr Stevens, and was put in possession of all the deeds, minutes, and documents connected with them. Mr Fraser continued in the management of the trust property from about May 1827 till the middle of 1830, during which time he made advances to Captain Fyffe to the amount (as alleged) of L.5000. These advances were averred by Fraser to have been made, not on the personal responsibility of Fyffe, but in reliance on the security of the subjects above mentioned, belonging to his wife and family, for whose maintenance and education the greater part of them were said to have been applied; and, in particular, with regard to Mr Stevens' trust, Fraser stated, that he considered Fyffe as the sole acting trustee during the period of his own agency. In security of the half of this sum of L.5000, Fraser, in January 1830, received from Fyffe, as sole trustee under Stevens' settlement, and without the knowledge and authority of Mr Stout, an absolute conveyance to a house in

Charlotte Square, Edinburgh, part of the trust-estate of Mr Ste- 8 Mar. 1836.
 yens. The conveyance contained an acknowledgment of the re-
 ceipt of L.2500, as the price, that being what Fraser then alleged
 to be the amount of his claims against Captain Fyffe and his family.
 Thereafter, Mrs Fyffe, on 1st May 1830, executed, in favour of
 Fraser, as if no trust had existed, a disposition in security for the
 same sum of L.2500, over the same house in Charlotte Square, as
 'sister and heir of the late Alexander Stevens, architect in Edin-
 burgh, heritable proprietrix of the subjects after disposed.' Hav-
 ing obtained this disposition from Mrs Fyffe, Fraser took out from
 the superior a precept of clare constat in her favour, as heir-at-law
 to her brother, upon which she was infeft. On the 9th July 1830,
 he assigned this security, to the extent of L.1800, to Mr Alexander
 Airth, and the remaining L.700 to Mr Poole, solicitor, London,
 by whom it was transferred to the late Mr Herriot, the constituent
 of the pursuers. Fraser subsequently, in November 1830, assign-
 ed to Mr Herriot his other claims against Captain Fyffe and his
 family.

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In October 1832, Messrs Carnegie, Richardson and Anderson
 were assumed as trustees under Mr Stevens' settlement by Captain
 Fyffe and Mr Stout, both of whom thereupon denuded themselves
 of the office.

The pursuers, Herriot's trustees, raised the present action, to con-
 stitute their claim against Stevens' trustees, with reference to whom,
 respectively, the pursuers concluded, 1st, That James Fyffe, and
 Mrs Fyffe, his spouse,—the former as an individual and as trust-
 ee, and acting for behoof of his said children, under the deeds of
 settlement of the said deceased Alexander Stevens and Baron John
 Fyffe,—the latter as possessed of the heritable subjects in her own
 right, and as having a right and interest in the properties and suc-
 cessions of Alexander Stevens and Baron Fyffe, and their children
 as fiars, or otherwise having a right and interest to and in the dif-
 ferent properties and successions of Alexander Stevens and Baron
 Fyffe, and of their father and mother, were resting owing to the
 pursuers, as representing Robert Herriot, the sum of L.2500, con-
 tained in the assignation by James John Fraser in favour of Robert
 Herriot, together with the interest due thereon. 2d, That the
 trustees, in consequence of the devolution by the former acting
 trustee, were liable qua trustees, and as intromitters with the trust-
 funds; and, 3d, That James Bennett, W. S. by his obligations un-
 dertaken, was liable, jointly and severally, with the other defenders,
 in payment of the said debt.

The summons was originally directed only against Captain and
 Mrs Fyffe, who appeared as defenders, and sisted their children.
 Thereafter a supplementary summons was raised for the purpose of

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calling Mr Stout, on which he entered appearance, and stated, that he and Fyffe had devolved the trust on Messrs Carnegie, Richardson and Anderson, who then appeared as defenders. Mr Bennett was made a party to the action, on the footing that, having become agent for Captain Fyffe, after Fraser had ceased to be so, he had guaranteed the payment of Fraser's debt. Bennett admitted the offer of such a guarantee, but stated, that it had never been accepted by Fraser on the terms on which it was made.

The pleas of the parties are detailed in the findings of the following interlocutor and note of the Lord Ordinary:

Lord Ordinary's Interlocutor.

' The Lord Ordinary having considered the closed record, &c. Finds it admitted that the pursuers, Herriot's trustees, can only maintain this action as in the right of James John Fraser, from whom they derive right by assignation, and subject to all pleas and defences competent against him: Finds, that the defender, John Stout, called by the supplementary summons, having accepted of the trust under the deed of Alexander Stevens, and acted therein, must be considered as having been still a trustee during the whole period within which the debt, by advances of money, is stated to have been contracted to the said James John Fraser: Finds, that, by the terms of the trust-deed, in the event which occurred, the whole ' annual produce' of the trust-estate was applicable ' to the aliment, maintenance and support of Jean Stevens, spouse of the said James Fyffe, my sister, and the aliment and education of her children, of the present or any subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her family;' with an express exclusion of the jus mariti of her husband, and of all right in him or his creditors to interfere with the ' rents or annual proceeds' thereof: Finds, that, in so far as advances might be made by the said James John Fraser, to the extent of the rents or annual proceeds, which were applied to the aliment of the said Jean Stevens, or the aliment or education of her children, such advances might become just and lawful debts, exigible from the said trustees, and effectual against the alimentary fund under their management in each year; but finds, that it was not competent to the trustees, or a quorum of them, except in virtue of the special power conferred on them, and by a regular trust act in conformity thereto, and altogether incompetent to one trustee, acting by himself, to pledge either the fee or reversion of the said trust-estate, or the future annualrents thereof, for advances made generally on the orders of the said James Fyffe, or of others of the family, in whatever manner the same might be applied, without prejudice always to the personal liability of the parties giving such orders, or re-

'ceiving such advances; and that no third party cognisant of the
 'terms of the trust can be held to have made any such advances
 'on the faith of the trust-estate, except to the extent above
 'expressed: Finds, that the said trust-deed contains a special
 'power to the trustees 'to sell any part of my heritable subjects,
 "or uplift any debts due to me, for the purpose of fitting out any
 "of the said Jean Stevens' children in life, putting them to ap-
 "prenticeships, or such like, or laying out the same in any other
 "way advantageous to her family,' on condition of the consent of
 'Margaret Stout, the testator's widow, being obtained: Finds, that
 'this power could only be exercised by a regular act of a quorum
 'of the trustees, and to the effect and according to the precise terms
 'so expressed; and, in respect that no such act of the trustees was
 'done or executed, and that no such sale or uplifting did take place
 'by authority of the trustees, finds it unnecessary to determine how
 'far the power fell or subsisted after the death of Margaret Stout:
 'Finds, that in so far as the said James John Fraser may have made
 'advances for making up titles to the trust-estate, or in the neces-
 'sary management of the trust, according to the terms and qualities
 'thereof, such advances are just debts against the trustees and the
 'trust-estate itself; therefore, finds, that in so far as this action and
 'supplementary action conclude against James Fyffe and John
 'Stout, as trustees of Alexander Stevens, or is insisted in against
 'the other trustees now sisted, it cannot be maintained against them,
 'or to the effect of adjudging the trust-estate, except to the ex-
 'tent expressed in the previous findings: Finds, that in so far as
 'the summons concludes against Mrs Fyffe personally, as proprie-
 'trix of an heritable estate, for the purpose of attaching that estate,
 'it was incumbent on the pursuer to shew, by some act or deed
 'legally effectual, that the said Mrs Fyffe did bind or pledge her
 'said separate estate for payment of such debt: Finds, that the
 'pursuers have not condescended on any such act or deed; and
 'finds, that Mrs Fyffe, as a married woman residing with her hus-
 'band, cannot be made liable, either in her person or in her sepa-
 'rate estate, for personal debts contracted by her husband, whether
 'for the support of his family or for other purposes; but finds, that
 'in so far as any advances may have been made in the management
 'or for the preservation of the subjects belonging to Mrs Fyffe in
 'her own right, such advances will constitute a just debt against
 'her and her said estate: Finds, that in so far as, by the settle-
 'ments of Baron Fyffe, there was any right and interest vested in
 'the said James Fyffe in the estate left by him, the pursuers are
 'entitled to obtain decree in this action against the said James
 'Fyffe, for any debt or debts which shall appear to have been
 'legally contracted by him personally, and to the effect of attaching

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‘such right or interest in the estate of the said Baron Fyffe; but
‘finds, that in so far as the rights and interests in the estate of the
‘said Baron Fyffe are vested in the children of the said James
‘Fyffe, there is no competent conclusion in the summons under
‘which any judgment can be pronounced to affect the said children,
‘or their rights and interests in the said estate; and, with these
‘findings, before farther answer, excepting as after expressed, re-
‘mits to to examine the accounts and vouchers referred
‘to in the deed of assignation, as constituting the debt now sued
‘for, and to report whether, or to what extent, there was a good
‘and subsisting debt in the person of James John Fraser compre-
‘hended in the said accounts, in conformity to the principles laid
‘down in this interlocutor: Finds, that no relevant ground has been
‘condescended on, in support of the conclusion of the summons
‘against James Bennett; sustains his defences, assoilzies him, and
‘decerns: Finds him entitled to expenses.’

Lord Ordinary's Note.

Note.—‘It is unnecessary to go into much detail in explanation
‘of the above interlocutor, but a short statement seems to be ne-
‘cessary. 1. As to the conclusion against Stevens’ trustees, the
‘trust-deed is, in the material parts of it, clear and unambiguous.
‘There were four trustees; and it is clearly ascertained that they
‘all accepted. Upon the death of the widow, the annual proceeds
‘of the estate were specially appropriated, in the terms quoted in
‘the interlocutor. It was not even a simple liferent that was given
‘to Mrs Fyffe: the funds were to be applied by the trustees, even
‘with a discretion in them, to the aliment of herself, and the ali-
‘ment and education of her children. It unfortunately happened
‘that, after Mrs Stevens died, Mr Rhind, another trustee, died
‘also. Mr John Stout resided in Lancaster—a fact known to the
‘truster when he named him. Mr Fyffe was named a trustee,
‘though there was the most anxious exclusion of all personal con-
‘cern by him or his creditors, even in the annual proceeds of the
‘fund. Perhaps he may, notwithstanding, have been entitled to
‘act as a trustee, though the Lord Ordinary certainly thinks that,
‘if the interests of this family had been properly attended to on the
‘death of Mr Rhind, a different arrangement should have been
‘made. However, Mr Fyffe did take upon him to act. If he
‘had merely drawn the annual proceeds, and applied them for the
‘maintenance of the family, there would have been no harm; but
‘he was in bankrupt circumstances, beset by creditors, and of im-
‘provident habits. In this situation Mr Fraser became his agent.
‘And what is the case now stated? It is, that Mr Fraser, with
‘full knowledge and consideration of the terms of the trust-deed,
‘made large advances to Mr Fyffe, far beyond all the annual pro-
‘duce of the estate, and, in fact, to the amount of L.5000 in the

' course of three years. The correctness of the statement is not
 ' admitted; but taking it to be so, Mr Fraser's case is, that he so
 ' advanced in reliance on the trust-estate. This is said without
 ' alleging any act, even by Fyffe pledging the trust-estate, and far
 ' less any trust act by Fyffe and Stout together. If Fyffe had exe-
 ' cuted such a deed, the Court must have held it to be an act, not
 ' only incompetent for one trustee to do, but beyond the powers of
 ' the trust, and a direct violation of his duty as trustee. But no-
 ' thing of the kind was done, and the pursuers can only rest on a
 ' supposed liability by the trust-estate, at common law; for it is no
 ' answer to say, that the trustees had power to sell or uplift part of
 ' the estate for fitting out members of the family, &c.; supposing
 ' the power to subsist after Mr Stevens' death, (and the Lord Or-
 ' dinary should rather think it did,) the provision gave no power to
 ' the trustee to contract debt. The power given was not exercised;
 ' and as an extraordinary act of administration, it could not be exer-
 ' cised without a regular act with Stout's concurrence. Stout's ab-
 ' sence can make no difference in this matter, for it is not alleged
 ' that any attempt was made to inform him, either that money was
 ' wanted for such purposes, or that Mr Fraser was making advances
 ' such as he now states; and, at any rate, the difficulty would only
 ' have rendered it necessary to apply to the Court, or to find other
 ' legal remedies. But all this is superseded by the fact, that even
 ' Fyffe made no attempt to exercise the power. Then, what is the
 ' plea? On an averment that the money was applied in the aliment
 ' of the family and education of the children, it is said that at com-
 ' mon law, not the annual proceeds only, but the fee of the trust-
 ' estate must be adjudged for any advances, however great, that
 ' were actually made; that is, that if Mr Fraser was so imprudent
 ' as to give his money to enable Mr Fyffe, a bankrupt, to live at
 ' the rate of L.1500 a-year, all the provisions and obligations of Mr
 ' Stevens' trust, made for the very purpose of preserving the es-
 ' tate for the wife and the children, against the husband, were ipso
 ' facto extinguished. The Lord Ordinary sees no possibility of
 ' maintaining this; and it would indeed be a very serious view of
 ' the law of trust in Scotland. It will be observed, that there is no
 ' question here as to the possibility of any of the children pledging
 ' their rights of reversion of the fee for advances made on their own
 ' account. None of the children are made parties to the action;
 ' and therefore no such question can be discussed. Neither is
 ' there any question raised on the bond, or the personal obligations
 ' in it, to which another process relates. The fact is, that the
 ' summons was originally laid on the assumption that James Fyffe
 ' was the sole trustee, but without any relevant statement that
 ' even he had in any manner pledged the trust-estate. But when it

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' has become certain that he was not the sole trustee, even this foundation for the action fails. 2. As to the conclusion against Mrs Fyffe, it is enough to observe, 1st, That there is not produced any writing or obligation by her, binding herself or her estate for these advances. If she had a separate peculium from which the *jus mariti* was excluded, she might no doubt, by any deed proper for the purpose, have bound it for money advanced for her aliment. But there is no such thing alleged. 2d, That a personal obligation by a married woman would not be effectual. 3d, That at common law, a married woman living with her husband cannot be sued upon an open account for money advanced for the maintenance of the family, even to the effect of attaching her separate estate; and, 4th, That Mrs Fyffe has only a *lifereit* in the subjects referred to; and yet the summons concludes that the fee shall be declared liable to adjudication. 3. As to Baron Fyffe's property, it will be observed, that there is no trust over that property. It is therefore manifest, that the pursuers can never touch the shares of it which are vested in Mr Fyffe's children, by an action directed against their father only. Many of them are of age; yet not one is called. 4. It is too clear for argument, that there is no case against Mr Bennett. Indeed, the pursuers scarcely attempted to maintain it.'

Herriot's trustees *reclaimed*. The case, as against Mr Bennett, was abandoned.

Opinion of
Court.

The Court was clear that Fraser was entitled to the expenses of making up the titles; but the *Lord Justice-Clerk* said, Mr Fraser could have no credit for saying that he relied on this trust-estate. It was not till 1832 that Mr Stout concurred in appointing new trustees, and then resigned; and Mr Fraser knew all the time that he was acting as trustee.

Lords Glenlee and *Meadowbank* were of the same opinion.

Lord Medwyn.—I do not think Fraser entitled to payment from the trust-estate. Fraser was all along agent, and knew well that Stout was acting, and that he was not safe in dealing with Fyffe alone. The children were not properly called in this action. No doubt they appeared, but I do not see that they were properly sisted; and I doubt whether a decision could be given against a compeerer, not called as a party to the action; but it was unnecessary to go into that.

Judgment.

The Lords *adhered*, reserving all questions of expenses.

Lord Ordinary, *Moncreiff*. Act. P. *Robertson*. Alexander Miller, Agent. Alt.
Dean of Fac. (*Hope*,) *Russell*. James Lindsay, Agent. T. Clerk.

R.

SECOND DIVISION.

No. CXV.

8th March 1836.

JAMES CARNEGIE AND OTHERS, (STEVENS' TRUSTEES,)
 against

JAMES JOHN FRASER, W. S.

TRUST.—MALA FIDES.—AGENT.—*Circumstances in which a law-agent under a trust, the purposes of which were known to him, having, in security of alleged advances by him to one of the trustees, in his private character, created and obtained a bond and disposition in security, prejudicial to, and inconsistent with the purposes of the trust; and having taken infestment, and assigned the bond and infestment to third parties, for valuable considerations, without disclosing to such third parties the existence and operation of the trust,—it was found, (in an action of count and reckoning and damages by the other trustees against the law-agent,) that the law-agent had acted in mala fides, and that whether the debt acknowledged by the bond was a just debt, for money actually advanced or not, and whatever might be the just state of accounts between the law-agent and the trust-estate, he was bound, in the first instance, to restore the estate in integrum against the real security created by the disposition and infestment.*

NOBIL OFFICIUM.—JURISDICTION.—COLLEGE OF JUSTICE.—*Circumstances where the Court, ex proprio motu, appointed the proceedings in a depending action to be laid before the Keepers of the Signet and Commissioners, in order to report to the Court their opinion thereon, in reference to the professional conduct of the defender in that action, a member of the Society of Writers to the Signet.*

THE pursuers, who had been assumed as the trustees of Alexander Stevens, and acting for behoof of Mrs Fyffe's children, raised a summons of count and reckoning and damages against Mr Fraser and Captain Fyffe, in which they set forth in substance, that at the time the defender, Fraser, was agent in Stevens' trust, James Fyffe was considerably involved in debt; and advances of money having been made, or being alleged to have been made to him by Fraser, to relieve him from his embarrassments, the following plan, in which the said James Fyffe concurred, was devised and carried into effect by Fraser, for the purpose of operating payment of this alleged debt. Fraser prepared, and, upon the 1st of May 1830,

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got executed in his own favour a bond and disposition in security for the sum of L.2500 sterling, the granters of the bond being Captain Fyffe, his daughter Elizabeth Fyffe, and his two sons John and James Fyffe; and the bond narrated, that they, the parties, had on the instant received the above large sum, when in fact no such sum was advanced at the time of granting the bond, or had been advanced: That although the above transaction was evidently one between Fraser and James Fyffe individually, the alleged advances for which it was granted having been made, if made at all, to the latter, solely on his individual account, and for his own private use, yet, notwithstanding thereof, Fraser and James Fyffe persuaded Mrs Jean Stevens or Fyffe, in the assumed character of heritable proprietrix of the said subjects, and as heir-at-law of her brother, to dispoise to him, Fraser, in security of the alleged debt of L.2500 contained in the said bond, a valuable house in Charlotte Square, part of the trust-estate of Alexander Stevens, in the same manner as if her brother had died intestate, and the trust-deed before narrated had never been executed or acted upon; which disposition contained, inter alia, an assignation to rents, mails and duties, in common form: That shortly after the bond and disposition in security was granted, Fraser, in order to render the security available for his own purposes, proceeded to make up a title in the person of the said Mrs Jean Stevens or Fyffe, in her above assumed character of heir-at-law, and for that purpose took out a precept of clare constat from the superiors, and expedie infestment thereon, which was registered: That Fraser, without expediting any infestment in his own person upon the said bond and disposition in security, on the 9th July 1830, executed an assignation thereof to the partial extent of L.1800 sterling, in favour of Mr Alexander Airth, some time of Craigs in Dumfriesshire, and now or lately residing in Edinburgh, who, upon both writs, immediately took sasine, which is duly registered on the 23d of same month: That quoad the remaining L.700 sterling, the pursuers did not know whether it was or was not still held by Fraser; but they are informed that he some time thereafter executed a conveyance of the bond and disposition in security to that extent, in favour of George Wooley Poole, solicitor, London, by whom the same was said to have been transferred at a subsequent period to the late Robert Herriot, Esq. residing at Whitsemehill, Berwickshire: That a portion of the trust-estate had been thus effectually encumbered by an heritable debt of L.2500, without such debt having been contracted, or such encumbrance in any manner created by the trustees: 'That Fraser 'knew well, when carrying the above proceedings into effect, that 'no advances to the extent of L.2500 sterling had been made by

' him for the purposes of the trust, nor could be competently made
 ' by him to that extent, for any purposes whatever which the trust
 ' required, or the trust-deed authorised: That by far the greater
 ' part of any advances he had made, had been made for the purpose
 ' of paying debts due by the said James Fyffe, in an individual ca-
 ' pacity, or for other objects from which the trust-estate derived no
 ' benefit, and with which he knew it had no concern: ' That in
 ' consequence of these proceedings, the trust-estate has sustained
 ' very considerable loss and damage, for which, and for all the con-
 ' sequences of the burdens thus created on the trust-estate, the said
 ' James John Fraser' is liable. The conclusions were, (1.) That
 Fraser should account for his actings as agent under the trust; and,
 (2.) Should reconvey to the trustees the house in Charlotte Square;
 or, (3.) Make payment of the sum of L.2500, with interest, as
 the amount of damage sustained by the trust-estate.

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The defender denied the statements in the summons, and *pleaded*
 —(1.) That the bond and disposition, which narrates payment of
 the money, must be held as probatio probata of the fact; and the
 positive declaration therein set forth of payment could only be re-
 dargued by the writ or oath of the disponent in a regular action of
 reduction. (2.) There being no reduction, the conclusions of the
 summons could not be supported, and the defender was not, in an
 action purely of count and reckoning, bound to do more than to re-
 fer to the unreduced bond, as entirely excluding the same. (3.)
 The money set forth in the bond having been advanced to, and re-
 ceived by the said James Fyffe and the other debtors in the bond,
 the present action could not be maintained. (4.) The defender
 having had no intromissions with the trust-estate, could not be called
 on in any action of count and reckoning touching that estate; and
 being a creditor, both for the bond in question, and to a large
 amount besides, the present action was most improperly brought
 against him.

Defender's
Pleas.

The Lord Ordinary pronounced the following interlocutor and
 note: 'The Lord Ordinary having considered the closed record, &c.
 ' In respect that no plea has been stated on this record, objecting
 ' to the title of the pursuers to insist in this action, or against the
 ' competency of the summons, on the ground of John Stout not
 ' being a party thereto, and that James Fyffe, being a party impli-
 ' cated in the transaction which is the subject of the action, is called
 ' as a defender, sustains the action, without prejudice to any ques-
 ' tion as to the competency of the said John Stout and James Fyffe
 ' resigning their office of trustees in any other matter or discussion;

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and, on the merits of the cause, finds, that from the nature of the transaction narrated in the summons, no reduction is necessary for enabling the pursuers to maintain the conclusions thereof: Finds, that the defender being in the full knowledge of the trust-deed executed by the deceased Alexander Stevens, and of the acceptance and actual operation of that trust, under which he admits himself to have been the acting agent, was in mala fide to create or to accept of the bond and disposition in security, libelled on, whereby Mrs Jean Stevens or Fyffe, by her title, completed as heir-at-law of the said Alexander Stevens, disposed a valuable part of the trust-estate to the defender, in security of an assumed debt of L.2500, said to be contracted by James Fyffe, her husband, who, though named a trustee, was expressly excluded from all personal interest in the trust-estate, and by three of the children of the said James Fyffe, suppressing altogether the said trust, and the rights and interests thereby created: Finds, that the said defender farther acted in mala fide, in so far as he did take infestment on the said disposition, and thereafter did assign the same to third parties for valuable considerations, not disclosing to such third parties the existence and operation of the said trust: Finds, that whether the debt acknowledged by the bond was a just debt, for money actually advanced to the parties therein mentioned, or not, and whatever may be the just state of accounts between the defender and the pursuers on the said trust-estate, the defender is bound, in the first instance, and without waiting the adjustment of any such accounts, to restore the estate in integrum against the real security created by the said disposition, and the infestment thereon, as now standing in the third parties, his assignees: Therefore, finds, decerns and declares, in terms of the *second* and *third* conclusions of the libel; but, with reference to the first conclusion, appoints the cause to be enrolled, in order that it may be put into a proper course of investigation; finds the defender liable in the expenses hitherto incurred.'

Note.

Note.—The Lord Ordinary is convinced, that very little is necessary to be said in explanation of the above interlocutor. On the merits of the cause, the only difficulty is to imagine how it should be defended at all. The short state of the case is this: Stevens, the brother of Mrs Fyffe, executed a settlement, by which he conveyed his whole property, heritable and moveable, to the trustees named. The trust was *expressly* accepted. By the terms of it, there was a liferent to the testator's widow, and then a liferent to Mrs Fyffe, and on her death, a fee to her children, who were *eleven* in number, at the date of the disposition in security; and the *jus mariti* of Mr Fyffe (he being bankrupt) was excluded.

' In this state of things, after the death of the widow and another
 ' trustee, Mr Fyffe being the only trustee resident in Scotland, em-
 ' ployed the defender, as he himself says, as agent in the trust; and
 ' it is too clear that the *very least* of the case is, that schemes were
 ' formed for making the trust-estate available to Fyffe himself, or
 ' to the defender, and others advancing money to him, to the pre-
 ' judice of the wife's liferent, and the ultimate purposes of the trust,
 ' in the disposal of the reversion. Finding that this could not be
 ' done directly, the defender devised the plan of making a title in
 ' the person of Mrs Fyffe, as heir-at-law, in which, of course, the
 ' trust was not mentioned. The pursuers do not complain of this,
 ' because it was in itself useful, and should have been followed by
 ' a disposition by her to the trustees. But instead of this, the de-
 ' fender immediately took the bond and disposition in security for
 ' a debt, stated simply as the *personal* debt of Fyffe himself, and
 ' three out of his *eleven* children, (even the wife disponer not being
 ' stated as a debtor at all,) and then, having taken infeftment, as-
 ' signed the security to certain creditors of his own, concealing the
 ' existence of the trust. How this can be attempted to be justi-
 ' fied, the Lord Ordinary cannot conceive. The defender says,
 ' that he had made advances for the better aliment, and for the edu-
 ' cation and outfit of the family, and that there was a power to the
 ' trustees in the trust-deed to *sell or uplift* part of the estate for the
 ' latter purposes. But was this transaction any thing like an exe-
 ' cution of such a power? The Lord Ordinary is constrained, how-
 ' ever unwillingly, to think that it was, on the contrary, a very de-
 ' liberate proceeding for defeating the trust, and creating a security
 ' by covert contrivance, which could not have been created, even by
 ' the surviving trustees concurring in any direct trust act. But it
 ' was known that that could not be even attempted. What may
 ' have been the state of the defender's advances to Mr Fyffe, or for
 ' the family, does not appear to the Lord Ordinary to be very ma-
 ' terial, or indeed at all material to the chief point involved in this
 ' action. The defender's statements on this subject are denied by
 ' the pursuers, who state, on very probable grounds, derived from
 ' documents in process, that the security was truly meant to be
 ' given for money *to be* advanced, and which never was advanced.
 ' But supposing it were otherwise, and that the pressure of such a
 ' state of advance was the stimulus which led to the extraordinary
 ' measure adopted, would that at all justify it, or afford any answer
 ' to the demand of the trustees, that matters shall be restored to the
 ' state in which they ought to have been, whatever other questions
 ' may remain? The Lord Ordinary had some difficulty as to the
 ' correctness of the proceeding without *John Stout* concurring in

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' the action ; but, 1. There is no *plea* on the title, or on that as a defect in the form. 2. The defender could not plead such a point, because his own case requires that he should say that Stout had ceased to be an acting trustee long before his resignation. 3. The action is by a full quorum of three trustees : Mr Fyffe is necessarily called as a defender, and the defender, Mr Fraser, has, by his pleadings in the record, rendered it impossible to discuss any question as to the competency of Stout's resignation, or the necessity of his being a party. The last plea in law refers to Mr Fyffe alone. If the defender reclaims, the bond and disposition ought to be printed.'

Fraser reclaimed.

Opinion of
Court.

Lord Justice-Clerk.—I have no doubt as to the interlocutor. I must say this is a case calling for the notice of the Court, independently of the merits involved in the questions at issue. It is necessary for us, as the Court of Session, having such proceedings before us ; and we should be deficient in our duty if we did not recommend these proceedings to the consideration of the Keeper and Commissioners of his Majesty's Signet.

Lord Meadowbank.—We must direct the Keeper and Commissioners of the Signet to report, leaving it to the Court to say what should be done.

The other *Judges concurred*.

Judgment.

The following interlocutor was pronounced : ' Adhere to the interlocutor ; refuse the desire of the note ; find additional expenses due : Further, the Lords having considered the special circumstances of this case, they, before further answer, appoint the proceedings to be laid before the Keeper of his Majesty's Signet and the Commissioners, in order to report to the Court their opinion thereon, with reference to the professional conduct of the defender, and that with their earliest convenience.'

Lord Ordinary, Moncreiff. Act. Dean of Fac. (Hope,) Russell. James Lindsay,
Agent. Alt. P. Robertson. Alexander Millar, Agent. T. Clerk.

R.

SECOND DIVISION.

No. CXVI.

8th March 1836.

THOMAS PATON, PENTLAND'S TRUSTEE, PETITIONER.

PERSONAL PROTECTION.—SANCTUARY.—*A limited personal protection granted ad interim to a party who had availed himself of the privileges of the Sanctuary of Holyroodhouse, in order to enable him to be examined as a haver in a depending process, and to make the necessary searches for the documents called for.*

A PETITION, in the following terms, was this day moved: “Unto the Right Honourable the Lords of Council and Session, the Petitioner of THOMAS PATON, Accountant in Edinburgh, Trustee for the Creditors of George Pentland, formerly coachmaker in Perth; *Humbly sheweth*, That in December 1827, Mr Pentland executed a trust-conveyance of his whole estates, heritable and moveable, in favour of Mr James John Fraser, W. S. for payment of his debts, and for relief to Mr Fraser of all sums which he might advance, and all obligations which he might undertake, in the execution of his trust. Mr Fraser continued to hold the estates till November 1831, when they were conveyed to the petitioner, as trustee, in place of him. In the agreement on which this transaction proceeded, it was stipulated, that Mr Fraser's claims against the estate for money advanced, or for obligations incurred, should be ascertained and liquidated in a submission to arbiters therein named, or, if the submission should prove ineffectual, by a decree of a court of law.

“The submission did prove ineffectual, having expired in consequence of not having been prorogated, and Mr Fraser, of this date, (Dec. 28. 1832,) brought an action against the petitioners, concluding for upwards of L.17,000, as the alleged balance due to him on his cash advances and business accounts, during the four years of his intromissions with the trust-funds.

“It became of the utmost importance to the estate, and to all who had claims upon it, as well as to the new trustees, who had made very large advances, that this demand should be thoroughly investigated, and, in particular, that all the books, documents, and vouchers bearing reference to it should be produced. Of this date, (July 11. 1834,) accordingly, a diligence for that purpose was granted by the Lord Ordinary, which has been renewed from time to time; but in consequence of Mr Fraser's non-attendance, or the

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opposition made by him when cited as a haver, at almost every stage, the production obtained under the diligence has hitherto been extremely partial. In particular, in the course of the proceedings, the Lord Ordinary (Dec. 11. 1835) having ordered the haver to produce to the commissioner a particular ledger, for the purpose of the latter making a special report on its state and appearance, Mr Fraser reclaimed against that order, and made that step again a pretext for refusing to produce any other of the documents called for until his reclaiming note shall be disposed of.

“ Your Lordships having unanimously adhered to the interlocutor of the Lord Ordinary, the petitioner hoped that no farther obstacle would occur to the execution of the diligence; but in the interval Mr Fraser has found it necessary to take the protection of the Sanctuary, where he now is.

“ Accordingly, at a diet of examination held under the diligence commission, and in the Abbey court-room, on Friday the 4th March 1836, Mr Fraser obeyed the order of the court, so far as concerned the production of the ledger; but when his examination as a haver proceeded, and he was called on to produce the other documents for recovery of which diligence had been granted, he made the following statement, as appears from the report of the commission: ‘ That the haver is ready to produce such of the writings called for as are in his possession; but from his having taken the benefit of the Sanctuary, he is prevented from having access to his papers, which are not within the precincts of the Sanctuary, on account of diligence for debts, of part of which the defender, Mr Paton, is bound to relieve him. These debts he expects to get arranged in the course of a few days, when he will be at liberty, and he will then attend the commissioner without any citation, and produce them; or he will produce them to the commissioner, immediately upon the defender getting him a protection from such diligence.

“ ‘ On the part of the defender, it was answered, that the statement that Mr Fraser is prevented from having access to his papers on account of diligence, of which Mr Paton is bound to relieve him, is incorrect in point of fact.’

“ In these circumstances, the petitioner is under the necessity of applying to your Lordships for such remedy as is competent, in order to prevent the course of justice from being impeded, and the rights of parties suffering material injury, in consequence of a haver of writings having placed himself within the protection of a privilege which renders useless to the petitioner the means of bringing forward evidence, which were granted to him by the diligence of the Court. On the one hand, the petitioner cannot reasonably be

required to proceed on the footing that Mr Fraser's residence in the Abbey is to be only for a few days; for he has no reason to believe that it will be so. On the other hand, the interests of the parties and the trust-estate are suffering great injury by the delay which occurs in investigating this large claim. Until it is ascertained, with something approaching at least to precision, what will be the real amount of this demand, or whether any part of it will turn out to be due, the affairs of the trust are in a great measure brought to a stand, while the inhibitions and arrestments which have been used on the dependence of an action for L.17,000 have already done irreparable injury, and are daily increasing it, to those who unfortunately have been exposed to these diligences, from being in any way liable for these illiquid claims. As Mr Fraser, again, depones that the documents, for the recovery of which the diligence has been granted, are not along with him in the Sanctuary, the petitioner cannot represent the haver as having refused, in this instance, to give obedience to the warrant of the Court, since he cannot obey it without endangering his personal liberty, and losing the privilege attached by law to the place to which he has retired; and the only remedy that remains to the petitioner is now to apply to your Lordships for such a protection as will enable the haver to go to the places where he states the documents to be, and produce or deliver them to the commissioner.

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"The Acts of Parliament 1663, c. 4, 1681, c. 9, and 1698, c. 22, while they restrict the granting of protections within due bounds, reserve to your Lordships, and to the Judges of the other Supreme Courts, full power to give such occasional and limited protection to persons cited to give evidence in a cause, especially where the case depends before your Lordships' own Court, as may enable them to fulfil the duty which the law requires of them, in justice to litigating parties, and as being essential to the due administration of justice. A haver who is cited by your Lordships' authority to depone and produce documents, which are to be evidence in the case, much more important, (as they may be in a multitude of cases,) than any parole testimony, is no less a witness, in regard to the justice of the case, and the principle on which the protection is granted, than if he were put upon oath to depone to disputed facts.

"The petitioner therefore humbly trusts that your Lordships will grant to the haver in this case such protection as is necessary to enable him to attend the diets of examination, in the places where the writs are, or to go to these places, in order to produce them to the commissioner under the diligence.

"The Act of Parliament 1681, c. 9, makes it a condition of such a protection as is now craved, being granted, that 'the parties who

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Paton, Petitioner.

‘ require witnesses to be cited, or their tutors and curators, if the said parties be minors, shall give their oaths of credibility, or subscribe a certificate under their hand upon oath, that those who are cited by them to be witnesses are material witnesses.’ In the petitioner’s absence in London, his agent in this case has made an affidavit, herewith produced, to his belief that the examination of the haver, and the recovery of the documents in his possession, for which diligence has been granted, are not only material, but indispensable to the justice of the cause, and for supporting the case of the petitioner.

“ May it therefore please your Lordships, on consideration of the premises, to grant to the said James John Fraser, the haver so cited, a protection against personal diligence for civil debts for such times only as at any diet of examination, under the commission and diligence, may be necessary for him to go to his own house, or place of business, or where the writs called for may be, in order to produce the said writs, and thereafter to return to the Sanctuary, but for no other or longer space; or otherwise to do in the premises as to your Lordships shall seem just. According to justice, &c.”

(Signed) “ JOHN RUSSELL.”

Lord Justice-Clerk.—Mr Fraser is not cited to appear before us. No case is cited.

Russell referred, as a precedent, to the case of Cockburn of Lanton, 30th July 1700, 2. *Fount.* 107.

The Court pronounced the following deliverance, signed by all their Lordships:

Judgment.

‘ The Lords having considered this petition, with the affidavit therein referred to, find it reasonable, and conducive to the ends of justice in this case, that the within-designed James John Fraser should be enabled to make the necessary search in his repositories for the documents he has been called upon to produce, and to undergo the necessary examinations as a haver, without incurring the hazard of forfeiting the privileges of the Sanctuary of Holyroodhouse, of which he may now be in possession; and do therefore grant to the said James John Fraser their protection against the execution of diligence for any civil debt, for one calendar month from this date, and no longer; but that only during such prescribed and limited times, in the course of the said month, as he shall be required, by orders of the commissioner, to attend for examination as a haver, or to resort to his own house to make search for the documents he may be called upon to pro-

‘duce: In addition to which times, so prescribed and limited by 8 Mar. 1836.
 ‘the commissioner, there being farther allowed and reckoned, in
 ‘each instance, one hour before and one hour thereafter, for coming Paton, Petitioner.
 ‘from and returning to the Sanctuary, for the purposes foresaid;
 ‘but never exceeding in all, or in either case, on any one day, be- Judgment.
 ‘yond the period from ten o’clock forenoon to six o’clock afternoon;
 ‘and, accordingly, the Lords discharge all messengers and other
 ‘officers of the law from putting in execution any personal dili-
 ‘gence against the said James John Fraser during his absence
 ‘from the Sanctuary of Holyroodhouse, for the purposes, and un-
 ‘der the conditions and limitations foresaid; and declare that his
 ‘due compliance herewith shall not infer any loss or diminution of
 ‘the privileges of the Sanctuary, now competent to him, in any re-
 ‘spect whatsoever; and the Lords appoint this petition, and their
 ‘deliverance thereon, to be recorded in the Books of Sederant.’

For Petitioner, *Russell.**Wm. Alexander,* W. S. Agent.*T. Clerk.*

R.

No. CXVII.

SECOND DIVISION.

10th March 1836.

JOHN WADDELL against Miss AGNES HAMILTON.

PROCESS.—SUSPENSION.—CAUTION.—John Waddell, without offer of caution, presented a suspension of a charge of horning, proceeding upon a decret of Court which had been pronounced in absence, and *pleaded*—That the execution of the summons was false; and the decret being in absence, that he was entitled to be reponed without caution. The charger *answered*—That, even had caution been offered, the suspender could not be reponed, except on payment of the previous expenses. The Lord Ordinary refused the bill, and found the suspender liable in expenses, adding, in a note, ‘It is a suspension of a decree in absence of the Court of Session, without an offer of the expense of obtaining the decree, without a reduction, and without caution.’

The suspender then brought a reduction, and presented a reclaiming note, praying a remit to pass the bill on juratory caution.

Lord Medwyn.—The ratio of the Lord Ordinary is bad. It is not necessary, Opinion of
 in order to be reponed against a decree in absence, that the previous expenses Court.
 shall have been paid, unless the defender had been personally cited, nor was it
 necessary in all cases that a reduction of a decree in absence should be brought;
 but here the case had been altered since the Lord Ordinary’s interlocutor, by a
 summons of reduction, and an offer of juratory caution, and therefore the sus-
 pender ought to be reponed.

The Court remitted to the Lord Ordinary, with instructions to pass the bill on Juratory caution. Judgment.

*Lord Ordinary, Cockburn.**Act. A. Wood.**Alt. Dean of Fac. (Hope.)**Ja.**Macdonell W. S. and Campbell & Macdonall,* S.S.C. Agents.*F. Clerk.*

R.

FIRST DIVISION.

No. CXVIII.

10th March 1836.

SIR JAMES BOSWELL
against
 MATTHEW MONTGOMERIE.

APPEAL.—*Circumstances in which a petition for leave to appeal to the House of Lords was refused.*

Narrative.

MONTGOMERIE having presented a petition for leave to appeal against the judgment in this case, 29th Jan. 1836, (ante, vol. xi. 317,) on the understanding that the Court had, by that judgment, decided that the cause was not one fitted for trial by a Jury :

Sir James Boswell answered, that the petition was unnecessary, as the true intention of the Court, in that judgment, was to remit to the Lord Ordinary to recover the documents on which it appeared that the final decision of the case would mainly depend, that his Lordship might be enabled to judge whether there was any necessity for a Jury trial or not.

Judgment.

The Court pronounced the following judgment : ‘ The Lords ‘ having advised this petition, with answers thereto, and heard ‘ counsel, refuse the desire of the petition, in respect that, accord- ‘ ing to the true meaning of the interlocutor, remitting the cause ‘ to the Lord Ordinary, diligence should, in the first place, be ‘ granted for recovering documentary evidence, and that, on con- ‘ sidering such evidence, the Lord Ordinary should judge whether ‘ any further investigation should proceed by proof on commission ‘ or otherwise.’

Act. Keay, Penney.

John Court, S.S.C. Agent.

Alt. Dean of Fac. (Hope,)

J. A. Maconochie.

William Bowie Campbell, W. S. Agent.

C. R.

FIRST DIVISION.

No. CXIX.

11th March 1836.

WILLIAM CRAWFORD
against
 ALEXANDER DAWSON.

LEGAL DILIGENCE.—IMPRISONMENT.—*An incarcerating creditor having failed to renew aliment after it had been exhausted, though intimation of the fact had been given personally to his agent, and the debtor having been liberated in consequence,—held, that a re-incarceration, two days afterwards, on the same diligence, and for the same debt, was not competent, no change of circumstances in the debtor being alleged.*

CRAWFORD, the suspender, was incarcerated in Paisley jail by Dawson, and having no funds, was allowed by the Magistrates an aliment of 1s. a-day. The supplies of aliment lodged by the incarcerator were exhausted on the evening of Thursday, the 4th of February, and due intimation thereof was made on that day to the agent of Dawson, as Dawson himself resided in Glasgow. On the 6th, application to be liberated, in respect of no aliment, was made by the suspender; but as no Magistrate could be got to sign the warrant of liberation, he was obliged to remain in prison until Monday, the 8th, when he was liberated, no additional aliment having then been lodged. On Wednesday, the 10th, the suspender was again apprehended, and incarcerated, upon the same caption, for the same debt. In these circumstances, the suspender brought the present suspension and liberation. It is to be observed, that, previous to his incarceration, he had, along with his wife, executed a trust for behoof of all his creditors; and he subsequently raised a process of cessio. Narrative.

The suspender *pleaded*—That he had made an honest surrender of all his property to his creditors: That having been liberated after due intimation to the agent of the incarcerating creditor, which was held sufficient, if the creditor is at a distance, in the case of *Mackenzie v. Maclean*, 14th Jan. 1830, (ante, vol. v. p. 258.) Unless some decided change could be shewn to have occurred, or, at all events, a considerable time had elapsed from the date of the liberation, a second incarceration for the same debt, must be viewed as an illegal and oppressive proceeding, on the principles established in the following cases: *Law v. White*, 10th Dec. 1709, *Mor.* 11,803; *Bogle v. Magistrates of Forres*, 8th July 1724, *Mor.* 11,808; Aber- Suspender's Pleas.

11 Mar. 1836. *cromby v. Brodie*, 19th June 1759, *Mor.* 11,811; *Boyd v. Ponton*, 21st Dec. 1811, *F. C.*; *Morison v. Forbes*, 3d June 1826; *Ersk.* iv. 3. 28. The case of *Inglis*, cited by the suspender, is a special case, and not similar to the present: That no allegation of a change of circumstances had been made; that an interval of two days only had elapsed between his liberation and second imprisonment; and that the expenses attendant on a new application for aliment would exceed the sum which the incarcerator was obliged to lodge for that purpose, so that he would be, in point of fact, without aliment, and living on the charity of his friends.

Crawford v.
Dawson.

Suspender's
Pleas.

Charger's
Pleas.

The charger *pleaded*—That he had given no instructions for the liberation; and although, by a mistake of the agent, the suspender had obtained his liberty, such an accident could not be held to deprive a creditor of his right to use the ordinary diligence of the law against his debtor: That in the late case of *Inglis v. Taylor*, 10th July 1833, (*ante*, vol. viii. p. 605,) which was very similar to the present, the suspender had been incarcerated four times within nine months on the same caption, and yet the suspension was refused.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the bill, answers and productions, refuses the bill, and finds the defender liable in expenses; appoints an account thereof to be given in, and, when lodged, remits to the Auditor to tax and report.'

Note.

Note.—'The Lord Ordinary considers it as fixed, that the mere fact, that a debtor has been once liberated on the Act of Grace, does not prevent his being imprisoned again, and immediately after, on the same diligence, and for the same debt, and that his protection consists in the power of the Court to check any abuse of the diligence, where it is attempted to be used oppressively. In the case of *Inglis*, 10th July 1833, there were four incarcerations in ten months; yet a bill of suspension and liberation was refused, and with expenses. Now, the Lord Ordinary sees no attempt at oppression or hardship in the present case. Almost all the cases referred to by the complainer, besides, were cases where the creditor had *refused* to aliment. Here he had not only not refused, but had actually alimented, and meant to go on doing so, when there was an inadvertent failure to lodge more money by the incarcerator's agent, unknown to the incarcerator himself. The Lord Ordinary can discover no authority for holding, that a momentary liberation, from this accident, operates as a protection from re-imprisonment, the very moment that

‘ the creditor hears of it. The complainer’s arrangements, or alleged arrangements with his creditors, do not interfere with the rights of the respondent, under his diligence.’

11 Mar. 1836.
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The suspenders *reclaimed*.

Lord President.—The mere circumstance of the debtor’s having accidentally gained his liberty would not prevent a re-incarceration; but, on the other hand, the re-incarceration must not be oppressive. Erskine, in treating of the subject in the passage quoted by the suspender, says, ‘ The debt and diligence upon which the debtor was imprisoned are not discharged by the Magistrate’s setting him (the debtor) free upon the statute, (the Act of Grace); and therefore the creditor may again use personal execution against him, upon the former caption. But if he abuse that power in an oppressive manner, he may be condemned in a fine for that abuse, and the debtor will have relief by suspension.’ I am therefore of opinion, that, in the circumstances of this case, the bill ought to be passed. It is to be observed, that personal intimation was given to the agent of the incarcerating creditor that the aliment was exhausted.

Opinion of
Court.

Lord Gillies.—I concur in thinking that the suspension should be passed. I agree with the law, as laid down by Lord Balgray, in the case of *Mackenzie v. Maclean*, where he says, ‘ After a debtor has obtained his liberation under the Act of Grace, and has executed a disposition omnium bonorum, his creditor holding that disposition must be cautious in re-incarcerating for the same debt, and must be able to shew solid grounds to justify him in such a proceeding; for, although he may incarcerate his debtor on the very day after the liberation, he cannot justifiably do so, unless some decisive change of circumstances has occurred, such as the debtor’s succession to an estate, or the discovery of some impropriety in his conduct.’

The other *Judges concurred*, and the *Court* unanimously pronounced the following judgment: ‘ The Lords having advised the reclaiming note, and heard counsel, In respect that no aliment was lodged after personal intimation to the agent of the incarcerating creditor, recall the interlocutor of the Lord Ordinary reclaimed against, and remit to the Lord Ordinary to pass the bill of suspension; and of consent, ordain the suspender, within fourteen days, to execute and deliver a disposition omnium bonorum in favour of the incarcerating creditor.’

Judgment.

Lord Ordinary, Cockburn. Act. Maitland. Dundas & Jamieson, W. S. Agents.
Alt. H. Bruce. W. A. G. & R. Ellis, W. S. Agents. D. Clerk.

C. R.

FIRST DIVISION.

No. CXX.

11th March 1836.

JAMES STEWART
against
 ALEXANDER SCOT.

EXPENSES. — PROCESS. — APPEAL. — *The House of Lords having reversed a decision, in which there was a decerniture for expenses, by a judgment containing a declaration in regard to a certain point in the case, and ordering, that, with this declaration, the case be remitted back to the Court of Session, 'to proceed therein as shall be 'consistent with this judgment,'—held, by a majority of the whole Court, that as the effect of the said declaration was to exhaust the whole cause on the merits, it was not competent for the Court to entertain a claim, made by the appellant, for the expenses incurred prior to the appeal.*

STAT. 6. GEO. IV. C. 120.—*Found, that when the opinions of the other Judges are taken by a Division of the Inner-House, it is the majority of the whole Court, and not that of the Consulted Judges merely, which is to rule the decision.*

Narrative.

THE former proceedings in this case will be found already reported, on the 6th March 1832, (ante, vol. vii. p. 316.)

The decision then given, finding the defender liable for all the intromissions of the factor, and also liable in expenses, having been brought by him under review of the House of Lords, the case was sent back, with the following judgment: 'It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the several interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is declared, that the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take the office: And it is further ordered, that with this declaration the case be remitted back to the Court of Session in Scotland, to proceed therein as shall be consistent with this judgment.'

The case having been thus again brought before the Court of Session, it was remitted to the Lord Ordinary, to carry into effect the finding pronounced by the House of Lords, when his Lordship pronounced the following interlocutor:

'The Lord Ordinary having resumed consideration of this peti-

'tion, with the debate, of consent assoilizes the petitioner from all
'the conclusions of the action, and decerns; finds him entitled to
'expenses; allows an account thereof to be given in, and remits the
'same, when lodged, to the Auditor for taxation.'

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Stewart v.
Scot.

Note.—'The defence ultimately sustained being, in substance,
'that there was from the beginning no competent ground of action,
'the Lord Ordinary had no doubt that expenses were due on the
'merits, and this, indeed, seemed scarcely disputed by the respon-
'dent. The only point of contention was *the competency* of award-
'ing such expenses prior to the appeal, which issued in a judgment
'of reversal, with a *general* remit 'to do what was consistent with
'that judgment.'

Lord Ord-
inary's Inter-
locutor.
Note.

'In conformity with the decisions in the cases of Clyne, 14th
'Dec. 1831, Dun and Stirling, 14th Jan. 1831, (*S. and D. ix.*
'276), and Torrance, 17th Jan. 1832, (*S. and D. x. 193*), the
'Lord Ordinary, even if his own opinion had been at variance
'with those judgments, (which it is not,) would have had no choice
'but to repel the objection to the competency, and find the peti-
'tioner entitled to his whole expenses. But it is impossible to dis-
'guise, that the distinction between these cases and some others;
'about the same period, is very thin; and that the practical rule
'by which a single Judge must now be guided in all such cases, is
'far from resting on a clear or satisfactory principle. In the case
'of Reid, 14th Nov. 1825, (*S. and D. iv. 198*), a reversal, with
'a remit 'to repel the defences, and decern,' and in those of
'Mactavish, 12th Feb. 1831, (*S. and D. ix. 431*), and Wilson,
'12th June 1832, (*S. and D. x. 640*), a simple reversal, (lead-
'ing necessarily to the same conclusion,) but without any remit
'whatever, were held to render a claim for expenses *incompetent*,
'though clearly just and irresistible on the merits. In the present
'case, and in those first mentioned, there was a judgment of rever-
'sal, with a *general* remit to do what was consistent with such judg-
'ment; and in all of these, there was nothing to be done on that
'remit, but to repel (or sustain) the defences, and decern. Now,
'it is not easy to see why an express remit to repel the defences
'and decern, (or a simple reversal without any remit, but leading
'necessarily to the same result,) should render an award of expenses
'incompetent, when it is competent, under a reversal with a remit,
'to do what was competent with that reversal, and there was no-
'thing consistent with it (or to be done) but to repel the defences,
'and decern. The truth is, that the substance and effect of the
'judgment *is the same in all those cases*; and that the terms of the
'remit, or the existence of any remit at all, are not of the slightest
'importance. A remit is always implied in every judgment of the

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Note.

House of Lords, because, after judgment, the record necessarily comes back to this Court, and it is only here that any warrant or diligence for carrying it into execution can be obtained; and, accordingly, the judgment is always *applied* in this Court, whether there be a remit or not. It is also plain enough, that nothing inconsistent with the judgment can ever be done here, after the case comes back, and consequently that a remit to act consistently with such subject is in effect a redundancy, and has no operation.

The present case, therefore, (as well as those of Dun and Torrance,) is truly identical with those in which there was a mere reversal, without any express remit at all; and in the same way; in this and the analogous case, as the reversal, taken by itself, led necessarily to a judgment sustaining the defences and decerning, there is no real difference (in such cases) between a simple reversal, or a reversal with a *general* remit to do what was consistent with it, and a *special* remit to sustain the defences and decern; and yet, as the decisions now stand, the competency of a claim for expenses prior to appeal must be decided, according as the judgment of the Lords, though in substance identical, shall happen to be expressed in the one *form* or the other. The Lord Ordinary cannot but wish, therefore, that the whole of these decisions should be reconsidered, and the rights of litigants in such circumstances settled on more satisfactory principles. If the House of Lords were to adopt the practice of making some special remit or deliverance as to expenses, in every case which comes before them, there would be no difficulty in future; but as this is scarcely to be expected, it would seem expedient to follow out one or other of these two maxims, *i. e.* either, 1st, to extend to the judgments of the House of Lords the rule which is now established as to the decisions of the Inner-House, *viz.* that, where the merits of the case, or any great branch of it, are finally determined, without any thing being said of expenses, no claim for those previously incurred should afterwards be competent; or, 2^d, to hold that, in every case of reversal, the question of expenses should be open, (where not specially determined,) when the Court comes to apply the judgment, and to pronounce an executory decree. Of these rules, the last would seem, on the whole, the most equitable, and safest in its application; as the other would plainly lead to frequent injustice, unless the House of Lords could be supposed as fully aware of its existence and effects, and to keep it as constantly in view in framing their judgments as the Inner-Houses now do.

If there was less ground for hesitating as to their general import, it would still be difficult to reconcile the decisions in the

‘cases of Mactavish and Wilson, with the express terms of the judgments of the House of Lords in these cases, which specially reversed interlocutors of this Court refusing expenses to the appellants. It might be going too far to hold that this reversal was equivalent to finding expenses due; but it seems strange to say, that it did not make the claim for them at least *competent*.’

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Stewart v.
Scot.

Note.

‘But the Lord Ordinary cannot, with the greatest deference, enter into the general view on which the cases of Reid, Mactavish, &c. appear to have been decided, viz. that after an appeal, this Court has no power over the cases which come back to it, except what may be conferred by the remit accompanying the judgment. If they can judicially *apply* the judgment, and make the only operative decerniture when there is no remit at all, it seems to him that they must, in every case, have a power to make any decerniture which the justice of that case requires, not inconsistent with the judgment of the court of review; and with regard to expenses in particular, the decret as to which is always an *accessory* decret only, and in fact a mere corollary form or explication of their general jurisdiction and right of contract over the litigants before them, he cannot but think, that if they can decern for those, although there be no conclusion to that effect in the summons, or to an extent beyond such conclusion, they must have the same power when applying a judgment of the House of Lords, whether that judgment be accompanied by an express remit or not, or by a remit confined to the *merits* of the principal question.’

The defender having *reclaimed* against this interlocutor, in so far as it found the pursuer entitled to expenses, the Court appointed the parties to lodge minutes of debate on the question of competency, as stated in the Lord Ordinary’s note.

The defender *pleaded*—That it was only necessary to look at the words of the reversal, in order to perceive that the House of Lords did not consider their judgment to have exhausted the cause. The House of Lords decided the point, that by the death of Mr Strong the tutory fell; but it did not follow that the defender was to be *assolized* from the conclusions of the action; and it was therefore left to the Court of Session to apply that finding to the facts of the case, and then to determine whether there was any room for decree being pronounced against the defender, and if so, to what extent. The parties were at issue as to the state of accounting between them. The defender averred, that, in August 1820, the period of Mr Strong’s death, there was no balance due by Mr Stevenson upon his accounts, but that, on the contrary, the estate owed him

Defender’s
Pleas.

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Stewart v.
Scot.Defender's
Pleas.

a sum of about L.200. The pursuer, on the other hand, averred that this was not the case, and that there was a balance due by Mr Stevenson; and it is evident, that if he had been correct in that averment, the defender could not have been assolizied, but decree might have been pronounced against him for the amount found due. Subsequently, it is true, the pursuer was obliged to admit that his statement was incorrect, and to consent to an interlocutor being pronounced assolizieing the defender; but this only proves, more satisfactorily, that the defender could not have obtained decree of absolvitor, without farther proceedings in the Court of Session, after the judgment had been applied. So far, therefore, from the Court of Session being functus by the judgment of the House of Lords, the case was again fully brought before them by the remit.

The Court have invariably held, that where the judgment of the House of Lords merely finds a principle in point of law, and remits to them to carry it into effect, it is competent for them to entertain the question of expenses, and to find those due which were prior to the appeal. If, on the other hand, there is nothing to be done by the Court of Session except to reverse or affirm their former judgment, it then is questionable whether, according to the decisions which have been pronounced, they have that power. In a variety of cases, it has been found, that where the finding in the House of Lords, and the remit accompanying it, contemplated any further proceedings in the Court of Session, or if the remit was not so special in its terms as to amount to a restriction of the power of the Court of Session to entertain any question of expenses, it was perfectly competent for the Court of Session to entertain the question of previous expenses; *Maberly v. The Bank of Scotland*, 11th Mar. 1826, *F. C.*; *Dick v. Cuthbertson*, 19th Jan. 1828, *F. C.*; *Stirling v. Dum*, 14th Jan. 1831, *F. C.*; *Caledonian Iron and Foundry Company v. David Clyne*, 14th Dec. 1831, *F. C.*; *Torrance v. Crawford*, 17th Jan. 1832, *F. C.*

In the cases of *Tod* and *Geddes*, quoted by the pursuer, there was nothing but a remit to proceed to apply the judgment of the House of Lords; and, therefore, as there was nothing further to be done in the Court of Session, the claim for expenses was held incompetent. But in that of *Stair*, as there were further proceedings in the Court of Session, expenses were given. The principle established in the case of *Taylor v. Mackenzie*, 9th June 1821, that if the Inner-House pronounce a judgment, and remit to the Lord Ordinary to carry that into effect, it is competent for him to entertain the question of previous expenses, although that question should not have been specially reserved in the judgment of the Inner-House;

should be applied here to the judgment of the House of Lords, as 11 Mar. 1836.
 in this case there is a remit to the Court of Session, with a certain
 finding, leaving to the Court of Session the subsequent explication
 of the case. Stewart v.
Scot.

The pursuer *pleaded*—That the original summons contained no
 conclusion for any balance, excepting only the balance which might
 be due at 23d February 1825, nor did the pursuer ever allege that
 there was any balance due at or before August 1820. The de-
 fender, it is true, averred that there was a balance due to Mr Ste-
 venson at that date, on his accounts, as factor for the tutors. He
 says this statement was denied by the pursuer; but this is incorrect,
 since the answer was as follows: ‘The statement in the answers,
 viz. that at the period of Mr Thomas Strong’s death, in August
 1820, there was a balance due to Mr Stevenson, on the factory
 accounts, is not admitted.’ The pleas in the condescendence also
 proceed on the assumption, that the pursuer had no claim except
 for the balance which occurred subsequent to Mr Strong’s death.
 The appeal cases proceed on the same assumption; but further,
 in the pursuer’s case against Mr Baikie, which is subjoined as an
 appendix in the appeal case in the present action, and was thus
 brought distinctly under the view of the House of Lords, the fol-
 lowing sentence occurs: ‘Up to the death of Mr Strong, it is al-
 leged that the tutors had accounted for their intromissions; but
 for the period which elapsed between the death of Mr Strong in
 August 1820, and the expiry of the gift in August 1825, the sur-
 viving tutors had large intromissions which are still unaccounted
 for, thus distinctly intimating that he had no claim for a balance
 due at Mr Strong’s death.’ It is therefore quite impossible that
 the House of Lords, in pronouncing judgment, could have had any
 view to such a claim, or any intention of reserving it, since no such
 claim was brought under their view. On the case being remitted
 back, as no point in discussion remained relative to the merits of
 the case, which the judgment of the House of Lords had in truth
 altogether exhausted, it necessarily followed from that judgment,
 that the appellant must be assoilzied from the conclusions of the
 action. The pursuer, therefore, did not object to a judgment of
 absolvitor, but objected to the competency of the demand for pre-
 vious expenses. Pursuer’s
Pleas.

It has long been recognised as a principle of judicial procedure,
 that, when a court of appeal decides the whole merits of a cause,
 and especially when it does so by reversing the judgment of the
 Court below, it must be held to have had before it, and to have de-
 cided also the question of past expenses. These expenses are a

11 Mar. 1836. mere accessory to the principal cause, and ought to be decided at the same time with it, when the Judge has the whole past procedure and conduct of the litigant distinctly under his view. In the case of this Court reviewing the judgments of the Lord Ordinary, it has been settled, that when the Court decides a whole cause on its merits, and omits to give expenses, there cannot afterwards be any claim for them; *Campbell and Company v. Mackenzie*, 21st May 1803, *F. C.*; *Fleshers and Bonnetmakers of Canongate*, 7th July 1809, *F. C.*; *Wilson*, 12th Nov. 1814, *F. C.*; *Falconer*, 4th March 1815, *F. C.*; *Taylor v. Mackechnie*, 9th June 1821, *F. C.*; *Bowie v. Dallas*, 5th Dec. 1816, *F. C.* On the same principle it has been settled, that when the House of Lords decides the whole merits of a case by appeal, it must be held to have had under its view, at the same time, the accessory question of past expenses; and, therefore, unless these are either awarded, or a special remit made to the Court of Session to decide upon them, they cannot be afterwards demanded in the Court of Session; *Pringle v. Tod's Legatees*, 6th Mar. 1799, *F. C.*; *Geddes v. Wilkie*, 16th Feb. 1816, *F. C.*; *Wilson v. Laidlaw*, 18th June 1818, *F. C.*; *Agnew's Executors*, 24th June 1826, 4 *S. & D.* 757; *Reid*, 18th Nov. 1825; *Macdonell or Mactavish v. Turner*, 12th Feb. 1831, *F. C.*; *Sinclair v. Wilson and Maclellan*, 12th June 1832, *F. C.* The Lord Ordinary and the defender refer to three other cases, which at first sight appear to be of an opposite tendency; *Stirling v. Dun*, *Clyne*, and *Torrance v. Crawfurd*; but it will be found, on looking into the reports of these cases, that the question of competency was in none of them raised or discussed.

In the cases of *Maberly* and *Dick*, cited by the defender, the judgment of the House of Lords related merely to a particular point of the case, and did not exhaust it fully; therefore the point of expenses could not at that stage be properly discussed, but was left for the decision of the Court of Session, after the whole points in dispute had been determined. These cases, therefore, form exceptions to the rules now laid down, and rather tend to confirm than weaken them.

On advising the minute and answers, the Court, before answer, desired to have the opinion of the other Judges on the competency of finding expenses under the judgment of the House of Lords.

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Lord Justice-Clerk, and Lords Glenlee, Meadowbank, Fullerton, Jeffrey and Cockburn, gave the following opinion:

We are of opinion that it is competent to entertain the appellant's claim for the expenses incurred prior to the appeal.

In some of the earlier cases, as in those of *Pringle v. Tod's Legatees*, 6th March 1799, and *Wilson v. Laidlaw*, 18th June 1818, it appears to have been held that such a claim was incompetent, unless the judgment of the House of Lords contained a special remit for that purpose. The successful argument in the case of *Pringle* was, that 'when the House of Lords think the appellant entitled to the expenses of the litigation in the Court of Session, a remit, with a special instruction to that effect, is inserted in the judgment: *when it is silent upon the subject, they are meant to be refused*; and it would be productive of much confusion if any supposed grounds of the judgment were taken into view which are not expressed in it.' And in the case of *Wilson* against *Laidlaw*, 'the Court' (13th May 1818,) '*in respect that the judgment of the House of Lords is silent upon the subject of expenses,*' found '*it incompetent to allow them.*'

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But by the later decisions, the principle so broadly laid down has been very much narrowed, if not entirely departed from. In the cases of *Maberly*, 11th March 1826, of *Lord Fife*, 8th July 1826, and *Dick v. Cuthbertson*, 19th Jan. 1828, the competency of the claim was sustained without any special remit. It is true, that in these last-mentioned cases the judgment of the House of Lords was not absolutely conclusive; and that the application of the judgments necessarily led to farther procedure in the Court of Session. But it is difficult to see how that circumstance could have had any effect, consistently with the principle laid down in the cases of *Pringle v. Tod's Legatees*, and *Wilson v. Laidlaw*. If the silence of the judgment of the House of Lords on the subject of expenses were held to imply a refusal, it would seem to follow, that, however necessary farther procedure in the Court of Session might be, still such judgment, without a special remit, would be as decisive in one class of cases as the other, against the claim for expenses prior to the appeal. For the House of Lords, though ignorant of the future course to be adopted in the Court of Session, and the merits of the litigants in the mode of conducting it, have always the means of ascertaining which of the parties has been to blame in the previous stages of the cause. Upon this point the case of *Dick* against *Cuthbertson* is very strong. There the main question discussed previously to the appeal was, whether the respondent, the trustee, 'was bound, at the expense of the bankrupt's estate, to make any addition to the title offered to *Dick*,' the appellant. The House of Lords ordered and adjudged that the finding of the Court of Session on this should be reversed; 'And it is declared, that *the respondent is bound to make the representor a good and valid title, and that the title offered to the respondent is*

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not such good and valid title; and with this reversal and declaration, it is ordered that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of in the said appeal, and to do therein as is consistent with 'this reversal and declaration.' Here, the House of Lords evidently decided the whole matter in dispute between the parties prior to the appeal, viz. the sufficiency of the title offered by the respondent to the appellant; and, on the principle of the decisions in the case of Pringle and of Wilson, their silence must have been held as a bar against the appellant's claim for previous expenses. Indeed, in the case of Dick, 6. S. and D. 390, it seems to have been expressly admitted 'that the later decisions had departed from the rules of the older ones.'

From these last decisions, then, it may be inferred, 1st, That a special remit of the question of expenses is not indispensable; and, 2dly, That when the judgment of the House of Lords is such as to shew that they contemplated some farther procedure in the Court of Session, the silence of their judgment regarding expenses is not to be held by implication as a refusal of them, but leaves the claim open to be discussed under the remit, like any of the other points in the cause not expressly decided by the Court of Appeal. Accordingly, this seems to have been the distinction adopted in the later cases.

In the case of Reid the judgment was reversed, (*Shaw and Dunlop*, Nov. 18. 1825); and though there was a remit, it was merely a 'remit to repel defences, and to decern.' In the case of *Mactavish v. Turner*, Feb. 12. 1832, there was a simple reversal conclusive of the cause, without any remit. The circumstances were the same in *Wilson v. Sinclair*, June 12. 1832, which was decided expressly on the authority of the cases of Reid and Mactavish. In all those cases, where the reversal was absolutely conclusive, where there was no remit, or a remit expressly confining the Court of Session to an act rather of a ministerial than of a judicial nature, viz. that of pronouncing a decerniture, it was held incompetent to entertain the claim for expenses.

But during the same period, another set of cases occurred, in which a different rule was followed, and the claim for expenses prior to appeal was sustained. Such was the case of *Stirling v. Dun*, Jan. 14. 1831, in which the judgment of the Court was reversed, with a remit 'to do farther therein as may be consistent with this judgment, and as may be just,' but without any special intimation to decern, or any finding as to expenses. It appears from the report that the claim for expenses prior to appeal was objected to precisely on the ground maintained here, (*Shaw and Dun-*

top, ix. 278,) viz. that 'where the House of Lords have had the whole cause before them, and decided it out and out without saying any thing as to expenses, their silence in such a case was tantamount to a refusal.' But the objection was disregarded, and the expenses allowed. The same course was followed in the case of *Clyne v. Sclater*, Dec. 14. 1831, in which the interlocutor of the Court had been reversed, and the case remitted 'to do farther therein as shall be just and consistent with this judgment.' It is true that, according to the report of that case, 'the competency of such demand was not disputed;' but the fair construction of the passage of the report appears to be, not that the question of competency was unnoticed, but that the competency was admitted, a circumstance which does not deprive the case of its authority on a point of practice. Lastly, in the case of *Torrance v. Crawford*, Jan. 17. 1832, under a remit of the same kind, the question of competency was raised and debated before the Lord Ordinary, who found that there was no incompetency in the claim; and Mrs Torrance, the party against whom the judgment was pronounced, and who reclaimed against it, 'intimated at the bar that she did not question the finding as to the competency.' In other words, she acquiesced in the interlocutor of the Lord Ordinary sustaining the competency, but objected to the expenses on the merits, on which last point she was successful.

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Now, it appears to us that it is by the rule adopted in the last class of cases that the present must be determined. Indeed, the special terms of the judgment of the House of Lords render this a case of comparatively little difficulty, and bring it, in principle, as near as possible to those of *Maberly*, *Dick*, &c. in which the competency cannot now be disputed. By that judgment 'the interlocutors complained of in the said appeal are hereby reversed, and it is declared that the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take office; and it is farther ordered that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be consistent with this judgment.' It is clear that, under this judgment, the Court were not confined to the merely ministerial extrication of the reversal by a decerniture. On the contrary, the terms of the remit necessarily imply that farther procedure in the Court of Session was in the view of the Court of Appeal, and that the whole case was sent back, subject only to the effect of the 'declaration.' Whether the bearing of that declaration upon the final judgment of the case was direct or indirect; absolutely conclusive or not, or led to a longer or shorter procedure, is of no importance with reference to the present dispute. Those

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matters are left to be decided by the Court of Session under the remit. The remit is so broad as to comprehend the whole points of the cause, and claims of the parties not expressly decided by the House of Lords, and 'consistent with that judgment;' and as the appellant's claim for expenses clearly falls within those limits, we think it is competent for him to bring it under the consideration of the Court.

Lords Medwyn and Corehouse gave their opinion as follows: We are of opinion, that it is not competent for the Court, in this case, to entertain the claim of the defender Scot, for the expenses incurred prior to the appeal.

The judgments of the House of Lords, on appeals from the Court of Session, are seldom framed, so as to admit of a decree being extracted without the intervention of the Court below. The cause, therefore, necessarily returns, that the judgment may be applied; and this is done, sometimes by an express remit, but more frequently without any remit, except that which is held to be implied in the judgment itself. Whether the remit be express or implied, it imposes upon this Court the performance of the judicial acts requisite to complete the procedure; for, in the *first* place, The Court must consider, whether the judgment of the House of Lords has exhausted the whole cause, or whether any points remain to be decided; and, *secondly*, If they are of opinion that the cause is exhausted, to frame such an interlocutor as is best adapted to carry the judgment into effect. The first is often a doubtful point, admitting of argument. In the present case, parties are at issue upon it in the minutes now before us, though, on considering these minutes, we are of opinion that the cause is exhausted. The second also, though less frequently, may be questionable, and require deliberation. But in the decision of both, the Court performs not a ministerial, but a judicial function,—that is, they proceed in a manner, which, they are of opinion, is consistent with justice, and proper to make the judgment effectual.

Now, the rule of law, with regard to expenses incurred before an appeal, as laid down or recognised in a very numerous series of cases, we apprehend to be this, that, if the cause is not exhausted on the merits by the judgment of the House of Lords, but if further procedure may still be had with regard to them, it is competent for this Court to entertain the question as to expenses incurred before the appeal; because the final issue of the cause, that is, the time when the question of expenses properly arises, had not occurred when the judgment of the House of Lords was pronounced. And, *adly*, although the cause has been exhausted on the merits, if there

be a special direction or remit to this Court to try the question of 11 Mar. 1836.
 expenses, the Court is, of course, authorised and bound to do so. 
 On the other hand, if the cause has been exhausted on the merits, Stewart v. Scot.
 and if there is either no remit at all, or merely a general remit, to
 do as shall seem just, or to proceed as shall be consistent with the
 judgment, it is incompetent for this Court to entertain the ques- Opinion of
 tion. The reason has been already given, namely, that a remit in Consulted
 these general terms is equivalent to no remit; it is a mere expres- Judges.
 sion of what is necessarily implied in the affirmance or revial of
 the judgment.

It is a natural and very plausible notion, that, if the question of
 previous expenses has not been expressly disposed of in the House
 of Lords, the cause in reality is not exhausted, and, consequent-
 ly, that it is expedient that that question, in such circumstances,
 should always be competent here. But the answer is, that the point
 is no longer open, having been set at rest by a numerous and uni-
 form train of decisions. Farther, with regard to expediency, we
 think it is hard for the losing party in the House of Lords, who may
 have been successful here, to have the whole cause argued over
 again on the merits, perhaps at the distance of years, for the pur-
 pose of trying the question of expenses, when the successful party
 might have moved for expenses in the House of Lords, at the time
 of the reversal, and obtained either a decision, or a special remit
 with regard to them,—a thing which has been frequently done in
 the practice of that House.

In the case of *Kennedy v. Cumming*, 19th April 1711, judg-
 ment is reversed, and it is ordered, ‘ That the Lords of Council
 and Session do direct the expenses in these suits to be taxed ac-
 cording to the course of their Court, and paid to Sir Andrew Ken-
 nedy, (the appellant,) by Sir Alexander Cumming, (the respon-
 dent).’ Thus, also, in a suspension, *Dunbar v. Erskine*, 16th May
 1712, the judgment of the House of Lords bears, that ‘ the appellant
 shall have his full costs for all his subsequent proceedings before the
 said Sheriffs and Lords of Council and Session, since the taxation
 of his costs by the said Sheriffs.’ In *Bogle and others v. Cumming*;
 &c. 15th Dec. 1757, the judgment bears, ‘ That the respondents do
 pay to the appellants their costs of suit in the Court below, and that
 an account thereof be given.’ The same thing was done in *Hamil-
 ton v. The University of Glasgow*, 9th May 1716; in *Douglas v.*
Dalrymple’s Trustees, 29th Dec. 1797; and in *Ross v. Macdonald*,
 5th Jan. 1798. More recently, in the case of *Little v. Oswald and*
others, 13th April 1835, in a judgment of reversal from the House
 of Lords, it is ordered, ‘ That the said Court of Session do and shall
 make such orders, and give such directions, relative to the costs

11 Mar. 1836. 'already paid, or ordered to be paid, by any of the parties in this cause, as to such Court shall seem meet.' It is a mistake, therefore, to suppose that the House of Lords, on a reversal, never entertains or decides the question as to expenses incurred in the Court of Session prior to the appeal. These, and many other instances which might be cited, shew that the practice has been otherwise, from the Union, down to the present day. It is true, that, in a great proportion of cases of reversal, there is no finding either as to expenses in the Court below, or as to the costs of the appeal; because, in general, it is held, that the judgment brought under review is of itself sufficient evidence that the party was not temere litigans.

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With regard to the question now before us, it will be observed, that there is a series of no less than seven cases, in which the rule we have stated has been laid down or acted upon,—the claim for expenses having been found incompetent, when the cause had been exhausted on the merits, and when there had been no special remit. The series begins with the case of Pringle, 6th March 1799, in which the point was fully considered on a reclaiming petition and answers, when *'the Court were clearly of opinion that the claim was incompetent.'* It was followed by six others, viz. Geddes, 16th Feb. 1810; Pettigrew Wilson, 18th June 1818; Reid, 18th Nov. 1825; Agnew's Executors, 24th June 1826; Mactavish, 12th Feb. 1831; Wilson v. Sinclair, 12th June 1832.

It will be particularly observed, that although in four of these cases there was no remit, yet, in the other three, there was an *express* remit, in terms the same or more comprehensive than in the present case. In that of Pringle, the leading case upon the subject, the House of Lords, after reversing, and sustaining the reasons of reduction, *'ordered the cause to be remitted back to the Court of Session, to proceed accordingly.'* In that of Pettigrew Wilson, they *'remitted back to the Court of Session to do therein as shall be just.'* And in Vans Agnew's Executors, it was ordered, *'That the cause be remitted back to the Court of Session to execute this judgment, and further, to proceed as shall be consistent with this judgment, and shall be just.'* In the present case the cause is remitted back, *not to do as shall be just*, but simply, *'to proceed therein as shall be consistent with this judgment.'* The precedent in the case of Agnew's Executors is exceedingly strong; for, notwithstanding the remit in express terms to proceed as shall be consistent with the judgment, and shall be just, it is reported, *'Their Lordships were generally of opinion, that as, in the reduction, the House of Lords had the whole question before them, and did decide it out and out; they might have judged of expenses, (in which*

‘ this case differed from that of Maberly); but as they did not award 11 Mar., 1836:
 ‘ them, this Court was not warranted in now doing so;’ 4. *Shaw*, 757.

Let it be considered next, whether this long series rerum judi-
 catarum is in any way shaken by the cases cited on the other side.
 They are *seven* in number also. Of these, the first *five* are, Ma-
 berly, 11th May 1826; Lord Fife, 8th July 1826; Speirs, 30th
 May 1827; Dick, 19th Jan. 1828; Stirling v. Dun, 14th Jan.
 1831. Now, in all these five, the cause was not exhausted upon
 the merits, but came back with ulterior questions, which either
 were actually tried, or might have been tried, had the parties
 thought fit; and, therefore, they are all in conformity with the rule.
 This is evident with regard to the first four, but it is equally cer-
 tain with regard to the fifth, *Stirling v. Dun*. It was a reduction
 of a lease for 300 years, on an entailed estate, on three grounds:
 1st, Facility, or rather imbecility, and lesion; 2d, Grassum; 3d,
 Contravention of the prohibition to dispoise; and there was a con-
 clusion in the summons not only for reduction, but also for violent
 profits. Parties were at issue on the facts as to imbecility and
 grassum, and those two reasons of reduction were never discussed
 at all; for the Lord Ordinary reported, and the Court here, and
 the House of Lords, decided exclusively on the third ground,
 namely, the import of a prohibition to dispoise. The House of
 Lords reduced, and the cause came back; but the conclusion in the
 libel for violent profits remained, which had not been disposed of;
 or touched upon, either here, or in the House of Lords. That
 question had to be tried, *and actually was tried and decided*, after the
 remit, upon a long argument, whether the defender was in bona
 fide, or, if in mala fide, at what time his mala fides commenced.
 Farther, if the Court had been in favour of the defender on those
 points, it would still have been competent for the pursuer, if he
 had thought fit, to fall back on the first two reasons of reduction;
 imbecility and fraud, and grassum; and both might have been very
 material in the question of expenses, the one as excluding bona
 fides altogether, the other in fixing the period at which it ceased.
 This, therefore, was a cause clearly not exhausted: in point of
 fact, it did proceed on the merits after its return, and might have
 given rise to much litigation. It may be added, that, in one of
 these five cases, that of Lord Fife, the distinction, between ex-
 haustion and non-exhaustion, was distinctly laid down on the Bench;
 in the same terms in which it had been, in the case of *Agnew’s*
Executors, a short time before. Lord Alloway says, ‘ If the House
 ‘ of Lords decide the case out and out, and do not give expenses,
 ‘ then I would not award them here; but if they do not so decide
 ‘ the cause, but remit to proceed farther, the question of expenses
 ‘ is open.’

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The two remaining cases, namely, Clyne, 14th Dec. 1831, and Torrance, 17th Jan. 1832, or rather one of them, is in a somewhat different situation. In Clyne's case, in the report in Shaw and Dunlop, it is stated, 'that the competency of the demand was not 'disputed,' though the Faculty Collection is silent on that point. In that of Torrance, the pursuer reclaimed against the Lord Ordinary's interlocutor, who had found that the claim was competent, and had awarded expenses. But the reporter says, that she 'intimated at the bar, that she did not question the finding as to the 'competency.' It was proposed on the Bench, that the Court should adhere to the Lord Ordinary's finding, sustaining the competency; but Lord Gillies observed, that the point of competency had not been argued before the Court; and accordingly, the proposal was given up, and the Lord Ordinary's interlocutor, which had both found the competency and awarded expenses, was simply altered. This case, therefore, was not a decision on the competency; on the contrary, that question was distinctly waived.

It may be conjectured, that the counsel, both in the case of Clyne and that of Torrance, were induced to give up the point of competency, in consequence of Lord Newton's note in the latter case, which was issued a short time before both cases came into the Inner-House. His Lordship states, that it 'seems to be established 'by various late cases, particularly that of Stirling v. Dun, 14th 'Jan. 1831, that it is competent to give expenses prior to appeal, 'when the judgment of the House of Lords is silent as to the matter.' His Lordship had overlooked the distinction, that Stirling v. Dun was an unexhausted cause, and therefore, in perfect conformity with the rule, and with every one case that had been decided before. He rests his opinion chiefly, if not exclusively, on the circumstance, that there was a general remit in the case before him, as there had been in the case of Stirling, 'to proceed as should 'seem just, and was consistent with the judgment,' without observing, that remits, in those general terms, in Pringle's case, in that of Pettigrew Wilson, and in Agnew's Executors, had been disregarded, the cause having been exhausted, or, as is elsewhere expressed, 'decided out and out on the merits.' It may be remarked also, that the Lord Ordinary, in his note here, classes the case of Stirling with those of Clyne and Torrance, and considers it as opposed to the previous decisions in Mactavish v. Turner, and Wilson v. Sinclair, when, in truth, it is quite consistent with all the prior cases, and concurs with them in establishing the rule which we have stated.

The result is, that out of fourteen cases, twelve are in strict accordance with the rule, and the remaining two cannot be consider-

ed as precedents, because the plea was expressly abandoned at the bar in both, before they were advised; and in one of them, the Court refused to consider the question of competency, on the ground that it had not been argued before them, and altered the Lord Ordinary's interlocutor, in which the competency had been sustained. It is believed, that there are very few points in the law of Scotland which have been ruled by so numerous and so consistent a series of decisions.

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Lord Moncreiff.—Though I had some doubt on this question, from the terms of the remit, and the apparently conflicting decisions, I am now entirely satisfied that the above opinion is the right judgment, and that there is really no case in which the decision of the Court was at all adverse to it, except that of Clyne, in which the point was expressly withdrawn from the consideration of the Court. I therefore concur in the opinion, that it is not competent for the Court, in this case, to entertain the claim of Mr Scot for the expenses incurred prior to the appeal, and for the reasons so fully stated.

At the advising, after these opinions had been delivered, the *Lord President* and *Lords Balgray and Gillies* concurred in the opinions of *Lords Medwyn and Corehouse*.

Opinion of Court.

Lord Mackenzie.—The Scotch act 1592, c. 144, in substance orders expenses to be decided upon, 'and liquidat by the decret,' in every case, 'by all judges within this realm.' That is, and always must have been interpreted to mean, in cases where expenses appear to the Judge to be justly due: to that extent it remains in practice. But I suppose it is not held to apply to the House of Lords, which does not pronounce decreets, and is not within this realm of Scotland. But then the House of Lords, in all cases, expressly, or by implication, remits to this Court to pronounce decret according to their judgment or findings. In doing this, the statute seems to apply to us; but there obviously arises a difficulty, which, in the greater part of such cases, takes away from us any safe grounds for giving decret for expenses on such remits; that is, that we have nothing left before us but the libel and the judgment of the House of Lords, which judgment says nothing of expenses. The view which the House of Lords had of the cause, as proceeding on a *probabilis causa litigandi*, or the contrary, we have no authentic means of knowing. Our own views on that subject are of no relevancy. These were superseded by the appeal. In case of a reversal this is obvious. All our views must be abandoned as totally wrong: but even in an affirmance, when it does not affirm any finding of expenses, the House of Lords may agree with us in our de-

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cision, and yet not in our views of the case, as a case for expenses, or the contrary; and it is their views only that are to have effect. We cannot apply their judgment by discerning what we do not know they judged right. In general, therefore, it seems plain, that when a case comes back to us on a remit, implied or express, without any finding or judgment by the House of Lords regarding expenses, we have no grounds on which we can give a decret for expenses; and accordingly it is, I think, very clearly the ordinary practice of this Court not to give them. The statement of cases in the opinion of Lords Medwyn and Corehouse I think demonstrates that practice. There may be exceptions. There seems to be an exception where the case is remitted for farther discussion: There we have the case before us for our own judgment, taking as part of it, no doubt, the judgment of the House of Lords; but it is before us, and we may have grounds for finding expenses. There may perhaps be other exceptions, where it obviously and necessarily follows, from the libel and judgment of the House of Lords, that expenses must be justly due. Put the case, for instance, that it was provided by a statute, that the defender, if assoilzied, should have expenses; that we decerned against this defender, but the House of Lords reversed, saying nothing regarding expenses: I still think, in the decret applying the judgment, we should decern for expenses, in obedience to the statute. Again, put the case, that a reduction is brought before us for forgery, that we assoilzie, but the House of Lords reverse our judgment, and find the writing to be forged by the defender, and remit the case to us, to proceed as shall be consistent with that judgment, not saying any thing regarding expenses. Perhaps we might find expenses, because the justice of such a finding necessarily follows on the libel and judgment. Possibly we might do so on a tacit remit in such a case, under the authority of the Scotch statute requiring expenses, where justly due, to be liquidat in the decret. But in ordinary cases, the rule seems to me pretty clear, both in reason and in practice; and the present is an ordinary case. There is a reversal of our judgment, and a general remit to proceed as shall be consistent with that judgment; but nothing is said by the House of Lords as to expenses. How then can we find expenses? We know nothing of the views that Honourable House had of the case, except by their judgment. Our own views are out of the question. Can we then say, that the judgment of the House of Lords necessarily implies that expenses ought to be decerned for? I think not. It is a decision on a point of law, implying no blame in the unsuccessful party. The Lord Ordinary notices, that it is a point of competency. But can there not be a *probabilis causa litigandi* on a point of competency? May there

not be the most blameless and unavoidable litigation on such points? I cannot admit that to be a decisive observation. I see no other ground stated, and therefore think, that in this case we ought not to decern for expenses.

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Rutherford, for the appellant, stated, that if the votes of their Lordships of the First Division were to be reckoned, the majority of the Consulted Judges would be then thrown into a minority of one, and suggested, that the votes of the majority of the Consulted Judges only, not those of the whole Court, must, under the terms of the statute, 6. Geo. IV. c. 120, rule the decision.

The Court, however, were of opinion, that the intention of the statute was to obtain the decision of the whole Court, and that in many cases that interpretation had been already acted upon, by deciding in conformity with the opinion of the majority of the whole Court.

The Court accordingly recalled the finding of the Lord Ordinary Judgment, as to expenses.

Lord Ordinary, *Jeffrey*. Act. *Dean of Fac. (Hope,) Thomson*. Alt. *Rutherford*,
Sandford. Alex. Scot, W. S. and James M^cCook, W. S. Agents. S. Clerk.
C. R.

SECOND DIVISION.

No. CXXI.

11th March 1836.

ADAM GIBSON, TEACHER OF LATIN AND OTHER LANGUAGES
IN THE ROYAL ACADEMY OF TAIN,

against

DIRECTORS OF SAID ACADEMY.

SCHOOLMASTER, (RIGHT TO DISMISS).—This was a circumstantial case, as to the right of the Directors of the Tain Academy, established by charter, to dismiss a teacher. Mr Gibson, (the teacher,) having suspended a resolution of the Directors removing him from his situation, the Lords Ordinary refused the suspension; the last Lord Ordinary (Cockburn) expressing, in a note, an opinion, that ‘the respondents had power to terminate their connection with the suspender, and that they exercised this power regularly.’

The suspender having reclaimed, *James Moncreiff* was fully heard against the interlocutor, and the *Dean of Faculty* in support of it; and the Court remitted to the Lord Ordinary to pass the bill, with-

11 Mar. 1836 out prejudice to the Directors proceeding by any competent form under the charter.

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Directors of
Tain Academy.

The case of *Adam v. Dundas*, of the Inverness Academy, 7th July 1815 *, was referred to in the pleadings. (See also as to that

* COURT OF SESSION, SECOND DIVISION.

Adam v. Directors of Inverness Academy, 7th July 1815.

Lord Robertson.—I have no difficulty at all. By the charter of erection, the Directors are empowered to appoint salaries for the masters, to dismiss any of them on proper grounds, and to elect others in their room. The question therefore is, whether they had proper grounds here? No doubt, they have set up a preliminary ground, which seems to be very extraordinary. They say, that though they are entitled by the charter to elect teachers, and to turn them out on proper grounds, they have taken upon themselves to elect the office during pleasure. I see no evidence that they told Mr Adam that he was to be elected during pleasure; and even if they did so, I am clearly of opinion that it was not legal. I have no idea, that they can take it upon them to elect any teachers to the Academy during their own pleasure. They say they can make bye-laws, and so they can; but I deny that they can make any bye-law in contradiction to the powers under which they themselves were incorporated; and farther, I conceive that such an election would be contra bonos mores. I conceive it most important that persons charged with the education of youth should not hold their office subject to the pleasure or the caprice of any body of men whatever. This has often been settled, but more particularly in the case of *Duff v. Grant of Monymusk*;—a case which is not taken notice of by either of the parties. Duff did not hold his appointment in consequence of any special minute of election, but he succeeded to a person who had acknowledged, by a writing under his hand, that he held the situation during pleasure; and it was maintained that Duff just came into the situation, and under the same conditions as his predecessor; and I believe it was the unanimous opinion of the Bench, that such an election was a pactum illicitum; that it was a thing that no court of law could sanction.

Having got rid of this question, the other question remains open, What are the grounds on which they have dismissed him? Now, my Lords, really, after reading these papers with all the attention in my power, I cannot find any tangible ground on which I can lay my hands. He did right in bringing what the other gentlemen had done under the notice of the Directors. It was the incumbent duty of the Rector to do so. No doubt the Directors did not seem to think that the conduct of the gentlemen who had been complained of was of a nature to call for their interference; but, after all, that was only the opinion of a majority of the Directors.

I don't see that there was any proper ground for dismissing the suspender, from what may be considered as his freehold, which, in terms of the charter, he was entitled to hold ad vitam aut culpam.

Another thing is, that he had made a statement which three of the Directors did not recollect. Is that to be held as a ground for dismissal from his office? Certainly not.

Lord Meadowbank.—I entirely concur with my brother. I see nothing stated in these papers at all like an argument, excepting the extravagant one, that the Court has no jurisdiction. It occupies, with some shew of argument, a great part of the Directors' pleading. You cannot find out from their statements what this person did amiss; and then, because he did something which they do not explain, they took the opportunity of dismissing him without accusation, and with-

case, *supra*, p. 161, this vol.) *Lord Glenlee* stated, that that case plainly proceeded upon no good ground for dismissal being assigned. 11 Mar. 1836.

Gibson v.
Directors of
Tain Academy.

Lords Ordinary, Balgray and Cockburn.

Act. Sol.-Gen. (Cuninghame,) and Ja.

Moncreiff.

Alt. Dean of Fac. (Hope,) and Buchanan.

Aeneas Macbean,

W. S. and Hugh Macqueen, W. S. Agents.

T. Clerk.

R.

out trial. It is the strangest species of justice this, that is held up to the Court, as a thing too sacred to interfere with, and that you are to bow to these wise gentlemen, who act with so much temper, and so much moderation. It is a question that is ridiculous, in the way in which it comes before the Court; but it is monstrously serious to the country. Mr Adam appears to be an able teacher, and a most respectable man. It is of great consequence that respectable persons should be employed in the education of youth; and I am sure that no person of respectability would accept of it on such terms as are here contended for. It has always been a matter of regret to me, that the ultimate reward of schoolmasters was so small in this country. They have no scale as they have in England, where they rise to the first situations in the state. The Bench of Bishops is filled with them. (Yes, My Lord, said Mr Cranstoun, and even the House of Peers.) We have but a very scanty opportunity of giving them any reward; but we at least have the common law of Scotland, giving them independence and protection from the caprice of any set of men. I concur completely with my brother, that it is contra bonos mores to appoint a man to a school, during the pleasure of any set of gentlemen. It is using him like a shoe-black, whose situation depends upon the will of a gentleman; and worse than a shoe-black, for it leaves him to the disposal of a numerous open body, who always to a proverb have no conscience.

Lord Bannatyne.—This is one of the most important cases that ever came under the consideration of the Court. No body of men in the kingdom are better entitled to protection than those who are employed in the education of youth. It was a just remark, that the provision made for them was extremely scanty, and that they really have little or no reward but protection from the law. The case before us is no doubt said to stand in a different situation from a parish school, at least it apparently does so: it rests entirely upon a charter; and we are told that we are to judge of the power of the Directors, not by the law of the land, but by the tenor and contents of their own charter. But in reality this institution is the parochial school, at the same time that it is the academy, and thus has the protection both of the common law and of the charter. We all know what the common law is, and that schoolmasters hold their situations *ad vitam aut culpam*. They cannot make a bargain under it that will deprive them of their right. Then the charter leaves a power of removing upon proper cause, but on proper cause only, and I need not say one word as to whether this was a proper cause or not. There is a long appendix annexed to this memorial; and I am sure of one thing, that if there was a proper cause for dismissing the rector, there would have been a proper cause for dismissing the others also. But there was not.

Lord Justice-Clerk.—My Lords, there can be no doubt that the Directors are entitled to dismiss on proper grounds, and on proper grounds only; but what are their grounds in this case? for I can see none in their memorial; and no bye-law, which is contrary to the charter, or to the law of the land, is binding. I am therefore clear for passing this bill.

Lord Glenlee of the same opinion.

The Court unanimously passed the bill.

FIRST DIVISION.

No. CXXII.

12th May 1836.

THE EARL OF DUNDONALD
against
 BOYES' TRUSTEES.

PRESCRIPTION, (NEGATIVE).—*The right to reduce a decree-arbitral, affecting a claim to heritable property, and which had remained unchallenged for forty years,—held to have been lost by the operation of the negative prescription.*

Narrative.

CAPTAIN JAMES GILCHRIST of Annfield had two daughters, Grizel, afterwards Mrs Boyes, from whom the constituents of the defenders are descended, and Ann, afterwards Countess of Dundonald, the mother of the pursuer. In July 1770, while both his daughters were still unmarried, Captain Gilchrist executed a settlement of his whole estates, the ultimate destination under which was in favour of the said Grizel and Ann Gilchrist, equally, share and share alike, and the heirs of their bodies respectively, reserving power to himself to revoke, alter or innovate at pleasure, but declaring, 'that any revocation shall not be inferred by any implications or constructions, 'but only by an express writing under my hand.' In 1774, the youngest daughter, Ann, married the pursuer's father, the late Earl of Dundonald, then Lord Cochrane; and the defenders alleged, that Captain Gilchrist, in the marriage-contract, revoked, in so far, the above-mentioned trust-settlement, by declaring, that, at his death, Grizel Gilchrist, his eldest daughter, besides and over and above the other half of the foresaid lands and other subjects which he intended to settle upon her, should be entitled to a præcipuum in terms of law, in the event that he should make no deed to the contrary thereof. No infestment could pass upon this contract, as it had neither procuratory nor precept. The contract itself was not produced, and the pursuer denied that it ever existed.

In 1777, Captain Gilchrist executed a bond of provision in favour of Mrs Gilchrist, his wife, by which he gave her a liferent of the subjects claimed as a præcipuum by the eldest daughter, consisting of the house, offices, and garden, at Annfield, with a certain portion of ground. Upon this bond Mrs Gilchrist was infest on 23d October 1777, and under this title she possessed these subjects in liferent, till her death, in 1803.

Captain Gilchrist died in June 1777. In December following, his eldest daughter, Grizel, married John Boyes of Wellhall, the ancestor of the parties, of whom the defenders are the trustees. On 29th and 30th September 1778, Mrs Boyes obtained a precept of clare constat from the superior, to infest her as 'eldest daughter, 'and one of the two heirs-portioners of Captain Gilchrist,' and nearest and lawful heir to him, in the one just and equal half of his heritable subjects. The infestment, which was taken the next day, was limited to the 'one just and equal half of the lands, teinds 'and other subjects above mentioned.'

19 May 1826.

Earl of Dundonald v. Boyes' Trustees.

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Narrative.

In 1778, a proposal was made of a general submission, between Mr Boyes and Lord Cochrane, of all matters relative to Captain Gilchrist's affairs, wherein Lady Dundonald and her sister were concerned. However, in the end, a limited submission was made to Mr Adam Rolland, advocate, 'as sole arbiter, mutually chosen by 'the foresaid parties, for ascertaining the extent of the præcipuum 'of the said Mrs Grizel Gilchrist, as the eldest heir-portioner of the 'said Captain Gilchrist, her father, and all questions betwixt the said 'parties respecting the time from which the said præcipuum is to 'commence, and all objections competent to the said Ann, Countess 'of Dundonald, to the extent of the said præcipuum, and the time 'the same is to commence.' In April 1780, Mr Rolland pronounced a decree-arbitral, bearing, that 'having heard parties and their doers, 'and being on the whole matter fully and ripely advised, and having God and a good conscience before his eyes, he found that Mrs 'Boyes had a right, as a præcipuum, to the house and offices of 'Annfield and pertinents, and also to certain pieces of ground 'therein described;' and the decree farther declares, 'These subjects I adjudge to the said Mrs Grizel Gilchrist, and declares it 'to be her sole and exclusive property, in full of her claim for a 'præcipuum, as the eldest daughter and heir-portioner of the deceased Captain Gilchrist; and further, I find that the said Mrs 'Grizel Gilchrist had right to the fee of the above subjects from 'the death of her father, but that the same is burdened with the 'liferent of the said Mrs Ann Robertson, her mother, without any 'claim to her, or to Mr Boyes, her husband, against Ann, Countess 'of Dundonald, or her husband, the Earl of Dundonald, on account 'of the subjects being burdened with the said liferent.'

Possession by the parties followed on this decree. Lady Dundonald possessed her share of the estate till 13th November 1784, when she died, leaving a son, the present pursuer, about nine years old. Mrs Boyes in like manner possessed her share of the succession; and on the death of her mother, in 1803, she entered also into possession of the præcipuum awarded to her by Mr Rolland. In

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Earl of Dun-
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tees.

Narrative.

1785, Mrs Boyes disposed her share of the estate, including the præcipuum subjects, to Mr Buchanan, who reconveyed the whole to Mr Boyes in 1786; and his son, Mr John Boyes, for whom the defenders are trustees, took infeftment on this reconveyance in 1818.

In 1786, a brieve of division was taken out by Mrs Boyes, which narrated Mr Rolland's decree, and comprehended the præcipuum subjects. The process fell asleep until May 1828, when it was awakened, and Mr Strachan, as agent for the pursuer, lodged a claim, in which he excepted the subjects adjudged to Mrs Boyes as a præcipuum. The process terminated by a decree of division in 1830, dividing Captain Gilchrist's heritable estate, exclusive of the præcipuum subjects, equally between the defenders, as in right of Mrs Boyes, and the pursuer, as the representative of his mother, in right of whom he had expedite a general service, as one of the heirs-portioners of Captain Gilchrist, and on this had obtained a precept of clare constat, on which he was infeft.

On 8th August 1833, the pursuer made up a new title, by serving himself, before the Bailies of the Canongate, as the eldest son and nearest and lawful heir of line, and also nearest and lawful heir of provision to his mother, the late Countess of Dundonald; and in virtue of the retour of this service, the pursuer was again infeft and seised in all and whole the one just and equal half pro indiviso of Captain Gilchrist's lands, conform to instrument of sasine in his favour, proceeding on the settlement of 1770.

Upon this title the pursuer raised the present action, in which he called for a reduction of the submission and decree-arbitral of Mr Rolland, on the ground of fraud and circumvention on the part of Mr and Mrs Boyes, and that it was entered into by Lord and Lady Dundonald in ignorance of their just rights, and that it was unjust, in so far as parties were not heard, and ultra vires, in so far as it adjudged the præcipuum to Mrs Boyes. 2d, Of the decree of division, on the ground, that the whole proceedings were founded on fraud and error; and concluding to have it declared, that in virtue of Captain Gilchrist's settlement, his eldest daughter had no right to any præcipuum, and that the pursuer, as in right of his younger daughter, had a right pro indiviso to a just and equal half of all the property contained in that settlement, including the house and offices of Annfield, claimed as præcipuum by the defenders, and that the defenders should hold count and reckoning for the half of the rents, from 21st February 1803, when Mrs Gilchrist died. The Lord Ordinary ordered cases for the parties, and made avisandum therewith to the Court.

The pursuer *pleaded*—That, in virtue of Captain Gilchrist's

settlement, they were entitled to a half of the whole of his property, including a half of the part now claimed as a præcipuum by the defenders, in as much as the marriage-contract, containing a pretended revocation, was not produced; and, even if it had, the clauses founded on would not have been an effectual revocation; and also in respect that their right under that settlement was not extinguished by the decree-arbitral, as in that submission there was no question referred as to the right of præcipuum, but only as to its extent. But even supposing that Lady Dundonald had submitted the question of right, under a belief that her elder sister had a claim to a præcipuum, it only shewed that Lady Dundonald was not aware of her rights under the settlement, and was such an error in substantialibus, as, even without fraud, would have vitiated the contract. Besides, as Mrs Boyes withheld all information regarding the deed from Lady Dundonald, and led her to enter into the submission as if no such deed had existed, in these circumstances the decree would have been reducible on the ground of fraud. Further, at the date of the submission, Lady Dundonald was not the right party to have entered into it, the feudal right being in hæreditate descende of Captain Gilchrist, and the personal right being vested in Mrs Gilchrist as the primary disponent under the trust settlement.

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The defenders cannot plead the positive prescription of the subjects in question, because the title of Mrs Boyes having been expressly limited to one just and equal pro indiviso half of the defunct's property, could therefore never be a title for prescribing any part whatever of the other pro indiviso half. Neither could the decree-arbitral be of any use as a title of prescription, as it did not and could not contain any warrant for infestment in favour of Mrs Boyes, and never was followed by an infestment in her favour. Even had it been perfectly valid, as a decree on the question of right, it would merely have conferred upon Mr Boyes a jus actionis to sue Lady Dundonald to convey her half of the subjects claimed as a præcipuum. The term of prescription has not run, for, as the pursuer was in minority in 1796, only about thirty-seven years had elapsed previous to the institution of this action. Besides, as Mrs Gilchrist, the liferentrix, who possessed till 1803, held the subjects in trust for her daughter, Lady Dundonald and the pursuer, they must therefore be held to have been in civil possession through the liferentrix until her death, which excludes that of the defenders and their authors; hence only thirty years have elapsed, and therefore the positive prescription cannot be pleaded.

But neither can the defenders plead the negative prescription, because, according, to Mr Erskine, iii. 7. 8, that cannot be pleaded even by a person who has a title proper to be the founda-

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tion of the positive prescription, if it be not actually established in him by that prescription. The challenge of the decree-arbitral cannot be excluded by the negative prescription; because the effect of Captain Gilchrist's settlement was to afford to his younger daughter an effectual defence or exception against any claim which the elder heir-portioner might make to any part of the subjects as a præcipuum; and this being the case, the right to state that defence could never prescribe at all; *Ersk.* iii. 7. 11. The case of Paul against Reid, cited by the defenders, is not a case in point. That action was instituted by the heir of a reversion of a wadset. Now, the statute 1617 extended the negative prescription expressly to reversions, and it was there pleaded, not that the right in the reversion was extinguished by prescription of any kind, but that this right was validly transferred to the respondent by the adjudication, decree of expiry of the legal, charters of adjudication, &c.; but in the present case, the right of Lady Dundonald, as her father's disponee, neither was transferred to Mr Boyes or his successors, nor was reduced to a mere reversion, but all along remained an absolute though personal *jus dominii*, and was either vested in the person of Lady Dundonald herself, or in her *hæreditas jacens*; hence she cannot be precluded by the negative prescription, since the party stating that plea is not in a situation to found upon the positive. Moreover, the period of the negative prescription has not elapsed, as it could not commence until Mr Gilchrist's death in 1803, as, until that event, the exception of *non valens agere* applies in favour of the pursuer, as in fact he had no immediate interest in the circumstances to try the question; so that his forbearance cannot be imputed to negligence, but to this, that the action would have been fruitless; *Ersk.* iii. 7. 37; *Stair*, ii. 12. 27; *Brown v. Hepburn*, 5th Feb. 1680, *Mor.* 11,209; *Elliot v. Aitchison*, 18th Feb. 1724; *Scott*, 21st Dec. 1756, *Brown's Supp.* v. 854.

Defenders' Pleas.

The defenders *pleaded*—The infestment in favour of Mrs Boyes in 1778, as eldest heir-portioner of her father, Captain Gilchrist, clothed her with that character and all its feudal privileges; and having possessed under it for more than a period of forty years, during all which there was a party *valens agere* in a challenge of the title, it must be held that prescription has run in favour of that title. Lady Dundonald survived till 13th November 1784, being six years and one month after the date of Mrs Boyes' infestment; the pursuer attained majority on 14th December 1796, while the present action was not raised till 31st August 1833; and adding the intermediate period of thirty-six years and eight months to the time that Lady Dundonald survived the date

of Mrs Boyes' infestment, the result gives forty-two years and nine months. So soon, therefore, as the character of eldest heir-portioner was feudally in her person, by the sasine of 1778, her right to a præcipuum was established and complete; *Ersk.* iii. 8. 13. This was a good title on which to prescribe the præcipuum subjects; and as the liferent of her mother was a mere burden upon that right, she, during the subsistence of the liferent, must be held still to have possessed the subjects as fiar.

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But the defenders' title is also fortified by the negative prescription, by which the pursuer is barred from challenging the submission and decret-arbitral, for the date of the decree is 6th April 1780, and Lady Dundonald survived four years and seven months from that date, which being added to the thirty-six years and eight months which have been already shewn to have elapsed between the date of the pursuer's majority and the raising of the present action, gives a period of forty-one years and three months, during which there were parties valentes agere. It is to be observed, that the defenders do not plead the negative prescription against a right of property, but against a right of action. They do not argue that any right Lady Dundonald and the pursuer may ever have had in the præcipuum subjects has been cut off by the operation of the negative prescription, but that these subjects were validly transferred, by Mrs Boyes' sasine in 1778, and Mr Rolland's decree in 1780, and that the right to challenge the last of these writs has fallen by the negative prescription. The negative prescription is thus used to extinguish not a right of property but a right of action; and the statute 1617, extending this prescription to certain specified actions, 'and to all others whatsoever,' introduces no general exception of actions involving in their ultimate results rights or questions of real property. Accordingly, in the following decisions, it was found that a right of action to set aside a title to real property was lost by the negative prescription; *Younger v. Johnstons*, Nov. 28. 1665; *Murray v. Irving*, 18th Mar. 1707, *Mor.* 10,721; *Grahame v. Douglas*, *Mor.* 1167; *Paul v. Reid*, 18th Feb. 1814, *F. C.* It cannot be said that the defender has merely a *jus actionis* to compel her co-heir portioner to convey to her the other half of the subjects of the præcipuum, the defence against which can never prescribe. Her infestment, as eldest heir-portioner, carried right to a præcipuum, and her title to the particular subjects in question was completed by the decree, which adjudges them to Mrs Boyes as her exclusive property, and did not require any additional conveyance from the pursuer. But, even assuming that the decree-arbitral gave a mere personal *jus actionis* to demand a conveyance to the præcipuum subjects, it cannot be said that

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this can be pleaded by the pursuer, for the purpose for which it is now made use of, viz. to take the right of a subject from one person and to establish it in that of the excipient; for Mr Erskine states that the rule, that the operation of the negative prescription does not apply 'to exceptions or defences competent to a defender for 'eliding any action,' refers only to such exceptions as exempt a party from a demand, not to such as have for their object to establish a right in the person of the excipient, by taking it from another. The plea, that Mrs Gilchrist's liferent prevented the necessity of interruption on his part, is of no avail, because, as Mrs Boyes had a jus in re in the subjects, the pursuer cannot assign any just cause of forbearance.

As the decree-arbitral finds that the share of Mrs Boyes was to be burdened with the liferent of her mother, without any claim of relief against the Countess of Dundonald, the right of Mrs Boyes is therefore as effectually protected by prescription, as the representatives of the Countess of Dundonald are secured from certain claims otherwise competent to the defenders.

The pursuer, as he libels upon a service as heir to his mother, is bound by her deeds in regard to the property in question, and more particularly by the submission and decree-arbitral following thereon in 1780.

Opinion of Court.

Lord Balgray.—I am clear the defences ought to be sustained.

Lord President.—I am quite satisfied that the defence on both the prescriptions should be sustained; but, in particular, that founded on the negative, adhering to the principle of the case of Reid v. Paul, which was so ably debated, and must not be disturbed. In that case Lord Hermand remarked, that the argument, that the negative could not be pleaded except by a person who was in a situation to plead the positive was unsound, as that would be making the plea available only when it was of no use; but it was true that a person could not plead the negative if he had not a title on which it was competent for him to plead the positive prescription—as, for instance, a person in possession on a tack could not plead the positive prescription upon that. Here however the negative applies, and the defence founded on it must be sustained.

Lord Mackenzie.—I agree, on the supposition that the judgment depends on the application of the negative prescription to the decree-arbitral. I cannot say that I am satisfied that either the positive or negative would extinguish the jus crediti under the settlement, but for the effect of the submission. I do not hold this opinion on the want of a proper title for the positive prescription, because I am inclined to think the sasine, as eldest heir-portioner, if it had been

followed by possession of the præcipuum for forty years, would have been sufficient for the positive prescription; but there was here no possession of the præcipuum for that time. It is said that the possession of the liferentrix was that of the fiar; but I do not think that that can be held here, where the liferentrix had equal right whether there was præcipuum or not. Then, again, the negative prescription is pleaded on the failure to claim for forty years. And I rather think the claim under the settlement, not being constituted by infeftment, might fall by the negative prescription of the act 1617; but then the forty years have not elapsed, as they could not run till the liferentrix died, when there arose a *valentia agendi cum effectu*. But whatever difficulties may arise on these points, I concur when I look to the submission. The plea is untenable, that the submission was merely intended to decide a hypothetical case. The terms of the decree-arbitral imply that there was a præcipuum, the extent of which was to be ascertained; and if the decree is valid, it is conclusive; but forty years having passed without its being questioned, and as there has been no possession contrary to it, all right to reduce it must have fallen by the negative prescription. We must therefore sustain the defences in the reduction of the decree-arbitral, from which it follows that we must sustain the other defences also.

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Boyes' Trustees.

 Opinion of Court.

Lord Gillies.—I concur. There are certainly some difficulties in the views taken by Lord Mackenzie, though, on the whole, I do not agree with him. It was stated by Mr Maitland for the defenders, that the title made up for them was in the same form as a title made up under the settlement; but he might have gone a step further, and added, that the title was the same as would have been made up if there had been no settlement at all. I differ from Lord Mackenzie in this, that I hold the possession of the liferentrix was that of the fiar. But it is unnecessary to decide this case on any other ground than that of the negative prescription, which is quite enough of itself.

The Court pronounced the following judgment: ‘The Lords Judgment.
 ‘sustain the defences on the negative prescription, and assoilzie
 ‘the defenders from the conclusions of the libel: Find it unneces-
 ‘sary to dispose of the other defences: Find the pursuer liable in
 ‘the defender’s expenses,’ &c.

Lord Ordinary, Cockburn.

Act. *Rutherford, Marshall, Milne.**Thomson Paul,*

W. S. Agent.

Alt. Dean of Fac. (*Hope*,) *Mailland.**Mackenzie & Mac-**farlane*, W. S. Agents.

D. Clerk.

C. R.

FIRST DIVISION.

No. CXXIII.

17th May 1836.

CARRICK, BROWN AND COMPANY
against
 DANIEL DUNCAN AND OTHERS.

CAUTIONER.—TESTAMENT DATIVE.—*Cautioners in the confirmation of certain executors found not liable in repayment of a sum which a bank had paid to those executors, in the belief, which afterwards proved to be erroneous, that the deceased to whom they were confirmed was the depositor.*

Narrative.

IN 1831, a sum of L.90 was deposited with the pursuers, in the name of Robert Duncan, Rothesay, and a deposit-receipt was granted in the usual form. Some of the defenders, representatives of another Robert Duncan, who was the master of a brig called the Eagle of Londonderry, and who was drowned in December 1831 or January 1832, confirmed themselves as executors of the deceased. The only article given up in the inventory was ‘the sum of L.90 sterling, contained in a bank check deposit-receipt, or promissory-note, by the Ship Bank at Glasgow, dated 29th July 1831.’ The Commissaries confirmed the said defenders as the ‘only executors-dative qua nearest of kin to the defunct, and in and to the debts and sums of money before written, herein given up and confirmed allenarly, with full power to them to uplift and receive the same, grant discharges thereof, if needful to pursue therefor, and generally every other thing thereanent to do that to the office of executors qua nearest of kin is known to belong, providing always that they render just count and reckoning of their intromissions therewith, when and where the same shall be legally required; whereupon, and that the debts and sums of money before written shall be made free and forthcoming to all parties having interest therein, as law will.’ The other defenders, Charles M‘Kinlay, and Robert Goodwin, became cautioners to this confirmation. The defenders, on producing this title, received the money from the bank, and a discharge was granted, which was prepared by Mr Goodwin, and which set forth, ‘that the said deposit-receipt or bank check was granted in favour of the said defunct, but which has been lost or mislaid, at least it cannot be found presently.’ Soon afterwards Robert Duncan, shoemaker in Rothesay, came to the bank and ex-

hibited the deposit-receipt for the L.90 above mentioned, and demanded payment, which he obtained. It was admitted by the pursuers that this person had previously made deposits with them; but denied that he was personally known to them.

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Carrick,
Brown & Co.
v. Duncan
and Others.

Pursuers'
Pleas.

The pursuers received repayment from the principal defenders of about L.40, and after having discussed them, came against the cautioners, *pleading*—1st, The defenders are bound, in terms of their cautionary engagement, to make the sum now in question forthcoming to the pursuer, as having interest therein, and the only just title thereto; see *Scott v. Carnegie*, 6th Dec. 1749. 2d, The obligation undertaken by the defenders bound them both to warrant that the executors had the title represented by them, and also that they would account for and administer the funds in terms of law.

The defenders *pleaded*—1st, Cautioners or executors are only liable that the sum confirmed be duly applied to the purposes of the executry, and not that the executors should repeat and pay back to parties paying to them, however erroneously, as debtors of the estate. 2d, Cautionary obligations receive a strict interpretation in favour of the granters, and cannot be extended beyond the objects and purposes for which they were entered into. 3d, The pursuers, having admitted or assumed that the deceased Robert Duncan was the owner of the money deposited in their bank, when they had or ought to have had ample materials for ascertaining the true state of the fact, cannot subject the defenders for acting on the same supposition with themselves. 4th, The alleged error having arisen solely in consequence of the negligence of the pursuers in not obtaining a designation, or otherwise making themselves aware of the owners of the money, and of the right of the representatives to the same in the circumstances above stated, the defenders are not liable for the amount.

Defenders'
Pleas.

The Lord Ordinary pronounced an interlocutor, *assolzieing* the defenders, and finding the pursuers liable in expenses.

The pursuers *reclaimed*, when the Court *adhered*, expressing an opinion that the bank ought to have made a stricter inquiry before paying over the money.

Lord Ordinary, Fullerton.
J. Anderson.
Clerk.

Act. Dean of Fac. (Hope,) More.

W. & D. Allester, and Charles Fisher, S.S.C. Agents.

Alt. M' Neill,

C. R.

FIRST DIVISION.

No. CXXIV.

18th May 1836.

JAMES WALKER
against
 WILLIAM DRUMMOND.

SETTLED ACCOUNT.—PROOF.—PRESUMPTION.—*Circumstances in which, after a final settlement had been made between a banking company and a customer, it was found incompetent for the bank to set aside the settlement on the ground of error.*

THE facts of this special case will be found clearly stated in the following interlocutor and note of the Lord Ordinary:

Lord Ordinary's Interlocutor.

‘ The Lord Ordinary having heard counsel, &c. finds, that the
 ‘ advocator, James Walker, kept a cash-account with the Fife Bank-
 ‘ ing Company for some time previous to 1819, and subsequently
 ‘ till the dissolution of that company in August 1823; and that he
 ‘ kept a similar account with the second Fife Banking Company, to
 ‘ which the business of the first was transferred, till December 1825,
 ‘ when it stopped payment: Finds, that the advocator’s account
 ‘ was regularly balanced every year on the 2d of August with both
 ‘ those companies; that a settlement on these occasions took place
 ‘ between the parties on an examination of the bank ledger; that
 ‘ interest was calculated and credited; that vouchers were exa-
 ‘ mined and discharged, the balance carried to a new account,
 ‘ and the settlement authenticated in the ledger by a doquet sub-
 ‘ scribed by the advocator, or by his sons, acting for him, and un-
 ‘ der his authority: Finds, that annual settlements to this effect
 ‘ took place on the 2d of August from 1819 till 1823, when the
 ‘ first banking company was dissolved; also in 1824 and 1825
 ‘ with the second company, and in May 1826, with those who
 ‘ acted for its creditors after it had stopped payment; and on the
 ‘ last-mentioned occasion, that the balance appearing due by the
 ‘ advocator was paid by him, and the bond by himself and his cau-
 ‘ tioners delivered up to him: Finds, that after all these consecu-
 ‘ tive settlements and exchanges of vouchers, it is not now compe-
 ‘ tent to found upon an error, alleged to have occurred in July
 ‘ 1819, not appearing on the face of the accounts as entered in the
 ‘ ledger, upon which, it is admitted, all the settlements took place

' but said to have been detected by an examination of the teller's 18 May 1836.
 ' book and clean cash-book, private books of the bank, to which
 ' the advocator had no access, and which it is not averred he ever *Walker v.*
 ' examined before his final settlement with the creditors of the bank- *Drummond.*
 ' ing company in 1826, for the purpose of setting aside all those
 ' settlements, and of establishing a claim against him after the lapse
 ' of so many years: Finds, that no presumption arises against the
 ' advocator from his not now being able to produce his pass-book
 ' for the year 1819, or from there being no entry to his credit in a
 ' private memorandum-book, which he has produced under the dili-
 ' gence, but which is proved by the bank books to have been care-
 ' lessly and irregularly kept; nor from his declining to state at this
 ' distance of time that he recollects of having paid in a sum to the
 ' credit of his account on the 22d of July 1819: Therefore, advo-
 ' cates the cause, recalls the interlocutor of the Sheriff, assoilzies
 ' the advocator from the conclusions of the libel, and decerns; finds
 ' the respondent liable in expenses in this and the inferior court.'

Lord Ordinary's Inter-
 locutor.

Note.—' It is admitted by the respondent, that in all the seven
 ' annual settlements between the parties, and in the eighth with
 ' the creditors of the banking company, the ledger was the book to
 ' which they both referred, and which was exclusively examined.
 ' If there had been any error *ex facie* in the ledger, for example,
 ' an error of summation, it might, even at this distance of time,
 ' have been corrected; but that is not the case. The respondent's
 ' story is, that the teller committed an error in July 1819, by de-
 ' biting the advocator improperly with L.191, and that he after-
 ' wards corrected the error in his own book, and in the state or
 ' clean cash-book, by reversing it, and then that the officer who had
 ' charge of the ledger committed a still greater and more palpable
 ' error, by entering the sum of L.191 to the advocator's credit, and
 ' omitting the corresponding cross-entry to his debit. This story
 ' proceeds upon the assumption, that the officers of the banks had
 ' never examined or checked their ledger from 1819, till the disso-
 ' lution of the company in 1826, although every time they balanced
 ' their cash during all that period they must have found a defi-
 ' ciency to the amount of L.191. The Lord Ordinary means to
 ' throw out no insinuation against the officers of these two establish-
 ' ments. It is enough to say, that it is possible that the entries in
 ' the private books, to which their customers had no access, might
 ' have been made for the purpose of falsifying this ledger, the book
 ' which was patent, and on the examination of which every settle-
 ' ment was made and docketed accordingly. It is thought that
 ' bankers, or those in their right, are not entitled to found on their

Note.

18 May 1836.

Walker v.
Drummond.

Note.

‘own gross and culpable negligence for a period of seven years, to
 ‘cut down accounts so settled by themselves; more especially, when
 ‘they themselves do not produce a single voucher under the advo-
 ‘cator’s hand to substantiate their claim, and when they have got
 ‘possession of every voucher by which he might have been able
 ‘to resist it. The Lord Ordinary considers it a doctrine pregnant
 ‘with mischief, that bankers, who are peculiarly bound to keep an
 ‘accurate record of their transactions, are at liberty to disregard
 ‘their own formal deeds of discharge, repeated again and again,
 ‘and acted on during a period of seven years, on pretences like
 ‘this. It would destroy all security in money dealing.

‘The advocator’s memorandum-book might have operated against
 ‘him, if, from the nature of his business, it was his duty to keep
 ‘regular books. But he was a country farmer, and the ledger of
 ‘the bank shews that he omitted to enter in that memorandum-
 ‘book a great many sums which he, or his sons for him, paid to the
 ‘credit of his account.

‘The Lord Ordinary thinks it unnecessary to consider the form
 ‘of the action. What is now stated would have been equally re-
 ‘levant in a reduction, had it been brought. He does not think
 ‘that the triennial prescription is applicable to the case.’

Judgment.

The respondent *reclaimed*, when the Court unanimously *adhered*,
 giving additional expenses.

Lord Ordinary, Corehouse. Act. Dean of Fac. (Hope,) Cheape. Alt. Robertson,
 Deas. Ker & Dickson, W. S. and Wm. Alexander, W. S. Agents. S. Clerk.
 C. R.

FIRST DIVISION.

No. CXXV.

18th May 1836.

MISS M. G. LOCKHART MACDONALD

against

SIR NORMAN MACDONALD LOCKHART.

TAILZIE.—CLAUSE.—PROVISIONS TO HEIRS AND CHILDREN.—
 STAT. 10. GEO. III. c. 51.—*An heir of entail in possession having,
 in virtue of powers contained in the entails under which he possessed,
 created, by his marriage-contract, a liferent in favour of his wife, and*

having also, by the same deed, provided his younger children in a sum of three years' free rent of the tailzied estates, 'so far as the same are free and unaffected at the time with liferents,' and under certain other deductions,—found, (1.) That the succeeding heir of entail was entitled, in estimating the free rental on which the children's provisions were to be paid, to deduct the liferent created in favour of their mother. (2.) That he was not entitled to deduct the sum which, in virtue of the option conferred on him by the 10. Geo. III. c. 51, he had allotted to the payment of sums expended in improvements under that statute by his predecessor.

18 May 1836.



Macdonald v.
Lockhart.

THE late Sir Charles Macdonald Lockhart held the entailed estate of Carnwath and others under two deeds of entail, the first executed in 1721, by George Lockhart, the second in 1787, by James, Count Lockhart. By the entail 1721, the heirs in possession are empowered to grant a locality to their wives not exceeding a fourth part of the estate, 'in so far as the same is free and unaffected for 'the time' with former liferents, and after deduction of the annualrents and the provisions after mentioned. They are also empowered to provide the younger children to such a sum as they shall think fit, 'always not exceeding three years' free rent of the said lands and estate, so far as the same is free and unaffected at the time 'with liferents, and after deduction of the annualrents of former 'provisions granted by any prior heirs to their younger children 'then resting unpaid.' The deed of 1787 is differently framed in regard to provisions to younger children, as it empowers the heirs of entail to provide their younger children 'to such a sum as they 'shall think fit, the same always not exceeding three years' free rent 'thereof, as far as the same are free and unaffected at the time with 'former liferents, and after deduction of the interest of former provisions granted by prior heirs to their children, then resting unpaid.'

In 1821, the possessor of these entailed estates entered into a contract of marriage with Miss Ross, which, after narrating the two deeds of entail above mentioned, and that 'the said Sir Charles 'Macdonald Lockhart stands now heritably infest and seised in the 'said lands and barony of Carnwath, and whole other lands and 'heritages contained in the said last-mentioned deed of entail, conform to the foresaid instrument of sasine in his favour,' he binds and obliges himself to infest and seise his spouse 'in liferent, during 'all the days of her life after his decease, in case she shall happen to 'survive him,' in certain lands forming part of the entailed estate; but providing always, 'that the said locality lands are hereby li-

18 May 1836.

Macdonald v.
Lockhart.

Narrative.

‘ mited to, and shall not exceed a fourth part of the said tailzied lands and estate, in so far as the same are free and unaffected for the time with former liferents, and after deduction of the interest of the provisions allowed by the said two tailzies to be settled by the heirs and members of taillie on their children.’ The marriage-contract contained also the following provision in favour of the children: ‘ And further, the said Sir Charles Macdonald Lockhart, in virtue of the powers conferred on him by the said two deeds of entail herein-before specified, binds and obliges himself, and the heirs succeeding to him in the said taillied lands and estates, to make payment to the children, one or more, other than and besides the heir of the marriage hereby contracted, succeeding to the same, of a sum of money amounting to and not exceeding three years’ free rent of the said taillied lands and estates, in so far as the same are free and unaffected at the time with liferents, and after deduction of the annualrents of former provisions granted by any prior heirs to their children then resting unpaid; and which sum of money shall be payable at the first term of Whitsunday or Martinmas after the death of the said Sir Charles Macdonald Lockhart.’

Sir Charles Macdonald Lockhart died on the 8th of December 1832, leaving daughters but no sons. He was survived by his widow, who had been infeft in her locality under the marriage-contract in 1822. The daughters’ provisions bore interest from the father’s death, and became payable at Whitsunday 1833, at which time also Lady Lockhart’s locality came into operation, being the first term after Sir Charles’ death. There was no dispute in regard to Lady Lockhart’s provision, the defender having been enabled to redeem it upon very favourable terms, in virtue of a special clause contained in the contract; but a difference having arisen between the parties as to the deductions to be made from the rental in estimating the children’s provisions, an amicable suit was raised for the purpose of setting these matters at rest.

The Lord Ordinary pronounced the following interlocutor: ‘ The Lord Ordinary having heard parties’ procurators, and considered the closed record and process, finds, that in estimating the amount of the provisions of the pursuers, agreeably to the powers in the entails of Dryden and Carnwath, and the exercise of these powers in the marriage-contract of their late father, Sir Charles Lockhart, the defender, the present heir of entail, is not entitled to deduct either the liferent created in favour of Lady Lockhart, or the sum which, in virtue of the option conferred on him by 10. Geo. III. c. 51, he has allotted to the payment of sums expended on improve-

‘ments under that statute by his said predecessor; therefore, to that extent repels the defences, and decerns; and appoints the case to be enrolled, and parties to be heard on the mode of ascertaining the precise amount of the provisions.’

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Against this interlocutor the defender *reclaimed*, and the Court ordered cases on the point, whether the widow's locality was to be struck out of the rental in estimating the amount of the children's provisions.

The pursuer *argued*—That Sir Charles Lockhart conceived he derived his powers of making provisions from both the entails, and looked upon them as giving the same powers. But, supposing the powers in the one to differ from those in the other, Sir Charles was vested with no power inconsistent with the provisions of the entail of 1787. Upon the rental of the estate then entailed, the provisions were to be calculated.

Pursuer's
Pleas.

But, in reality, Sir Charles, under both the entails, was entitled to provide the children, without reference to the liferent which his widow, their mother, might be entitled to under the entail; for the liferent of Sir Charles' widow was not a subsisting liferent by which the estate, under the true meaning of either of the entails, could be affected at the time when the provisions were granted, or at any time during Sir Charles' life,—not, in fact, until the first term after his death; for though the liferent was constituted during his life, it did not till then affect the estate.

The defender's interpretation of the powers conferred by the entail leads to this result, that the widow's liferent must suffer deduction of the interest of the children's provisions, while they are to be limited by the widow's liferent. There are thus two unknown quantities, the amount of each depending upon that of the other, which leads to questions of so complicated a nature that they cannot be solved by arithmetic, but require the assistance of algebra; and therefore such an interpretation is not easily to be adopted.

It is clear that Sir Charles looked upon both entails as giving him the same powers, from his referring to them in the marriage-contract; and he must be held to have considered the expression, former liferents, to have been equivalent to liferents affecting the lands at the time. At all events, he can only have intended to exercise the power with which he was vested, which was that of the entail of 1787.

The defenders *pleaded*—The entail of 1721 being in full force

18 May 1836.

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Lockhart.Defender's
Plea.

at the date of the execution of the marriage-contract, it must be held that the latter was framed with a view to the powers in the original deed, especially as the terms are the same in both. And this circumstance excludes the argument, that Sir Charles must be held to have acted in conformity with the powers of both deeds, as it appears he rejects the phraseology of the latter, and adopts that of the original.

By the terms of the marriage-contract and the entail 1721, it is clear that the free rental is to be ascertained by the deduction of all liferents whatever which may affect the lands at the time the calculation is made; for it is obvious that the expression, at the time, must mean the time when the provisions come to be ascertained, in order to payment. But the period in the present case was the first term after Sir Charles' death, being Whitsunday 1833; and at that time the liferent of Lady Lockhart, which was given 'during all the days of her life after his decease,' must be held to have affected the estate. Indeed, it appears to have come into operation from the moment of Sir Charles' decease; but, at all events, it cannot be doubted that it became a burden simultaneously with the provisions at the succeeding term of Whitsunday, and falls to be deducted in estimating the free rental.

The interpretation of the defender leads to no more complicated questions than can be resolved by a simple equation of algebra.

At advising—

Opinion of
Court.

Lord President.—Though I have some doubts on this case, yet it rather appears to me that the liferent of Lady Lockhart ought to be deducted. I do not think the answer, that it should not be deducted, because it cannot be held to have affected the estate till Sir Charles' death, as it was not payable till then, is a good one; for I think it takes effect from the date of the lady's infestment; and there are situations in which it might be payable even during Sir Charles' life; for, put the case that she had divorced him, or that he had been outlawed for non-appearance, or transported for felony, it would then have been payable during his life. Now, this shews that it affected the estate from the time of the infestment.

Lord Balgray.—I concur, and particularly on looking to the words of the entail and contract of marriage. The free rents, from which the provisions are to be taken, must be estimated at the time of the testator's death, as was established in the case of Douglas of Mains. It cannot be said that here the burden of the widow's liferent was not created at the time of Sir Charles Lockhart's death, and it therefore falls to be deducted. And looking to it as a matter of justice, how can we call that free rent out of which pro-

visions are to be given, when one-third of it is to be taken away? 18 May 1836.
 It appears to me that this locality is just a substitution for the terce,
 and it cannot be disputed but that that would have been deducted. 
 Macdonald v.
 Lockhart.

Lord Gillies.—I concur. My opinion is very much founded on the words of the marriage-contract. The provision to the children is a sum not exceeding three years' free rent of the estates, so far as the same are free and unaffected, at the time, of liferents. Now, the expression, at the time, evidently means the tempus mortis of the testator. But it is argued, that it applies to the time when the deed was executed. No doubt it would have been competent for Sir Charles to have made such a provision; but then the expression would have been free at this time of liferents; but the words are, free at the time, which must mean the tempus mortis.

Opinion of
 Court.

Lord Mackenzie.—I have difficulty in concurring with your Lordships. If the actual time of making the provisions is to be looked to, the three years' free rent provided can never be held as affected at that time by a liferent, not to commence till after the death of the granter; and which may never commence at all; and I think the provisions might have been so expressed, as to make that the only time to be looked to. But even assuming that the time is to be the time of the granter's death, still I am not satisfied that either the entailor or Sir Charles in this case intended that the free rent, in reference to which, by the same deed, a liferent to the widow and provisions to the younger children were simul et semel granted, should be held to be affected, as to each, by the grant of the other in that deed. I rather think the free rent is to be looked to as existing independently of that deed, and before it has operated at all, and that, in reference to this free rent, both the widow's liferent and children's provisions are to have effect. The deed is in this view to be regarded as a deed made at the time of death, in which throughout the granter looks, and is authorised to look, to the free rent as existing when he begins to make his deed, not to the free rent which is to exist after his own deed, or any part of it, shall come into operation. I am not much moved by the hardship on the heir of entail, who could better bear the whole burden of the widow, than the younger children could bear any share of it. It is by no means reasonable, that from a few years' rent provided for younger children, a full deduction should be made of a temporary burden, such as terce, or a conventional liferent. Suppose the temporary burden were the courtesy; would it be reasonable to provide the younger children in nothing at all?

The Court pronounced the following interlocutor: 'The Lords Judgment.
 ' having advised this reclaiming note, with the minutes of debate,
 ' alter the interlocutor of the Lord Ordinary reclaimed against, and

18 May 1836.

Macdonald v.
Lockhart.

Judgment.

‘ find, that in estimating the amount of the provisions of the pursuers, the defender, the present heir of entail, is entitled to deduct the liferent created in favour of Lady Lockhart: quoad ultra, adhere to the interlocutor, and remit to the Lord Ordinary to proceed in the cause.’

Lord Ordinary, Fullerton.

M^rNeill, Neaves.

Agents. D. Clerk.

Act. Dean of Fac. (Hope,) T. Robertson.

Alt. Andrew Storie, W. S. and Cunningham & Bell, W. S.

C. R.

SECOND DIVISION.

No. CXXVI.

18th May 1836.

WILLIAM HOWIE

against

ABERDEEN MASON LODGE.

FRIENDLY SOCIETY.—STAT. 33. GEO. III. c. 54, § 8.—*Circumstances in which, upon a construction of the above statute and relative bye-laws of a Friendly Society, it was found,—that the expulsion of a member was just, and the proceedings legal and regular.*

Narrative.

THE Aberdeen Mason Lodge was originally instituted in 1541, chiefly for the purpose of establishing and keeping up a fund for the relief of decayed, necessitous members, their widows and children. Its laws and regulations have been confirmed by repeated acts of Parliament, and the Society or Lodge is now possessed of considerable property. In virtue of the regulations, the members, both at entry, and annually, during their continuance in health, make contributions to the fund, over which, when aged and infirm, they have, by the constitution of the society, a claim for support. The pursuer was admitted a member of this Lodge in the year 1800. At the annual election of office-bearers, on the 27th December 1813, he was appointed its treasurer, and he continued to act in the same capacity until the 27th December 1820. The pursuer was also employed as a mason, in executing certain improvements on the society's property in Aberdeen.

In January 1820, the Lodge appointed a committee to examine the pursuer's accounts from the time of his entering on the office of treasurer, and to report to the society the amount of interest due

by him. By the report, it appeared that the amount of interest upon the pursuer's intromissions, from his appointment as treasurer, to the 27th December 1819, was L.14:19:9. The pursuer then brought forward certain claims for remuneration and services, which were disallowed. By the laws and constitution of the Lodge, their treasurer had the power of borrowing money for its purposes; and the pursuer borrowed the sum of L.100 from John Craighead of Mindurno, on the 20th of June 1820, to whom, of that date, he granted his acceptance, as treasurer to the Lodge, and for its behoof, at twelve months, for L.105, being the L.100 borrowed, and interest. At the annual general meeting, held on the 27th December 1820, the pursuer was voted out of office, and John Chalmers, builder in Aberdeen, was elected treasurer in his stead. On that occasion the pursuer laid before the meeting a state of his accounts for the preceding year, but it did not include the loan he had received from Craighead, and it exhibited a balance as due by him of L.57:0:1, though he stated that he was in advance for the Lodge L.68:11:8. The pursuer, however, in the course of a few days, received an account of the Lodge rent of L.97, and he received further quarter dues amounting to L.13:11:11½, making together L.110:11:11½, thus shewing a balance against him of L.42:0:3½. This sum of L.42:0:3½ the pursuer accordingly handed to Chalmers, his successor in the office of treasurer; who, having been obliged to pay the bill granted to John Craighead, proceeded, in terms of directions from the Lodge, to raise an action, in May 1823, before the Sheriff of Aberdeenshire, against the pursuer, 'as late treasurer' of the Lodge, concluding against him for payment of the sum of 'L.100 sterling, borrowed by the said 'defender, as treasurer of the said Lodge, from John Craighead, 'farmer at Mindurno, upon the 20th day of June 1820, and not accounted for by the defender to the said Lodge, nor to the pursuer, (the said John Chalmers,) as his successor in office, conform 'to a bill,' &c. with interest and expenses, as particularly set forth in the summons. Howie maintained, as a preliminary defence, that, by the provisions of the Act of Parliament, the matter in dispute fell under the exclusive jurisdiction of the Court of Session. After a litigation, Howie's defences were repelled, and a final decree in favour of the Lodge pronounced by the Sheriff. Upon the extracted decree ultimate diligence was raised against Howie.

On 23d December 1823, at a meeting of the managers of the Lodge, 'the master stated to the meeting; that the clerk had, in 'virtue of the order of the last meeting, raised letters of caption, 'at the instance of the treasurer, against William Howie, for the 'debt due by him to the Lodge, on which he had been taken into

18 May 1826.

Howie v.
Aberdeen
Mason Lodge.
Narrative.

18 May 1836.

Howie v.
Aberdeen

Mason Lodge.

Narrative.

‘ custody; but having intimated that he wished to make some position to the managers, to several of whom he had applied individually to delay the diligence, it had been thought proper to delay the diligence till this meeting; which having been considered by the meeting, they referred the same to the annual general meeting on St John’s day, the 27th current, and appointed the clerk to give the said William Howie notice then to attend.’

‘ At the annual general meeting on 27th December, at which the pursuer was present, ‘ the meeting took under consideration the case of William Howie, with regard to the debt due by him to the Lodge, which was remitted by the managers at the last seditunt to this general meeting; and the said William Howie being present, stated, that he wished an extract from the Sederunt-book of the Lodge of the minutes of the meeting held on the 18th of June 1817, and also of the minutes of the annual general meeting of the Lodge held on the 27th December 1820, relative to his accounts, as he was to submit them to his friends, for the purpose of getting them to come forward as security to the Lodge for payment of the debt; and requested the Lodge to have the goodness to delay the execution of the diligence against him for the space of three months from this date, within which time he would report to the managers what he could do towards the liquidation of the debt; which having been considered by the Lodge, they agreed to grant the request of the said William Howie, and authorise the clerk to furnish him with the extracts wanted.’

An indulgence of several months having been granted to the pursuer, he still delayed to make a settlement of the debt; and at length, in August 1824, he was incarcerated upon the diligence. Up to December 1823, the pursuer had continued to make his annual payments to the Lodge. During his incarceration, the pursuer having petitioned for aliment, was judicially examined; and he emitted a declaration, in which the following statement of the bill transaction was given: ‘ That he borrowed L.100 from John Craighead in Mindurno, for which he granted him his bill as treasurer for the Lodge, without informing the managers or getting their consent to it; and thinking that he would be retained in office the following year, he did not enter the sum of L.100 sterling, so borrowed from Mr Craighead, in his accounts as treasurer, at St John’s day 1820, intending to pay the interest of the money himself.’

He further declares, ‘ that at St John’s day 1820, he made up, as usual, an account of his intromissions with, and expenditure of the funds of the Lodge, which account did not include either the said sum of L.100, nor the interest charged by the committee on

his former accounts, nor the declarant's charge for trouble and expenses, allowed by the committee.' 'That with the exception of said interest, and his own charge for trouble and expenses, allowed by the committee, and the not crediting the said L.100, all the other articles of charge and discharge in said account, now shewn to him, and marked by him of this date, as relative hereto, are all, as far as he knows, correct.' And 'that if the declarant had been continued in office for a year longer, as he expected, and which was also the practice of the Lodge, he thought that he would have been able to redeem his credit, and not have touched the Lodge, nor any man else, as he was then due no other person, except a few trifling debts, not exceeding L.20.'

18 May 1836.

Howie n.
Aberdeen
Mason Lodge.

Narrative.

By the second section of the laws it is provided, that the election of office-bearers in the Lodge should take place 'at the general meeting which is to be held for that purpose upon the 27th of December yearly;' and the manner of convening the general meeting appointed to be held on the 27th December yearly is provided for, viz. by advertisement in the Aberdeen Journal or newspaper, at least eight days before the meeting. On the other hand, the manner of convening general meetings for other purposes than the election of office-bearers is provided by the 8th law of the Lodge, which, after mentioning other particulars, enacts, 'That the master, or, in his absence, the depute-master or senior warden, shall have power to call general meetings of the Lodge for entering new members, or otherwise, as may be found necessary for the affairs of the society, by the officers of the Lodge, in the usual manner.'

The officer and the clerk are distinct persons, and the functions of the officer are described in the 5th regulation, where it is said, that the duty of 'the officer shall be to summon and attend the usual meetings.' The meeting at which the pursuer was expelled was called by the authority of the clerk to the Lodge; and the intimation given to members was a note added by the clerk to the usual advertisement in the Aberdeen Journal or newspaper, applicable to the annual general meeting for the election of office-bearers. No citation was given by the officer, and no notice was given to the members personally.

By the 14th article of the regulations of the society it is enacted; 'That, for preserving the character of the society, it is ordained; that upon information or flagrant report of any misdemeanour, fraudulent bankruptcy, or such like, of any member, the master and other official managers for the time do make strict inquiry thereanent; and if it shall appear evident to a majority of the

18 May 1886. 'members present, at any general meeting called for the purpose,
 Howie v. 'that the report is well founded, such offending member shall be
 Aberdeen 'expelled from the society, and forfeit for ever any interest there-
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On September 14. 1824, the managers resolved to bring this matter before the general meeting of the Lodge on St John's Day (27th December) next; 'and, in the mean time, the clerk was directed to give notice in the Aberdeen Journal, previous to said meeting, that the subject would be then considered, and a motion 'made for the expulsion of the said William Howie from being a 'member of the Lodge,' &c. At a meeting of the managers on 13th December, 'a copy of the advertisement of the general meeting, and intimating that a motion would then be made for the 'expulsion of William Howie from being a member of the Lodge, 'in terms of Article 14. of the regulations of the Lodge, was read 'to the meeting, and unanimously approved of, and appointed to 'be published in the next Aberdeen Journal, and also in that of 'the 22d current, before St John's Day.' During all these proceedings the pursuer was detained in jail. At the general meeting on 27th December 'there was laid before the meeting a petition 'from William Howie, craving his liberation from jail, in which 'brother John Chalmers moved, that the advertisement in the 'Aberdeen Journal, that a motion was to be made at the present 'meeting for the expulsion of the said William Howie from being 'a member of this Lodge, be read; which was done accordingly, 'along with the 14th article of the regulations, and also the declaration of the said William Howie in the process of aliment at his 'instance against the treasurer of the Lodge, before the Magistrates 'of Aberdeen, in which he admitted that he had borrowed the 'sum of L.100 from John Craighead in Mindurno, and had not 'entered it in his account with the Lodge at St John's Day 1820, 'nor accounted for in any way to them, but had applied it in payment of his own private debt; when the said John Chalmers further moved, that the said William Howie should be expelled from 'being a member of this Lodge, which was seconded by brother 'Patrick Still; and the vote having been put,' only one member voted against the expulsion, whilst three declined to vote. 'And 'the meeting, accordingly, do hereby declare the said William 'Howie to be expelled from the Lodge, as a member thereof, accordingly, in terms of the foresaid 14th article of the regulations.' The meeting then proceeded to consider the petition which had been laid before them on the part of the pursuer, which was to the following effect: 'To the Right Worshipful Master, and all the

‘ office-bearers and members of St John’s Lodge, Aberdeen : I have 18 May 1836.
 ‘ to express to you my deep regret, that I should in any shape have
 ‘ abused the trust which you were pleased to commit to my charge ;
 ‘ and I beg leave to declare to you my firm determination to repair
 ‘ the injury which the Lodge has sustained, as far as my future
 ‘ abilities will admit. In my present circumstances, however, I am
 ‘ altogether destitute and helpless. I am severely afflicted, as many
 ‘ of you are aware, with rheumatisms, and have a wife and family
 ‘ dependent on me to a considerable extent. On these grounds,
 ‘ I humbly entreat that you will liberate me from my present con-
 ‘ finement, which is the hope of an afflicted brother.’ (Signed) ‘ Wm.
 ‘ HOWIE.’ Upon considering this petition, the Lodge agreed to
 accede to the request, and authorised the pursuer to be liberated
 from jail.

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In May 1830, the pursuer brought an action of declarator, re-
 duction, and count and reckoning against the defenders, and also a
 separate action of reduction and declarator, on the point of his ex-
 pulsion from the Lodge, which were afterwards conjoined. It was
 maintained, (1.) That the proceedings were unjust and illegal, the
 pursuer not having been guilty of any offence which subjected him,
 in terms of the regulations, to be expelled. (2.) They were not
 entitled to set up the bill transaction with Craighead as a ground for
 expulsion, having waived the objections which might have been taken
 to the pursuer’s conduct in relation thereto, and having, when fully
 in the knowledge of the whole facts, not only permitted the pursuer
 to remain a member of the Lodge for several years, but also, during
 that time, received contributions to the funds made by him in the
 capacity of member. (3.) As the defenders expressly made the
 expulsion of the pursuer contingent upon his failing to satisfy the
 pecuniary claims of the society against him, they were not en-
 titled to pretend that his expulsion was occasioned by some other
 circumstance than his failure to make that satisfaction, or to allege
 that he was expelled for an offence of a different description. (4.)
 The proceedings in regard to the expulsion were irregular, in
 respect that although questions of that nature could, according to
 the regulations of the society, be entertained only in meetings
 called for the special purpose of considering and deciding on them,
 the meeting at which the question was decided was not a special,
 but an ordinary general meeting ; and there was, at that meeting,
 business of a different nature discussed and determined, while the
 nature of that business was fixed by the laws to be merely the elec-
 tion of office-bearers. (5.) These proceedings were irregular, be-

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cause the meeting was not called by competent authority, and because the members were not personally summoned by the proper officer. (6.) The conduct of the defenders, in the expulsion of the pursuer, was unjust and illegal, no scrutiny having preceded the expulsion, opportunities of explanation having been refused, and no regular notice given to the pursuer of the intended procedure,—and by the defenders' persisting in his incarceration, he was precluded from being present.

As to the process in the Sheriff-court, it was, *inter alia*, contended, (1.) That it was irregular and incompetent in the defenders to bring into Court an action, with conclusions applicable to a single article of the pursuer's intromissions as treasurer of the Lodge; while, in relation to these intromissions, counter claims were preferred on the part of the pursuer before the action was raised, and in the knowledge of the parties raising it, in relation to these intromissions, the only action competent in the circumstances being one of count and reckoning. (2.) The counter claims of the pursuer were competently stated in the action before the Sheriff, as they arose out of the same transactions to which the claims made in the summons related; and the claims arising out of the discharge of the office of treasurer were relevantly pleaded in abatement or extinction of claims made against the pursuer, on account of his intromissions in the office. (3.) The Sheriff acted improperly, not only in going into the investigation of the single article of charge made against the pursuer, in the face of the demand for a general accounting made by him, but in failing to allow proof, and to decide on the merits of the counter claims which he competently stated. (4.) The Sheriff had no jurisdiction to entertain the question, in respect of the provision of the act, 33. Geo. III, cap. 54, for summary proceedings in the Court of Session in relation to such questions. (5.) The Sheriff had no jurisdiction, since the rules of the society rendered decision by arbitration imperative, and the act 33. Geo. III. prescribed a strict adherence to such regulations.

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Pleas.

The defenders *pleaded*—(1.) The expulsion of the pursuer was conducted according to the rules and regulations of the society, and it was not competent to reduce or set aside the resolution of the society by which he was expelled, upon the ground that such expulsion was severe or undeserved in the circumstances of the case. (2.) The pursuer, by his conduct, had subjected himself to the punishment of expulsion, which was justly applied; and the members of the Lodge acted with fairness and justice in refraining from expelling him until his conduct had been fully investigated in the

action before the Sheriff. (3.) The process of relief, raised in the Sheriff-court against the pursuer, was perfectly regular, and did not require to assume the shape of a count and reckoning; and the conduct of the Sheriff was perfectly just and regular. (4.) The Sheriff had jurisdiction, in regard to the subject-matter of this action, which did not fall under the exclusive cognisance of the Court of Session. (5.) The subject-matter of this action being no part of the funds of the Lodge, but merely a claim of debt due to the Lodge, arising out of a fraudulent transaction of the pursuer, it was competent for the treasurer to recover such debt, without resorting to the Court of Session. (6.) The rules of the society did not render decision by arbitration imperative in this case; to which the provision in these rules, as to the decision by arbitration, did not apply. (7.) In cases to which this provision of the society applied, it was incumbent on the party defender to found upon that provision, and on that ground to decline the jurisdiction of the Court, or to propose an arbitration, in terms of the rules, in limine of the process. (8.) The pursuer was bound by the statement of his accounts, submitted to the Lodge when he went out of office. (9.) The claims brought forward by the pursuer were altogether inadmissible.

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The Lord Ordinary (20th May 1835) pronounced this interlocutor and note: ' Having considered the closed record in the con-
' joined processes, with the productions, and heard parties, finds,
' (under the action for setting aside the decree of the Sheriff,) *Imo*,
' That the defenders were not bound, by the 33. Geo. III, cap.
' 54, sect. 8, to have made their demand against the pursuer in the
' Court of Session; *2do*, That the pursuer, never having claimed
' the benefit of the 22d article of the regulations of the Lodge in
' the inferior court, cannot object now to the jurisdiction of the She-
' riff, on the ground that the case could only be settled by arbitra-
' tion; and therefore sustains the defences to this action, assoilzies
' the defenders, and decerns; finds the pursuer liable in expenses:
' Finds, (under the action for setting aside the expulsion from the
' Lodge,) that the proceedings were irregular, in respect that no
' specific charge was made against the pursuer; therefore reduces
' the said sentence of expulsion of the 27th December 1824, and
' decerns in terms of the declaratory conclusions of this action;
' finds the defenders liable in expenses,' &c.

Lord Ord-
inary's Inter-
locutor.

Note.—' The judgment of the Sheriff is not challenged on its
' merits, but only on the two (inconsistent) grounds: 1. That, by
' the 33. Geo. III. cap. 54, sec. 8, the demand by the society should

18 May 1836. ' have been made in the Court of Session: 2. That, by the 22d
 ' regulation of the Lodge, it ought to have been settled by arbitra-
 ' tion. The Lord Ordinary does not think that the statute touches
 ' this question. It applies only to the case in which an officer of
 ' the society refuses or fails to deliver or pay, or to render his ac-
 ' count of moneys or books, &c. in his hands, belonging to the so-
 ' ciety. The pursuer here was not charged with retaining any of
 ' the society's funds, but only with being indebted to it otherwise.
 ' As to the 22d regulation, if the pursuer had founded on it in the
 ' court below, he might have been entitled to have the claim adjust-
 ' ed by arbitrators; (Cooper, 11th March 1826.) But he not only
 ' did not plead this, but maintained the very reverse; for he main-
 ' tained, that it could only be determined in the Court of Session.
 ' Having stated no objection at the time on this ground, he is bar-
 ' red from stating it now. He argued, that the 33. Geo. III. cap.
 ' 54, sec. 16, makes the enforcement of this regulation so impera-
 ' tive, as to exclude all other jurisdiction. But it only compels the
 ' parties to 'such arbitrators as shall be named and selected,' and he
 ' prevented the society from naming any body. The expulsion is
 ' challenged, partly on the ground that it did not take place, as re-
 ' quired by the 14th regulation, at a meeting 'called for the pur-
 ' pose.' This point is not free from doubt; but the Lord Ordinary
 ' has not thought it necessary to dispose of it, because he holds it
 ' to be clear, that the conviction was irregular in another respect.
 ' The regulation allows the society to expel a member who has been
 ' guilty of 'any misdemeanour, fraudulent bankruptcy, or such like.'
 ' This implies that he can only be expelled for a crime, and conse-
 ' quently that, before he can be convicted, he must be duly tried;
 ' not certainly with all the formalities of an ordinary trial before a
 ' court, but still with a fair regard to the substance of justice. Now;
 ' there never was any specific charge preferred against him; nor is
 ' the exact offence for which he was expelled even yet to be gathered
 ' from the proceedings. It would seem from the notice given of
 ' the intended motion, that it was meant to extrude him, because he
 ' had not paid his debt; at other times it seems to have been for
 ' official malversation; elsewhere for breach of trust, &c. &c.; and
 ' he is nowhere told exactly what to defend himself from. Certain
 ' facts, or alleged facts, are set forth; and, on considering these, his
 ' brethren, upon the whole, expel him. In this situation, it is need-
 ' less to dispose of his plea, that he was convicted without evidence,
 ' because the evidence cannot be judged of without knowing the
 ' charge. All that the Lord Ordinary can say is, that though he
 ' plainly deserved to be dismissed from the treasurership, the proof

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‘ of criminal guilt, so as to warrant his expulsion, is not quite satisfactory.’

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Both parties *reclaimed*. On advising,

The *Lord Justice-Clerk*.—I must own that from the first I had doubts about the validity of the present act of expulsion, and I still entertain those doubts. I cannot agree to alter the Lord Ordinary’s interlocutor; nor do I consider myself compelled to express any opinion as to the conduct of the pursuer. If I were trying that in a competent shape, or as a member of this society, there was nothing in the pursuer’s conduct which would induce me to have voted for his remaining a member of it: but the question for the Court to determine is, whether the society had duly and legally expelled the pursuer from the benefits of a charitable institution, on which he had a claim by law? It was most material in this case, considering the nature of the institution, to keep in view that no member could be deprived of its benefits, but by due course of procedure, and that was laid down in the 14th section of the regulations of the society, and was so explicit, that it was impossible to supply it by equipollents. If the meeting was not called for the purpose, they could not entertain the motion. There was an annual meeting of the Lodge, and at such I do not conceive it was incompetent to vote the expulsion of a member, if the regulations of the institution had been complied with in calling it. If expulsion was then to be voted, that meeting should, over and above ordinary formalities, have been called for the express purpose. The positive regulations of the society were not done away with, because it was a general meeting. The meeting for such a purpose must have been summoned by the officer. The regulations bore so, even for any purpose except that on St John’s day. It was no equivalent, that notice was given in the newspapers that this matter was to be taken up. The pursuer, at the time of such notice, was in jail at the instance of the society, and was not in a situation regularly to receive the newspaper. The 14th regulation ordained, that before any member could be expelled, it must be at a meeting called by special summons, issued by the officer to all the members, that on that occasion expulsion would be moved for. Now, the first question was, Was this such a meeting? I think not, in terms of the section in the regulations quoted; but more than this, the pursuer should have been duly, and regularly, and formally apprised, that at the meeting a specific motion was to be made for his expulsion. If the minutes of the society had been transmitted to him, that would have been the proper course; and I consider nothing could have been more necessary in the circumstances. The pursuer was entitled to this, because every

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one but he knew what was proposed to be done. There was a total absence of any thing like notice to him. It was supposed there was much ground and information in the declaration of the pursuer, which led to the notice for his expulsion. The society, under the circumstances, were not entitled to say that they were ignorant he had borrowed the money, and they could draw no other conclusion than that it was borrowed for his own purposes. On the 14th September, there was notice given of the pursuer's application for aliment, and the minute indicates the feeling of the members on the subject of granting him an aliment. I do not think, that on that occasion they were actuated by any feelings in regard to his misconduct. There was a necessity for the fullest notice on the 14th September. I take the pursuer's letter applying for liberation as proof that he was not aware of any purpose to expel him. In it he addresses them, and prays as 'an afflicted brother;' and this letter formed part of the society's own minutes. I am clear that the meeting was not called for the purpose of expulsion, and that the pursuer got no notice, and therefore that the Lord Ordinary's interlocutor is well founded.

Lord Glenlee was of a different opinion, and thought that, considering all the circumstances, due attention had been paid to the interests of the pursuer, and due intimation given of his proposed expulsion.

Lord Meadowbank delivered an opinion concurring with the Lord Justice-Clerk, and *Lord Medwyn* agreed with Lord Glenlee.

Their Lordships being thus equally divided, the case stood over till 4th December, when the Lord Justice-Clerk delivered an opinion, more emphatically, and to the same effect as his former one; but the difference of opinion on the Bench not being reconciled, the record was ordered to be laid before the whole Court for their opinions, and the parties were appointed to lodge short cases on the question of reducing the sentence of expulsion.

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The following opinion was returned by the *Lord President*, and concurred in by *Lords Fullerton* and *Moncreiff*.—'We are of opinion that the interlocutor of Lord Cockburn ought to be adhered to, for the reasons stated in his Lordship's interlocutor and note, which, therefore, it is unnecessary for us here to repeat. And we are confirmed in this opinion, by attending to the proceedings with reference to the motion for expulsion, which do appear to us to have been irregular and unfair towards Howie, and to evince a determination to expel him, right or wrong. The motion for expulsion was never personally notified to him. It was only pub-

lished in the Aberdeen newspaper, which he expressly states he never saw, and which, considering his poverty, and that he was then actually in jail at the instance of the Lodge, is extremely probable; at all events, he expressly avers that he was ignorant of the intention of bringing forward any such motion at that meeting. And, therefore, although it certainly was not necessary that the proceedings against him should be conducted with all the forms and regularity usual in cases before courts of justice in criminal cases, we are of opinion that he should, at least, have had previous notice of the intended motion against him—the more especially as the notice, as printed, supposing him to have seen it, was only conditional, ‘in case no satisfactory arrangement is made of the debt due by him to the Lodge before that time.’ Now, if he had been aware of the intended motion, he might at that very meeting have offered some satisfactory arrangement for liquidating or securing the debt. Further, it appears that on the 27th December 1824, he presented a petition to the Lodge, praying them to liberate him on account of his poverty and bad health. See his petition on p. 14. of the case for the Lodge, Feb. 14. 1836. Now, when this petition was read at the annual meeting, it was superseded till the motion for his expulsion was disposed of; by which means, as he was then in jail, he was deprived of all opportunity of giving any explanation, or offering any arrangement as to the debt, in terms of their own advertisement. Then, having superseded his liberation, they proceed to expel him; and having thus got rid of him without giving him any opportunity of being heard in any shape against the expulsion, they then resume consideration of his petition for liberation, which they grant, after it could no longer be of any avail to him with reference to the question of expulsion. All these proceedings appear to us to be so irregular, unjust and harsh, and evincing such a fixed determination to free themselves from the expense of contributing towards this poor man’s relief, that we are of opinion it gives a colour of oppression to this case, not to be justified, even on the supposition that Howie did substantially deserve to be expelled.

Addition by Lord Fullerton.—‘I concur in the opinion above expressed, that the interlocutor of the Lord Ordinary ought to be adhered to. *First*, Though the strict formalities of a trial were neither required by the rules of the society, nor indeed consistent with its constitution, I think that, by necessary implication from those rules, construed agreeably to the most obvious considerations of justice and propriety, the society was not entitled to pronounce sentence of expulsion on one of its members, without giving him

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‘ due notice ; and I do not think that intimation in the newspapers
‘ was due notice, particularly considering the qualified terms of that
‘ intimation, and that the party was at the very moment detained
‘ in prison at their instance. *Secondly*, I am of opinion that the
‘ meeting of the 27th December 1824 was not summoned accord-
‘ ing to the form prescribed by the rules in regard to the expulsion
‘ of members. By the 2d article of those rules, the general meet-
‘ ing of the 27th of November, or the next lawful day thereafter,
‘ is to be held, ‘ for the purpose of electing officers,’ &c. notice
‘ of the hour being given in the Aberdeen Journal. By the 14th
‘ article, expulsion can only be pronounced by ‘ the majority of the
‘ members present at any general meeting called for that purpose.’
‘ Article 8. provides, ‘ that general meetings for entering new
‘ members, or otherwise, as may be found necessary for the affairs
‘ of the society,’ shall take place by the authority of the master,
‘ &c. and be called by the ‘ officer of the Lodge in the usual manner.’
‘ By the combined operation, then, of those articles, 8 and 14, it
‘ appears to me, that the competent form of summoning a general
‘ meeting, for the purpose of expelling members, was by ‘ the officer
‘ of the Lodge ;’—a mode of citation implying a personal notice, or
‘ something equivalent, to all the members of the Lodge, and of
‘ course to the party accused, if within the reach of such notice.
‘ And I do not think that this form, required by Articles 8. and 14,
‘ could be supplied by the intimation in the newspaper ; an intima-
‘ tion much less certain and direct, and in the present case merely
‘ subjoined to the notice of a general meeting, intended, agreeably
‘ to the second article, for purposes distinct from the expulsion of
‘ members.’

Addition by Lord Moncreiff.—‘ I concur in the Lord President’s
‘ opinion, principally on this ground, that though there was clearly
‘ no obligation on the society to institute any thing like a regular
‘ trial, they were bound to give the party full and fair notice of the
‘ precise nature of the charge made, and of what was intended
‘ against him, and to give it in such circumstances that he might
‘ have it in his power to attend the meeting, or in some manner to
‘ state whatever he might choose to say against the proposed reso-
‘ lution to expel him ; and that, while the defenders were detain-
‘ ing him in jail, the advertisement, with reference to the annual
‘ meeting, and the terms of that advertisement, cannot be considered
‘ as such fair and full notice. If the pursuer had not been in jail,
‘ and if the advertisement had stated distinctly the charge intended
‘ to be brought forward, and an unconditional purpose to propose
‘ that he should be expelled from the society, I should not have

‘ been prepared to say that, under the regulations as I understand
 ‘ them, it would have been incompetent to proceed in the matter at
 ‘ that meeting. But, in the actual circumstances, I think that the
 ‘ notice was insufficient, and the proceeding incompetent, as well as
 ‘ contrary to the essential principles of justice.’

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Lord Cockburn returned the following opinion: ‘ I am still of
 ‘ opinion that the expulsion of the pursuer cannot be maintained
 ‘ in law. In saying so, I refer to the record *as it is*, and do not
 ‘ speak of the case in any new character which it may be made to
 ‘ assume by the addition of new pleas. It is competent for the
 ‘ Court to *suggest* an additional plea; but both parties are entitled
 ‘ to be heard, first before it be admitted, and again upon its effect.
 ‘ In the meanwhile, the case must be disposed of on the existing
 ‘ record; with reference to which alone this consultation has been
 ‘ held. The Mason Lodge was not bound to proceed with any
 ‘ thing approaching to the regularity of a court; but it was bound
 ‘ to proceed according to the plain, obvious, and indispensable rules
 ‘ of common fairness; and if they did not do so, the greatness, or
 ‘ the clearness, of the guilt of the pursuer is perfectly immaterial.
 ‘ Such societies, if not duly checked, are extremely apt to convert
 ‘ their exemption from form into an exemption from the necessity
 ‘ of being just, and to imagine that their confidence in the guilt
 ‘ of a brother, (whose expulsion may be convenient,) is a sufficient
 ‘ reason for dispensing with his defence. Now, though the inter-
 ‘ locutor decides the case on only one point, because this was
 ‘ thought enough, I am of opinion that the proceedings were
 ‘ vitiated by two fatal flaws: 1. It is not proved that any notice
 ‘ of the intention to try was given to the accused; and so far as
 ‘ can be inferred from the statements of the defenders on the re-
 ‘ cord, there is sufficient *prima facie* evidence that no such notice
 ‘ was given. The only intimation which they allege was by ad-
 ‘ vertisement, twice in a single newspaper, in December 1824;
 ‘ which advertisement was not confined to this particular subject,
 ‘ but had the summoning of an annual meeting for its principal ob-
 ‘ ject, (statements 49, 50.) But the pursuer avers, (condescen-
 ‘ dence 16,) that he never saw this advertisement; and this is ren-
 ‘ dered probable by the fact that he was in jail from the 27th of
 ‘ August till after he was expelled on the 27th of December. It
 ‘ is said by the defenders in their case, (p. 14,) that in point of
 ‘ fact he was aware of the intended motion; but there is no such
 ‘ averment in the record. It is said that he does not deny his
 ‘ knowledge in the record. I rather think he does indirectly; for
 ‘ the end of the 16th article of his condescendence scarcely admits
 ‘ of any other construction. Accordingly, he sent a petition to the

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‘ meeting at which the expulsion took place, praying to be liberated
 ‘ from jail ; in which petition there is not even an allusion to any
 ‘ design of extrusion—a fact which is irreconcilable with the idea
 ‘ that he was aware of a much heavier calamity than a little longer
 ‘ incarceration being impending over him. But let it be assumed
 ‘ that he not only knew what awaited him, but that he knew it from
 ‘ reading the advertisement ; I do not think this was enough. He
 ‘ was entitled to remain passive, till he was put into the position of
 ‘ an accused man, by being warned by a direct personal intimation to
 ‘ prepare for his defence on a particular day. 2. No specific charge
 ‘ was given notice of in the advertisement, or was made at the
 ‘ meeting, or is specified even yet in the record. That he had ap-
 ‘ plied L.100 of the funds to his own purposes, which he had been
 ‘ incapable of replacing, is clear ; and it may even be admitted,
 ‘ that out of these facts a criminal charge, warranting expulsion,
 ‘ might have been made. But his accusers were bound to state
 ‘ what the charge was. Not certainly with technical accuracy.
 ‘ They were not bound to distinguish embezzlement from theft, or
 ‘ breach of trust from either. But he had a right to know, no mat-
 ‘ ter in what language, the practical import of the moral delin-
 ‘ quency meant to be charged. The proceedings shew that his
 ‘ misconduct was sometimes considered to have consisted in a cri-
 ‘ minal appropriation of the money to himself, intended and devised
 ‘ from the very first. At other times it is stated as a piece of mere
 ‘ official rashness or malversation, in the treasurer using the so-
 ‘ ciety’s funds at all, however honestly in the original design.
 ‘ Then it is treated as lying in his official concealment of the truth
 ‘ from his constituents in his accounts ; and often, and chiefly, is
 ‘ his guilt said to consist in his inability to repay. If their true
 ‘ feeling can be gathered from their proceedings, it is clear that it
 ‘ was on this last score that the expulsion took place. The minutes
 ‘ of the meeting on the 14th of September 1824 bear that the clerk
 ‘ was ordered to advertise the motion for expulsion on the 27th of
 ‘ December, ‘ in case no satisfactory arrangement is made of the
 ‘ debt due by him to the Lodge before that day.’ If he had paid
 ‘ the debt, we have their own authority for holding that any delin-
 ‘ quency, through which it was incurred, would have been over-
 ‘ looked. Since his conduct admitted of these various aspects, he
 ‘ was well entitled to be informed explicitly which view of it was
 ‘ meant to be taken ; and the society would not have been the
 ‘ worse of having the exercise of its penal jurisdiction assisted by
 ‘ what the accused man might possibly say, either in defence or in
 ‘ extenuation, for justice or for mercy. No doubt the 14th article
 ‘ gives the society power to expel, ‘ if it shall appear evident to a

“majority of the members present” that there has been due delinquency; but this certainly does not make any thing resolve into the mere caprice of the meeting. They had no right to say that a brother’s guilt appeared evident, until they gave him an opportunity of explaining his conduct,—which he could not do until he was told exactly what the substance of his alleged criminality was. He was never told to prepare himself against any particular charge. The spirit with which the whole proceeding was conducted may be appreciated from three facts: 1st, Instead of casting him off as a criminal, they were willing to keep him if he would only pay his debt; that is, the expulsion was resorted to for the attainment of a personal object of their own. 2d, His petition for liberation from jail, which, though it had only been for an hour, was absolutely necessary to enable him to make his defence, was rejected by the meeting; which, in his absence, thus created by them, proceeded to expel. 3d, Then, having deprived him of the right to come among them as a member, they instantly grant the prayer of his petition; proving that the prevention of his defence had been their only object in refusing it before. I cannot think that a court of justice can sanction such proceedings.’

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Lords Balgray, Gillies, Mackenzie, Corehouse and Jeffrey returned this opinion: ‘We rather think that the interlocutor of the Lord Ordinary should be altered, and the defenders assolized. There seems no room for doubt at all, that the expulsion of the pursuer from the Lodge was in itself a measure perfectly just and proper; for it appeared, from his own confession, that he had committed an act of breach of trust, fraud and embezzlement, for which he might justly and legally have been subjected to a sentence of at least imprisonment, for a term of no short duration, in the bridewell of Aberdeen. And that act, too, was committed against the Lodge itself, whose confidential officer he had been, which had thereby suffered a considerable loss. In these circumstances his expulsion from the society was a measure of the most obvious and undoubted justice and propriety. But it is said that, however just, it was not competently effected, from the want of due form. In the first place, it seems to be contended, that the form necessary was something approaching at least, or resembling in certain respects, a legal trial before the Lodge, for the misdemeanour, on account of which he was expelled. We cannot adopt that view. The Lodge had neither jurisdiction nor skill suited to legal, or any thing like legal trials of their members for delinquencies. It was, in reason, proper and necessary that they should have a power of expulsion, upon inquiries wholly untrammelled by any legal formalities of that kind. In general, there

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‘ would be no room for any such trial, in cases the most fit for expulsion. Take, for instance, the obvious cases of a member who had notoriously fled the country, after committing a crime, or been convicted of a crime by a criminal court, and transported or sent to bridewell; it is plain, that in such cases there could be nothing at all like a trial for the crime before the Lodge itself, previous to the expulsion of such member. As little could there be any occasion for any thing like a criminal trial before the Lodge, when a member did not attempt to deny, but under his own hand confessed a disgraceful delinquency. Accordingly the power of expulsion is expressly provided in the regulations, quite free from any such unnecessary, and indeed impracticable restriction. The clause is in these words: ‘ That for preserving the character of the society, it is ordered that, upon information or flagrant report of any misdemeanour, fraudulent bankruptcy, or such like, of any member, the master and other official managers for the time do make strict inquiry thereanent; and if it shall appear evident to a majority of the members present at any general meeting called for that purpose, that the report is well founded, such offending member shall be expelled from the society, and forfeit for ever any interest therein.’ The import of this regulation, we think, is, that the inquiry or exhibition of evidence, respecting the fact of misdemeanour, may be of any form or nature that affords a rational ground of certainty to a general meeting called for the purpose of considering it, however different it may be from any thing admissible in legal procedure for crimes. If, before such a meeting, there were such grounds of certainty, we do not think that any member expelled by such meeting could pretend to have it rescinded, merely on the ground that it followed on an investigation, not similar in all respects, or in any respect to a judicial trial for crime. The less strict and formal was the proof of the misdemeanour on which the expulsion proceeded, the more it might be open to the member expelled to maintain that it was erroneous, that he was innocent, and still to offer evidence establishing his innocence. But where the actual fact of the misdemeanour and the justice of the expulsion was undeniable, we cannot see that the mere want of a sort of formality, certainly not required by the regulations, could afford any ground for reducing a well-founded act of the society. But it is farther said, that the meeting was not a general meeting called for the purpose, in terms of the regulations. We think that this objection is not sufficient. The meeting was the annual meeting, competent generally for the discussion of any business. But, besides that, notice had been specially given in the public newspapers that the subject of the pur-

‘suer’s expulsion would be considered at this meeting. We think, 18 May 1838.
 ‘therefore, that this was truly a general meeting called for this pur-
 ‘pose. It had also other purposes; but that did not exclude this
 ‘particular purpose, of which notice had been given, and which, of
 ‘course, the meeting were called to consider. No form of trial
 ‘being necessary, and the meeting being sufficient, we think then,
 ‘that, by the pursuer’s own confession in writing, it did most rea-
 ‘sonably appear evident to a majority of that meeting that the pur-
 ‘suer had been guilty of a misdemeanour, for which it was pro-
 ‘per to expel him. He was expelled accordingly, and we see no
 ‘good grounds why this act of unquestionable justice and propriety
 ‘should be rescinded. We must farther observe, that we think it
 ‘very doubtful, whether the pursuer ought to be allowed to bring
 ‘forward a formal objection of this kind, *post tantum temporis*. If
 ‘he had insisted upon it at the time of his expulsion, it is very proba-
 ‘ble that evidence could then have been produced of communica-
 ‘tions between the Lodge and him, such as to afford a complete
 ‘answer to it, which evidence may no longer exist. And it seems
 ‘clear that, if at that time there had been felt to exist any doubt in
 ‘the case, there was an immediate remedy, by expelling the pur-
 ‘suer anew, in a form not subject to the objection; whereas, if the
 ‘objection were to be sustained now, he must be held to have con-
 ‘tinued a member for years after he was certainly expellable, and
 ‘fully understood to have been expelled. It does not therefore
 ‘seem consistent with equity to allow the pursuer, by lying by so
 ‘long a time, to gain the advantages of insisting on a formal ob-
 ‘jection of this kind, in circumstances, and to an effect, different
 ‘from what existed at the proper time for insisting on the objec-
 ‘tion.’

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The following interlocutor was pronounced, on advising the case. Judgment.
 with the above opinions: ‘The Lords having resumed consideration
 ‘of the mutual reclaiming notes, cases for the parties, with the opi-
 ‘nions of the Consulted Judges thereon, adhere to the interlocutor.
 ‘of the Lord Ordinary, in so far as regards the action for setting
 ‘aside the decree of the Sheriff, and refuse the desire of the re-
 ‘claiming note for the said William Howie; and in so far as re-
 ‘gards the action for setting aside the expulsion of the pursuer from
 ‘the Lodge, in respect of the opinions of the Consulted Judges, find,
 ‘that there are no grounds of irregularity in carrying through the
 ‘same, which can affect the said proceedings; therefore alter the
 ‘interlocutor of the Lord Ordinary to that extent, sustain the de-
 ‘fences to the reasons of reduction, assoilzie the defenders, and de-

18 May 1836. 'cern; and in respect no claim for additional expenses has been
 'made, find none due.'

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Lord Ordinary, Cockburn.

Act. C. Fergusson.

Alt. H. J. Robertson.

Robert

Macfarlane, W.S. and Walter Duthie, W.S. Agents.

Mr Thomson, Clerk.

R.

SECOND DIVISION.

No. CXXVII.

18th May 1836.

WILLIAM COWAN, (CRAWFORD'S TRUSTEE,)

against

MRS JANE RONALD ANGUS OR CRAWFORD

AND OTHERS.

TRUST.—(LIABILITY OF TRUSTEES.)—DILIGENCE.—*Circumstances in which it was found, that trustees acting under a trust-deed, by which it was declared that they should 'not to be liable for omissions, or not doing diligence, but each for his own actual intromissions only,' were not liable personally for losses occasioned to the trust-estate, 1st, By the insolvency of their factor, whom they had, for a series of years, neglected to call to account; and, 2d, By the misconduct and insolvency of a tenant, occurring after the factory had determined; and while the sole management of the estate was vested in the trustees.*

Narrative.

By trust-disposition and settlement, dated 22d October 1799, the late William Crawford conveyed his whole estate, heritable and moveable, to trustees, of whom the pursuer was one, and to the survivors or survivor of them. The ultimate purpose of the trust, after payment of debts and legacies, was declared to be for behoof of William Crawford, the testator's grandchild, in whose favour the trustees were directed to divest themselves of the residue of the estate, upon his arrival at majority. The trust-deed conferred full powers upon the trustees for the management of the estate; and, in particular, they were authorised 'to appoint factors, either of their own number, or other fit persons, for uplifting the rents of my lands and estate, and principal sums and annualrents of the debts hereby disposed, and whole other subjects of the said trust; and from time to time to employ the same, and the prices and proceeds of the said trust-estate, upon such securities, real or personal, as they

‘ shall think fit, until the same shall be applied in manner as here- 18 May 1836.
 ‘ in after directed; and to give such salaries and gratifications to
 ‘ the said factor, or any others who shall be employed in the pre- Cowan v.
 ‘ mises, as they shall think fit.’ The deed also contained a pro- Angus or
 ‘ tecting clause, declaring, ‘ that the trustees shall not be liable for Crawford and
 ‘ omissions, or not doing diligence, but each for his own actual in- Others.
 ‘ tromissions only, and not to be answerable to my said grandchild, Narrative.
 ‘ or his foresaids, in any farther, or for one another.’

Mr Crawford, the truster, died on the 22d November 1799, leaving considerable property, partly invested in government and other securities, and partly consisting of current leases of farms and coal-works in Ayrshire. His widow and two children were dissatisfied with the provisions bequeathed to them under the trust-deed, and resolved to betake themselves to their legal claims. Accordingly, George Reid, the testator’s son-in-law, who had been nominated one of the trustees, refused to undertake the office. The only accepting trustees were Mr Cowan, (the pursuer,) Mr M’Whinnie, the truster’s law agent, and Mr Wood.

The accepting trustees, in terms of the powers conferred upon them by the trust-deed, granted, on the 3d January 1800, a factory and commission to the said George Reid, the testator’s son-in-law, who had, for some years previous to the testator’s death, acted as his assistant in the management of several factories for landed proprietors in Ayrshire, which were held by him. A bond of caution for his faithful discharge of the office was granted by Mr Logan of Knockshinnoch, upon the 6th of the same month. He accordingly entered immediately upon the management of the trust-affairs, and had extensive intromissions with the trust-funds down to the close of the year 1804, when his management ceased. The pursuer, Mr Cowan, who was at that time a teller in the office of Messrs Hunter and Company, bankers in Ayr, continued to take, to a certain extent, a superintendence of the trust-affairs, and occasionally received and made payments on account of the trust-estate. An account was opened in the books of Messrs Hunter and Company, in the name of the trustees, in which the occasional intromissions of Mr Cowan were entered. Subsequent to Martinmas 1804, when George Reid ceased to be factor, the active management of the trust devolved upon Mr Cowan.

In consequence of the resolution of the truster’s widow and children to repudiate his settlement, the trustees raised an action of multipointing during the year 1800; and on the 17th February 1801, Lord Stonefield, Ordinary, pronounced an interlocutor, afterwards adhered to by the Court, finding the different members of the family entitled to their respective legal provisions. In order to ascertain

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—
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the amount of property left by the deceased, and to determine the precise extent of these claims, a remit was made to Mr Charles Ferrier, accountant, by whom a full report was made on the 26th November 1804. The accounts given in by the trustees, upon which this report was framed, contained no separate statement of Mr Reid's intromissions, but combined his accounts with the transactions of the trustees, which were included in the account with Messrs Hunter and Company. Mr Ferrier, therefore, in framing his report, likewise stated the account as that of the intromissions of the trustees generally, without distinguishing between the intromissions of the factor and those of the trustees; and reported, upon the whole, that there was in the hands of the trustees, at 3d June 1803, a balance of L.2555 : 9 : 1. No objections were stated to the report by any of the parties. The claims of the widow and children were settled in conformity with it.

Besides his proper intromissions, Reid was indebted to the trust-estate for the rents of Dalvennan, part of the leasehold property left by the testator, which the trustees subset to him in 1800 for the remaining years of the principal lease. This farm was afterwards subset by Reid to Robert Orr, from Whitsunday 1803, at a large advance of rent. The tack to Reid was subsequently reduced, at the instance of Peter Crawford, the son of the testator, as administrator for his son, the residuary legatee. At the termination of his factory in 1804, Reid was indebted to the trust-estate in the sum of L.1731 : 8 : 9; and his counter claims on account of the legitim due to his wife amounted to L.739 : 19 : 11. Subsequent to this date, the pursuer recovered certain sums from him; but it did not appear that any settlement of the accounts with him took place, or that any legal measures were adopted by the pursuer for making the claims against him fully effectual, either under the bond of caution or otherwise. Reid finally became bankrupt in 1822, when he raised a process of cessio bonorum against his creditors, in which the pursuer was called as a defender. Nothing was afterwards recovered from his funds.

By the tack of the farm of Dalvennan, which had been acquired by the testator, various obligations in regard to the fences and buildings were imposed upon the tenant; and the landlord having applied to the Sheriff, at the termination of the lease, for an inspection of the houses, fences, &c. that they might be put into the state of repair required, decree was pronounced against the trustees, as principal tacksmen, for the sum of L.304. Actions of relief were then raised by the trustees against the subtenants of the other farms, and the proportions chargeable against them were recovered. The proportion payable for Orr's farm, however, was not recovered, he

having become insolvent. The trustees also incurred expenses by 18 May 1836.
 concurring with Orr in resisting an action of damages, brought 
 against him by the landlord for overcropping and overploughing
 the lands. These expenses they claimed credit for in accounting
 with the residuary legatee. There were also some minor claims
 for damage on the part of the landlord against the trustees, arising
 out of the condition in which the farm was left. The late Dr
 William Crawford, the residuary legatee, attained majority in 1815,
 when the trustees were authorised by the trust-deed to make over
 to him the residue of the estate. The pursuer accordingly made
 large payments to him on that account. No detailed statement,
 however, of the trust-accounts was rendered to Dr Crawford, al-
 though the correspondence produced shewed that he was acquainted
 with the general situation of the trust-affairs, and that the ma-
 nagement of the pursuer had met with his approbation. Dr Craw-
 ford died in October 1826, and was succeeded by his only son,
 William Ronald Crawford, and by Mrs Jane Ronald Angus, his
 widow, as executrix and general disponee of her late husband.
 The pursuer, Mr Cowan, who was now the sole accepting and sur-
 viving trustee, then brought the present action, concluding to have
 it declared that the trust had been duly executed, that he should
 be exonerated as trustee, and that the balance due to him on the
 trust management should be ascertained and paid. Defences were
 given in for the representatives of the late Dr Crawford, in which
 they admitted generally the existence of the trust, and the trus-
 teeship of the pursuer; but they did not admit either the regularity
 or correctness of his proceedings, and denied that any balance was
 due to him.

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—
 Narrative.

In these circumstances, the Lord Ordinary, on the 20th June 1832, before answer, remitted the accounts to Mr D. Lindsay, accountant, for his report. In his report, Mr Lindsay found that there remained due on Reid, the factor's accounts, a balance of L.1166, 4s. 8d. The defenders contended that Mr Ferrier having reported that there was a balance in the hands of the trustees, at 7th June 1803, of L.2555 : 9 : 1, to which no objections were stated by the parties, and no attempt having been made at the time to shew that the trustees were not liable for the whole balance reported, the pursuer must still be held liable for the whole amount. The accountant, however, stated it as his opinion, that notwithstanding the form of the accounts which were lodged by the trustees in the process of multiplepoinding, and the report thereon by Mr Ferrier, it was still competent for the pursuer to require that the accounts should be stated according to the actual res gestæ, as the object of the multiplepoinding was not so much to adjust the accounts of the trus-

18 May 1836. tees, as to settle the claims of the widow and children of the testator upon the trust-estate.

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Defenders'
Pleas.

Upon Mr Lindsay's report the defenders *contended*—(1.) That the pursuer should be charged with the balance which might ultimately be found due by Reid in account with the trustees; and that it was the duty of Mr Cowan, when Reid ceased to be factor, to have his accounts examined, and the balance due by him adjusted and recovered. In this they alleged there could have been no difficulty; for assuming that Mr Reid had been unable to discharge the balance, Mr Logan, the cautioner for his intromissions, was responsible. They therefore contended, that Mr Cowan having failed to perform his duty in this respect, and the trustees not being exempted by the trust-deed from responsibility for factors, he was bound to relieve the trust-estate of all loss which might thence arise. (2.) That the state of the trustee's account with Mr Orr proves that ordinary diligence was not used by them for making the rents effectual. Orr was always allowed to be in arrear. Besides, the trustees are liable in the damages and expenses occasioned by his miscropping, as they ought to have been aware that they were liable, as principal tenants, for every act done by the subtenants to the prejudice of the farm, and yet they never interfered to check or prevent Orr's mismanagement.

Pursuer's
Pleas.

Answered for the pursuer—(1.) At the time Reid ceased to be factor, he held, in right of his wife, large claims upon the trust-estate, which greatly reduced the balance apparently due by him, and which balance included the subrents payable by him for the farm of Dalvennan. He would not therefore have been justified in instituting legal proceedings against Reid at that time, and still less against Logan, the cautioner. By subsequent payments recovered from Reid by the pursuer, the balance, even after charging Reid with the additional subrents of Dalvennan, which became afterwards payable by him in consequence of the reduction of his lease, was ultimately reduced to L.139 : 9 : 7. In these circumstances he could not, as a trustee acting gratuitously, and in the fair exercise of his discretion, be held liable under a trust-deed, which expressly declared that the trustees should not be liable for omissions, or not doing diligence, but each for his own actual intromissions only, and not to be answerable 'to my said grandchild or his 'foresaid, in any farther, or for one another.' (2.) That the rent paid by Orr was greatly more than the value of the farm, and no beneficial effects would have resulted from resorting at an early period to legal measures against him; and that, at the close of the

lease, the trustees used sequestration against the tenant's crop and 18 May 1838. stocking, whereby the ultimate amount of arrear was reduced to little more than one year's rent. Under the protecting clause of the trust-deed, the pursuer cannot be held liable for the damages or expenses occasioned by the misconduct of Orr.

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The accountant's report having been lodged, the Lord Ordinary ordered cases, with which he made *avisandum* to the Inner-House, stating his views in the following note appended to his interlocutor:

Note.—‘The cases being already printed, the Lord Ordinary Note.
‘thinks it best to report them without a judgment, more especially
‘as it will probably be necessary to remit anew to an accountant,
‘after the decision of the Court upon the principal matters in dis-
‘pute has been obtained. In this situation, he has not thought it
‘incumbent on him to form a definite opinion upon all the points
‘that have been raised in the discussion; though it may be proper
‘to mention generally what has occurred to him upon some of the
‘most material.

‘He still inclines to hold with the accountant, (Mr Lindsay),
‘that the pursuer is only bound to account for the trust-funds ac-
‘cording to what he can now shew to have been their actual state
‘and condition while under his management; and that he cannot,
‘therefore, be made personally answerable for the whole sum of
‘L.2555, reported by Mr Ferrier to have been in the trustees’
‘hands in June 1803, if, in point of fact, he can shew that L.1700
‘of that sum was then truly in the hands of Reid the factor, and
‘that part of it has been since lost, without any fault or culpable
‘negligence of the pursuer. Mr Ferrier’s report was not at all
‘intended to furnish data for any settlement between the trustees
‘and their factor, but only to give such a view of the amount of
‘the trust-funds as might shew to what sums the *jus relictæ* of the
‘widow, and the legitim of the children, should extend. Whether
‘the available amount was actually in the hands of the trustees
‘themselves, or of their factor, might well be thought a matter of
‘indifference in such an inquiry; and while it is not even in-
‘sinuated that the pursuer had any improper motive for acquiescing
‘in this part of the report, there is not the slightest evidence that
‘those who then acted for the defender were in any degree misled
‘by it.

‘In the next place, the Lord Ordinary has no notion that Mr
‘More, by finding in his decret-arbitral that the pursuer *must ac-*
‘count for the rents payable by Reid, and those who succeeded him
‘in the farm of Dalvennan, intended to fix upon him a direct *per-*
‘sonal responsibility for the full nominal amount of those rents, in

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Note.

‘ so far as they may be still unpaid. The words, as well as the
‘ plain meaning of the whole finding, would seem to exclude so
‘ rigorous a construction. The meaning plainly is, that he shall
‘ account, at the very utmost, only as a factor would be bound to
‘ account; that is, *either* by reporting payment, *or* by shewing that
‘ payment could not, by ordinary diligence, be recovered. As a
‘ gratuitous trustee under such a deed as is here in question, he was
‘ probably bound to less exact diligence. But that belongs to an-
‘ other chapter.

‘ On the other hand, it is apprehended to be equally clear, that
‘ there is nothing in this decret-arbitral that can prevent the de-
‘ fenders from fixing a personal responsibility on the pursuer, by
‘ proof of malversation or gross negligence; and that the ratio de-
‘ cidendi assigned by the arbiter for specific findings to a more
‘ limited effect can never be founded on as an authoritative decision
‘ of that more general question.

‘ The chief difficulty of the case is as to the degree of negligence
‘ and irregularity with which the pursuer is truly chargeable; and
‘ the sufficiency of such negligence (for there is no allegation of
‘ fraud) to deprive him of the immunity which seems held out to
‘ him by the terms of the trust-deed. The extent of that immunity
‘ has no doubt been jealously and wisely restrained by the course of
‘ recent decisions. But each case is a case of circumstances; and it
‘ would be difficult, even now, to lay down a rule of general applica-
‘ tion. The Lord Ordinary will not go into details; but he may ob-
‘ serve, that the two things that have weighed most with him against
‘ the pursuer, in so far as Reid’s balance is concerned, are, first, the
‘ omission to call on his solvent and responsible cautioner, Mr Logan,
‘ or to give him the least notice of the heavy balance which stood
‘ against Reid at the beginning of the intromissions, as factor, and
‘ continued to accumulate till their close; and, second, the actual
‘ payment over to him of the sum of L.365, in October 1806, while
‘ he was confessedly indebted to the estate, on unsecured and past-
‘ due bills, to the extent of L.1300, and on his factory accounts to
‘ the amount of at least L.260 more. His liability under both these
‘ heads is much enhanced by his very blameable omission to keep
‘ any sederunt-book, minutes, or record of any kind of the trust-
‘ affairs. There is not even a letter-book or state of correspondence;
‘ though the pursuer is a man of business, and, from not residing
‘ on the spot, was the more called upon to preserve some record of
‘ the information he received or required, and the instructions he
‘ gave. The Lord Ordinary is also inclined to hold, that the pur-
‘ suer is not entitled to take credit for any allowance to Reid, in
‘ the name of factor-fee. As that person was found liable to the

‘ estate for the surplus rents which he drew from Dickie and Orr, 18 May 1836.
 ‘ (and which are still wholly unaccounted for,) any claim he might
 ‘ have had for factor-fee should have been set off against those
 ‘ rents, the pursuer, though relieved by the decret-arbitral from
 ‘ any personal responsibility for these rents, having a plain duty
 ‘ to perform in making them effectual. If the proper factorial
 ‘ accounts had been cleared by an exact equality of charge and dis-
 ‘ charge, it is thought plain that the pursuer could not have paid
 ‘ over a factor-fee to Reid, while he knew that he was largely in-
 ‘ debted to the estate for the surplus rents in question; and if he
 ‘ could not have paid, in such circumstances, it rather appears that
 ‘ he cannot be allowed to take credit for such a factor-fee, as things
 ‘ actually stand, to the effect of diminishing that part of Reid’s debt
 ‘ to the estate, for which he may be more immediately answerable.

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Note.

‘ As to Orr’s arrears, and the damages and expenses in which
 ‘ the estate has been subjected by his neglect of the fences and mis-
 ‘ cropping of the farm, the Lord Ordinary is, on the whole, disposed
 ‘ to take a view more favourable for the pursuer. The whole arrear
 ‘ not recovered at the close of a twelve years’ possession scarcely
 ‘ exceeded one year’s rent; and, considering the history of the pos-
 ‘ session, and the want of any notice or complaint on the part of
 ‘ the landlord, it is conceived that the mere omission of an active
 ‘ superintendence of the tenant’s operations ought not, in a case of
 ‘ this description, to subject the trustee personally for the conse-
 ‘ quences of his irregularity; especially considering that the ques-
 ‘ tion as to the tenant’s liability for the fences and buildings was
 ‘ one of very considerable difficulty, and that the damages for mis-
 ‘ cropping were awarded, (though to no greater amount than L.140
 ‘ on the whole,) not on account of any one flagrant transgression
 ‘ of the lease, or the rules of good husbandry, but for a series of
 ‘ little irregularities which could not well come to the knowledge
 ‘ of the most vigilant trustees, and of which the landlord never com-
 ‘ plained while they were in progress.

‘ The history of the pendicle called Dallowie will require farther
 ‘ explanation. The other smaller articles seem well enough dis-
 ‘ posed of by the accountant, except perhaps the item of L.26 for
 ‘ property-tax, as to which the Lord Ordinary is rather disposed to
 ‘ adopt the views of the pursuer.’

At the advising, it was explained, in reference to the Lord Or-
 dinary’s note, that the sum of L.365 referred to, was paid at a time
 when the balance of accounts was in Reid’s favour; that the omis-
 sion to prosecute for the factory balance had been occasioned by
 the depending litigation with Reid, to which Dr Crawford was a

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party, and the nature of which is fully explained in the pleadings, and that the factor's fee could not, in any view, be charged otherwise than it had been by the accountant.

Lord Justice-Clerk.—Before considering the particular items, regarding which parties are at issue, we must settle the general principles of law, by which the whole case must be ruled. *1st*, I am satisfied that the Lord Ordinary and the accountant have done rightly in throwing Ferrier's report out of view. It was necessary at the time, as a general *vidimus* of the trust-funds, but was not intended, and cannot be made use of to ascertain the amount of the trustee's liability. The real facts,—the true *res gestæ*,—must be ascertained, and the liability of the trustees regulated accordingly. *2d*, In considering the question of Cowan's liability, we must remember that this is a penal action. We must have proof of fraud upon the part of Cowan, or of such *culpa* or *crassa negligentia* as is equivalent to fraud, before we can subject him in the penalty of refunding the losses sustained by the trust-estate. At first I had doubts as to some parts of the case; but when I look at the protecting clause in the trust-deed, expressed, as it is, in terms uncommonly anxious, I feel that it implies an exuberant confidence in the trustees upon the part of the testator, and that it was his anxious wish that they should not be held liable for such losses as have been sustained. Then they are empowered to appoint a factor from their own number; and, under all the circumstances, it is very natural to conclude, that Reid was the person whom the truster expected to be chosen. He had himself employed him in various factories. He knew that the other trustees had each business of his own, which required all his attention. Mr Cowan, in particular, held a situation in a bank, and had no time at his own disposal. One of the doubts which I at first entertained arose from the circumstance, that the trustees required security for Reid's intrusions. It appeared from this, that they were aware that his circumstances were such as to render it prudent for them to insist upon having a cautioner. Now, if it could be shewn that they, knowing that a large balance was due by this factor, took no steps whatever to recover it, such an act of negligence might have raised a question of liability against Cowan. No doubt this would have been merely an omission, but it would have been an omission of so gross a character, as to have rendered him liable, notwithstanding the protecting clause. It is said that the cautioner's affairs were found, upon his death, to be embarrassed; but if a balance had been at any time clearly due, and the factor's solvency had been doubted, why not apply immediately to the cautioner? But there is no proof of such negligence on the part of the trustees. There is no proof, that

while they knew that a large balance was due by the factor, and that his circumstances were doubtful, they neglected to recover that balance from him. In a question, whether Mr Cowan did right or wrong in not proceeding against Reid and his cautioner, we are not entitled to mix up the debts of Reid as factor, with his debts as a private individual. It could not have been held a ground for proceeding against the cautioner, that the factor owed a balance upon other transactions; nor were the trustees entitled upon that account, in proceeding against the cautioner, to refuse to give credit for the factor-fee. The case of a judicial factor is totally different from the present. My *second* doubt related to the large payment of L.865 to Reid, at a time when he was so much indebted to the estate. I should have wished to hear more upon this point, although the statement made at the bar appears satisfactory. In any view, however, I could not have concurred with the Lord Ordinary as to the factor's fee. It clearly is properly deducted from the factor's balance. *Lastly*, I think it perfectly clear that Cowan cannot be held liable for the unrecovered arrears of Orr's rent, or for the expenses occasioned by his mismanagement.

18 May 1886.

Cowan v.
Angus &
Crawford and
Others.

Opinion of
Court.

Lord Glenlee.—I entirely concur with your Lordship, and I must say, that I have no doubt at all upon those points, with regard to which your Lordship hesitated. The only question is, the general one of the trustee's liability. Now, the truster specially provides against their liability for omissions; and he was entitled to do so. He was entitled to attach what conditions or what privileges he pleased to the office of trustee. No doubt, it is contrary to common sense to say, that under the general term 'omissions,' he meant to include such culpa lata as has always been considered in law equivalent to dole. The only question, therefore, is, whether the trustees have been guilty only of slight omissions, or of such negligence as may be considered as equivalent to fraud. Now, there is no reason given for holding that the trustees had been guilty of such negligence. Mr Cowan is spoken of as if he had done nothing to recover the balance due by this factor, while, in point of fact, he has done so much as to reduce the balance to a mere trifle; but, is there any point in Mr Cowan's conduct, regarding which, it might be said, that he fraudulently neglected the interests of the trust? I am aware of none. The factor-fee comes in, not in settling with Cowan, but in ascertaining the balance due by Reid. There seems to be no reason for holding, that at any time Reid was in such a state of poverty as to render the mere delay of the trustees to call him to account a gross neglect, or sufficient to subject them in the loss thereby occasioned.

18 May 1836.

Lords Meadowbank and Medwyn concurred.

*Cowan v.
Angus or
Crawford and
Others.*

Judgment.

The Court found, ' that the pursuer is not personally liable for
' the balance reported as due by the trustees in the former process
' of multiplepinding, but that he is in this accounting entitled to
' have the accounts framed according to the true *res gestæ*; find,
' that the trustees have not stated any grounds relevant or sufficient
' to subject the pursuer personally, either in the balance due by
' George Reid, the former factor, for the arrears of rent due by
' Robert Orr, or alleged claims of damages and expenses con-
' nected with the sublease referred to in the record, either on the
' ground of gross negligence, want of due diligence, or any of the
' other grounds maintained by the defender; and with these find-
' ings, remit to the Lord Ordinary to proceed in the cause quoad
' ultra, reserving all questions of expenses for the decision of his
' Lordship.'

Lord Ordinary, *Jeffrey.*Act. *Rutherford, Cowan.*Alt. *Keay, Whigham.*G. *Maclelland, W. S. and Donaldson & Campbell, W.S. Agents.*

T. Clerk.

R.

SECOND DIVISION.

No. CXXVIII.

18th May 1836.

GEORGE NOBLE AND OTHERS, (CAMPBELL OF BLACK-
HOUSE'S TRUSTEES,)

against

ALEXANDER CAMPBELL AND ANOTHER.

TRUST, (CONSTRUCTION OF.)—TAILZIE.—(LIABILITY TO FET-
TERS.)—*Expressions in a holograph trust-disposition, by which the
trustees were directed ' to pay over the residue ' of the estate to the
truster's son, declaring the will of the testator to be, that ' his said
' trustees shall entail the whole amount on the heirs-male ' of his son,
whom failing, on other substitutes,—found to be sufficiently indica-
tive of the truster's intention, that his son, as institute, as well as
the substitutes, should be subject to the fetters of the entail, which the
trustees were bound to execute.*

Narrative.

THE late Archibald Campbell of Blackhouse, on the 9th Decem-
ber 1818, executed a holograph trust-disposition and settlement,
conveying to the pursuers, as trustees, his whole estate and effects,

real and personal, for the purposes mentioned in the deed. After bequeathing various legacies, it was provided, 'that my said trustees shall pay over the whole free residue and remainder of my means and estate above disposed to Alexander Campbell, my son, and his heirs, executors and successors, hereby declaring my will to be, that my said trustees shall entail the whole amount on the heirs-male of the said Alexander Campbell; whom failing, on the heirs-male of my late brother, Duncan Campbell; whom failing, on the heirs-male of my late sister, Jean; whom failing, on the heirs-male of my niece, Mary, now Mrs Paterson; and I hereby give full power to my trustees, and survivors or survivor of them, as soon after my death as they may judge proper and expedient, and for the interest of all concerned, to sell and dispose of my whole lands and estate, heritable and moveable, above conveyed to them, and that either by public roup or private bargain, as my said trustees shall think best, in order that the same may be converted into money, for answering the several purposes of the trust, and converting the free residue, after paying the legacies mentioned in this will and any future memorandum, into land, to be entailed as above mentioned.' In a codicil to the trust-deed, dated 17th February 1819, and also holograph of the testator, the following clause occurred: 'It is my wish that my boy may be liberally educated, to fit him for any profession he may point at; and in purchasing lands for him to be entailed, I wish a preference to be given to the old family estate of Inverawe, if it can be got.' Mr Campbell died on the 12th May 1825, leaving a natural son, Alexander Campbell, the residuary heir nominated in the trust-deed, then under ten years of age, and several nephews and nieces, to whom he made sundry bequests in his will. The pursuers accepted of the trust, and after paying the debts and legacies of the testator, applied the principal part of the residue of the funds in the purchase of the estate of Oakfield, the proprietor of Inverawe having declined to sell it. They also laid out about L.5000 in improving the estate.

They then raised this action of multiplepoinding and exoneration, in which they called Alexander Campbell, the testator's son, and the substitutes named in the trust-deed. They claimed and pleaded—1st, That according to a sound construction of the settlement of the deceased, the fund to be invested must consist, not only of the balance, as it stood at Mr Campbell's death, but of the fund accumulated prior to the majority of the heir. 2d, The conditions and limitations of the entail to be executed must be so framed, as to apply to the truster's son, as well as to the other substitutes of tailzie.

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Others, &c.
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Narrative.

Pursuers'
Plea.

18 May 1836.

Noble and
Others, &c.
v. Campbell
and Another.

Alexander
Campbell's
Pleas.

Alexander Campbell, the son, claimed and *pleaded*—1st, That by the terms of the trust-deed, the estate, as it stood at the death of the truster, after paying the legacies and expenses of the trust, was to be applied in purchasing lands, to be entailed in the manner specified in the trust-deed; and consequently, all the rents and produce of the trust-estate, subsequent to the death of the truster, belonged to the claimant, and must be paid over to him. 2^d, In any deed of entail to be executed by the trustees, the fetters could not be imposed upon the claimant, as institute, but solely upon the substitutes mentioned in the trust-deed.

James A.
Campbell's
Pleas.

James Archibald Campbell, the substitute heir, claimed and *pleaded*—That according to the true and fair construction of the deed of settlement and codicils, it is incumbent on the trustees to execute a strict entail, the fetters of which should apply to the testator's son, as institute, as well as to the substitutes after him.

The Lord Ordinary pronounced the following interlocutors and notes:

Lord Ordinary's Interlocutor.

' 18th February 1836.—The Lord Ordinary having resumed consideration of the debate, with the closed record, and whole process, finds, that according to the best and most probable construction of the trust-settlement of the late Archibald Campbell, and the codicil of February 1819, thereto annexed, in so far as the said settlement and codicil relate to the free residue of the truster's whole property, after payment of debts and specific legacies, it must be held to have been the meaning of the said truster, that the said residue should be vested in lands to be purchased by his trustees, or allowed to remain vested in lands belonging to him at his death, and which could not be sold to advantage; and that the said lands should be settled by them on Alexander Campbell, (the truster's natural son,) and the heirs-male of his body, whom failing, the other near relations of the truster himself, mentioned in the said deed of settlement; but only in the form of a strict entail, according to the law of Scotland; the whole fetters and limitations of which must be laid on the said Alexander Campbell himself, as well as on the substitutes appointed to succeed to him, so as to secure the succession of the said several substitutes in their order; and finds, that it is the right and duty of the said trustees to execute such an entail accordingly; and, before answer as to the other points of the cause, directs it to be enrolled, that parties may be further heard.'

Note.—' The only question hitherto discussed is, whether the entail, which all parties are agreed the trustees must execute,

' before divesting themselves of the property, shall be so conceived
 ' as to impose the fetters on Alexander Campbell, the institute, as
 ' well as on the succeeding heirs, or shall vest him with an unlimited
 ' fee, and impose limitations only on those whose hope of succe-
 ' sion he may not choose to disappoint. When it is conceded, that
 ' there must be *an entail*, under which, and not otherwise, Alexan-
 ' der Campbell must take the lands, it does not appear to the Lord
 ' Ordinary that there can be much difficulty in this question. When
 ' a man orders his trustees only to denude of his property in the
 ' shape of *an entail*, it is scarcely possible to doubt that his object is
 ' to secure, by that mode of settlement, the succession of all the per-
 ' sons whom he there names as the objects of his favour; indeed, it
 ' it is believed that there is no instance where it has fallen out
 ' otherwise, except through the blunder or unskilfulness of the con-
 ' veyancer, who has not employed proper expressions to carry that
 ' object into effect. It is altogether impossible, therefore, to argue,
 ' from the strict legal construction which is applied to imperfect
 ' entails, to a case in which the only question is, what is *the true*
 ' *meaning of instructions* given by an absolute proprietor to make an
 ' entail, which, whatever its character may be in other respects,
 ' certainly could not have been meant to have been *blundered*, or to
 ' fail of its intended effect, by defective or imperfect expression.

' Though a mere intention to secure the succession of all the
 ' substitutes may not therefore be sufficient to bring the institute
 ' under the fetters necessary for that purpose, if they are not ex-
 ' pressly laid on him, such an intention will be completely binding
 ' on trustees appointed for carrying it into effect, and will make it
 ' their duty to lay the fetters on the institute, in order that it may
 ' not be defeated.

' The settlement, it must be admitted, is expressed with singular
 ' infelicity, and is manifestly *inconsistent* in its two leading direc-
 ' tions, as to the residue now in question. It *first* positively directs
 ' the trustees to pay over the whole of it ' to Alexander Campbell,
 ' *his heirs, executors and successors*,' which would clearly have car-
 ' ried it to his heirs, male or *female*, and to his executors nominate,
 ' or assignees, onerous or voluntary. But, in the very next line,
 ' it is stated, that the trustees shall ' *entail* the whole amount,' *not*
 ' on Alexander Campbell himself, but ' on the heirs-male of Alex-
 ' ander; whom failing, on the heirs-male of Duncan Campbell,'
 ' (a deceased brother of the testator,) and a variety of other sub-
 ' stitutes; and then to take away all doubts as to this entail being
 ' intended to include the whole residue of his property, after paying
 ' debts and legacies, he proceeds to direct them to turn his whole
 ' estate into money, and after paying debts and special legacies, ' to

18 May 1836.

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 and Another.

 Note.

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Note.

“invest the whole *in land*, *to be entailed* as above mentioned.’ And
‘in a codicil of the year following, he directs, in reference to Alex-
‘ander Campbell, that the trustees, ‘*in purchasing lands for him, to*
“*be entailed*, shall give a preference to his old family estate of In-
“verawe, if it can be got.’

‘The first instruction *to pay over* the whole residue to Alexander
‘Campbell, and his heirs and executors whatsoever, being totally
‘superseded by the posterior and irreconcilable instruction to en-
‘tail the very same subject on *his heirs-male exclusively*, the Lord
‘Ordinary, but for the expression now cited from the codicil,
‘would have had considerable doubt whether Alexander Campbell
‘himself could have had any place in the proposed entail, or could
‘have taken any thing under the settlement; for in its ruling and
‘only operative part, the lands are directed to be conveyed, not to
‘him at all, but to his heirs-male, (which, being illegitimate, could
‘mean heirs-male *of his body* only,) and he would therefore appear
‘to be named only as the *stirps* from which the institute was to
‘spring, and as a part of the description or designation of that in-
‘stitute only. With reference to the first (though inconsistent)
‘direction, and to the relationship of the parties, such a purpose
‘must indeed be admitted to be very improbable; and more weight
‘is, on this account, to be given to the terms of the subsequent
‘codicil, in which the purpose of giving him a leading interest in
‘the entailed lands is plainly enough expressed; and therefore, and
‘because none of the other parties have raised any question as to
‘his absolute exclusion, the Lord Ordinary has not scrupled to give
‘him such a place on the entail as seems best to meet the *double*
‘purpose of the testator, at once to favour his natural son, and to
‘secure the succession of his property in the male line of his kin-
‘dred, to a remote generation.

‘Alexander Campbell made a bold attempt at the debate to *re-*
‘*concile* the first and second instructions to the trustees already re-
‘ferred to; and contended, that though the direction actually to
‘*pay over* the residue to himself, or heirs-general, was indeed con-
‘trolled by the subsequent direction to *entail* the whole on *his heirs-*
‘*male* only, to the utter and final exclusion of his heirs-general, exe-
‘cutors, or assignees, still the practical result might be nearly the
‘same, if the fetters of the entail were not laid upon him as insti-
‘tute; as he might, in that case, ultimately transmit the estate, *by*
‘*deed*, to his heirs-*female*, or sell it, and leave the price to his *exe-*
‘*cutors* or *assignees*. It seems only necessary, however, to suggest,
‘in answer to this strained construction, 1st, That the terms of
‘the first direction are plainly calculated to rule the succession, in-
‘dependent of any future deed or settlement by Alexander Camp-

‘ bell, and would, if not superseded by what follows, clearly vest 18 May 1836.
 ‘ his heirs-general or executors, as conditional institutes, in the event
 ‘ of his predecease, with all the rights provided to himself personally,
 ‘ in the event of his survivance; and, 2d, That whatever may have
 ‘ been the favour which the testator entertained for Alexander
 ‘ Campbell himself, it is utterly inconceivable, (and therefore de-
 ‘ cisive in a *quæstio voluntatis*,) that he should ever have intended to
 ‘ give his heirs-female, or executors, whom he had altogether ex-
 ‘ cluded even from a *limited* fee in his estate, such an *unlimited* and
 ‘ absolute property in it; as to make the ultimate succession of his
 ‘ own legitimate relations entirely dependent on *those* (most im-
 ‘ probable) preferences of them to all the rest of the world.

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Note.

‘ It may also be remarked, that the direction ‘ to entail the lands
 ‘ on the heirs-male of Alexander’ does not necessarily, or even
 ‘ primarily, signify, to put *their* right to the property, for the first
 ‘ time, under limitations. The more ordinary and natural sense of
 ‘ the direction would seem rather to be, *to secure their succession to*
 ‘ *the lands by an entail*; the limitations of which must, of course, have
 ‘ been laid on some antecedent person. This is undoubtedly the
 ‘ meaning most usually intended, when we speak, in common par-
 ‘ lance, of lands being *entailed on* such or such persons; the ordi-
 ‘ nary implication of the phrase being, that they are irrevocably
 ‘ secured in the succession by an entail; not that their right is
 ‘ burdened by its limitations; and looking to the whole scope and
 ‘ object of this settlement, the Lord Ordinary is of opinion that it
 ‘ was in this sense that the phrase was used by the testator. The
 ‘ case of *M’Allister*, 29th June 1827, (5 *Shaw*, 364,) presents a
 ‘ singular coincidence with some of the most extraordinary features
 ‘ of the present; and its decision affords a precedent for the inter-
 ‘ locutor now pronounced, which was scarcely to have been ex-
 ‘ pected.’

‘ 24th February 1836.—The Lord Ordinary having heard the
 ‘ counsel for the parties on the remaining points of the cause, and
 ‘ made avisandum with the trust-deed and whole process, finds, that
 ‘ the free annual profits and proceeds of the trust-estate, from and
 ‘ after one year subsequent to the death of the truster, and till the
 ‘ actual investment of the free capital or residue in lands to be en-
 ‘ tailed as directed by the said trust-deed, must be accounted for to,
 ‘ and be at the disposal of Alexander Campbell, the proposed insti-
 ‘ tute, individually, and that, in the event of his death before the
 ‘ final investment of such capital, the free annual proceeds of any
 ‘ part of the said capital that may remain so uninvested must, in like
 ‘ manner, be accounted for, and be at the disposal of the heir next

Lord Ord-
inary's Inter-
locutor.

18 May 1836, 'appointed to succeed to the said lands or residue; no part of the
 Noble and 'said free annual profits or proceeds accruing subsequent to one
 Others, &c. 'year after the death of the truster being to be accumulated or
 v. Campbell 'added to the capital in the hands of the said trustees, for the pur-
 and Another. 'pose of being vested in lands to be entailed: Finds also that the
 'whole expenses hitherto incurred are to be defrayed out of the
 'trust-funds.'

Note.

Note.—'This seems to follow, from the last judgment of the
 'House of Lords, in the case of Lord Stair; the character and
 'structure of the trust-deed being, in the present case, even more
 'favourable for that interpretation than in the former; as there is
 'here no instruction (similar to what there occurred,) to invest not
 'only the residue, but *the interests and proceeds* in lands to be pur-
 'chased; while the direction is to pay the debts as soon as conve-
 'nient, and the legacies, if possible, *within six months* after the death
 'of the testator. The only ground of doubt might be, that as the
 'residue is here assigned to a *boy*, for whose maintenance and edu-
 'cation the trustees are directed to provide, and who could not,
 'during his minority, have any personal or uncontrolled enjoyment
 'of the property, so it might be inferred that it was the intention
 'of the testator that the surplus annual profits, beyond his actual
 'wants, should rather be entailed along with the capital, than ac-
 'cumulated merely for the purpose of paying them over to him on
 'his majority, as his individual and absolute property. But as the
 'majority or minority of the person first succeeding was a casualty,
 'depending entirely upon the period for which the life of the tes-
 'tator might be prolonged, and on the survivance or predecease
 'of those named to succeed him, and as the deed contains no spe-
 'cial provision for the event of the testator being succeeded by a
 'minor, it would be unwarrantable to give a different construction
 'or effect to it, in one case, from what it would receive in another.
 'Besides, holding the decision in Lord Stair's case as intended to
 'fix a general rule, where no specific direction or declaration to the
 'contrary is made in the settlement, it does not appear to the Lord
 'Ordinary that the accidental majority or minority (any more than
 'the sanity or insanity) of the heir first called can be allowed to
 'interfere with its application. If the benefit of such a rule legally
 'belongs to the party to whom the residue is effectually devised, a
 'court of law is not *less* bound to secure him in that benefit, though
 'he is a minor, entitled to its protection.'

Against these interlocutors Alexander Campbell, the institute,
 reclaimed. At advising,

The Lord Justice-Clerk—I am clear that we must give effect

to the intentions of the testator; and in endeavouring to ascertain what these intentions were, we must remember that the trust-deed is one written by a private gentleman with his own hand. He begins by bequeathing certain legacies to his friends and relatives, for whom he appears to have entertained a sincere regard. Then he makes an ample provision for this young man, his natural son; but he also wishes to confer a beneficial interest in his succession upon his other near relations. We are not to consider a single expression of such a deed as this as of itself sufficient to indicate the testator's intention. We must take the whole together; and in doing so, I cannot hesitate for a moment in holding, that it was the trustor's clear intention that his son, as well as the others interested, should be fettered by a strict entail. The clause upon which Alexander Campbell founds, that 'the trustees shall pay over to him 'the free residue,' is only one limb of a sentence, the latter part of which provides, that the trustees shall execute an entail of this residue. Then the expressions in the codicil also clearly import the intention of the testator that a strict entail should be executed. The only question then is, whether it is to be an effectual entail or not; whether a loop-hole is to be left, by means of which this boy may defeat the purposes of his father's settlement. I am clearly of opinion, that unless we hold the entail effectual against the son we do not give effect to the testator's will. I have looked into the case of M^cAllister referred to, and the judgment in that case is strongly in favour of this view. A similar judgment was pronounced relative to a settlement by Macpherson of Bellville, of which I have notes, although it does not appear to have been reported. As to the second point, I am satisfied that the case of Lord Stair has no application. The period of a year allowed to realise the estate is, in my opinion, not too much. The trustees required to sell various estates.

Lord Glenlee.—I thought at first that there had been two separate provisions in the trust-deed, one directing the trustees to pay over the residue to the claimant, and the other directing them to execute an entail in favour of other parties. Even if this had been the case, we might have held the intention of the testator to be, that an effectual entail should be executed to fetter his son as well as others. But there is no such difficulty here. The direction is given in one sentence, one clause of which explains the other. The testator had made his intention as clear as if he had employed a man of business to write the deed. Every one, but especially unprofessional persons, in using the term entail, mean a strict entail in terms of the statute 1685. The testator's meaning

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Opinion of
Court.

18 May 1836. was, that the residue of his fortune should be given to this young man under the fetters of such an entail.

Noble and
Others, &c.
v. Campbell
and Another.

Opinion of
Court.

As to the second point, it may be difficult to distinguish between the annual produce of the estate and the sums realised during the first year; but if this were ascertained by an accountant, the proceeds of that year properly belong to the young man.

Lord Meadowbank.—I have no doubt whatever as to the testator's intentions. If I had, I would be against the entail; for it is a rule, that unless the intention to entail be clearly expressed, the interpretation should be in favour of leaving the property unfettered. But this is a mere question of intention, and the intention is most distinctly expressed.

Lord Medwyn.—I am entirely of the same opinion. I agree with Lord Meadowbank, that we cannot hold that lands must be entailed unless the intention to entail is distinctly expressed. But here the intention of the testator is manifest. He directed his trustees to execute an entail; and it was obviously his intention that it should be an entail which his son could not defeat. I concur with Lord Glenlee in thinking, that the intention could not have been more explicitly declared by a professional gentleman.

As to the second point I have some doubt; but this is of the less consequence, as I see that the trustees laid out a sum of L.5000 in improving the estate, the immediate benefit of which will fall to the institute.

Judgment.

Their Lordships *adhered* to the interlocutor of the Lord Ordinary, pronounced on the 18th of February 1836; refused the desire of the reclaiming note, and decerned; but recalled, in hoc statu, the interlocutor of the 24th February last, and remitted to his Lordship to hear parties farther, relative to the findings thereof, and to determine as to his Lordship shall seem just.

Lord Ordinary, *Jeffrey*.

Blair, W. S. Agent.

William Young, W. S. Agent.

Campbell & Traill, W. S. Agents.

For the Trustees, *Sol.-Gen. (Cunninghame.)*

For the Institute, *Dean of Fac. (Hope,) More.*

For the Substitute, *M'Neill, John Tai.*

R. Clerk.

R.

FIRST DIVISION.

No. CXXIX.

19th May 1836.

ALEXANDER PIRIE HENDERSON

against

GILFILLAN'S CREDITORS.

PROCESS.—(PETITION & COMPLAINT.)--SEQUESTRATION.--TRUSTEE.—*Petition and complaint against a resolution of creditors on a sequestrated estate dismissed, because the trustee was not called.*

A PETITION was presented by Henderson against a resolution of an alleged majority of a meeting of creditors on Gilfillan's sequestrated estate, ordering the trustee to pay the bankrupt a certain sum of money for services rendered by him to the estate.

The petition was dismissed, in respect that the trustee was not originally called as well as the creditors, and that it was not competent to rectify this by now calling him, as a petition and complaint could not be amended.

Act. Dean of Fac. (*Hope*,) Maitland.Alt. Sol.-Gen. (*Cuninghame*,) M'Neill.

C. F. Davidson, W. S. and John Cullen, W. S. Agents.

S. Clerk.

C. R.

SECOND DIVISION.

No. CXXX.

19th May 1836.

GEORGE YOUNG AND JAMES MORTON, ADVOCATORS,

against

MRS MARY McLEAN OR BRYAN, AND OTHERS, RESPONDENTS.

CESSIO BONORUM.—ARRESTMENT.—PERSONAL EXCEPTION.—

ACQUIESCENCE.—*The trustees under a disposition omnium bonorum granted in a cessio, having delayed to act for a period of ten years, and one of their number, who was eventually the sole trustee in this country, having used arrestments as an individual creditor subsequent to the date of the disposition,—the trustees found not entitled to claim a fund belonging to the debtor, in competition with other creditors who had used preferable arrestments subsequent to the date of the cessio.*

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Young and
Morton v.
M'Lean or
Bryan and
Others.

—
Narrative.

THE advocates were appointed trustees, under a disposition omnium bonorum, granted for behoof of creditors, by James Wilson, writer in Kilmarnock, on the 20th December 1821. James Robertson, merchant in Kilmarnock, was debtor to Wilson; and Morton, the advocator, had used arrestments in his hands in 1814, 1823, and 1825. The first of these arrestments was allowed to prescribe, and the others were rendered null by informalities. The respondents, as creditors of Wilson, also used arrestments in Robertson's hands, one in 1820, which was also rendered null by informalities, and another in 1825.

Wilson, the bankrupt, had raised an action to constitute his claim against Robertson before the date of his cessio, and in his own name, in the Sheriff-court of Ayrshire, which action, and relative proceedings at Robertson's instance, were advocated to this Court. Thereafter decree was pronounced against Robertson's representatives; but they discovered that Wilson had been divested by his disposition omnium bonorum, and they therefore objected that he was not in title to pursue. The Lord Ordinary sisted procedure until the concurrence of the trustees should be obtained, or until it should be ascertained whether they refused to concur; and a minute was, in consequence, lodged for the trustees, on the 19th November 1831, in which they disclaimed any interest in the question, but granted their concurrence, for the purpose of removing the scruples of Robertson's representatives, 'reserving always the right of the trustees to appear, if so advised, and if the proceedings shall appear for the interest of the creditors, in the action of multiplepounding, at present in dependence in the Sheriff-court of Ayrshire.' It did not appear that there were any other funds of Wilson to be carried by his disposition omnium bonorum than those arrested; and the respondents were called as creditors in the cessio, and the disposition granted in alios for their behoof.

During these proceedings a process of multiplepounding had been raised by Robertson's representatives, in order to determine the preferences of the claims of the different arresters. In this process claims were lodged for the respondents, and for Morton, the advocator, as an individual creditor of Wilson; and it was conjoined with an action of forthcoming at the instance of Mrs Bryan, one of the respondents. The conjoined processes were allowed to fall asleep; but in 1833, when the process at Wilson's instance had been brought to a successful termination, they were awakened by a supplementary process of multiplepounding. In this action, besides the parties who were claimants in the previous process, the advocates lodged a claim in the character of trustees for Wilson's creditors, in the first place, for the expense incurred by them in granting their concurrence to

the action in Wilson's name; and, in the second place, for the remainder of the fund in medio under the disposition omnium bonorum. The Sheriff having repelled this claim, Young and Morton brought the case by advocacy before the Court of Session, and the Lord Ordinary pronounced the following interlocutor and note:

19 May 1836.

Young and
Morton v.
M'Lean or
Bryan and
Others.

Lord Ordinary's Interlocutor.

'The Lord Ordinary having resumed consideration of the debate, with the closed record and whole process; In respect that the advocates have judicially admitted and set forth, in the process of multiplepointing before the Sheriff, now advocated, and especially in their replies in that process, that the disposition omnium bonorum, granted to them as trustees for his creditors in the cessio of James Wilson, and on which they now found as their only title, had been allowed to lie untouched (and unextracted) for twelve years after it was granted; and that, when called upon for their concurrence in 1830, in the action at the instance of the said James Wilson against James Robertson and his representatives, they had merely granted their concurrence, as such trustees, to obviate objections to the title to pursue of the said James Wilson, as an individual, and not at all as claiming the sums due by Robertson for behoof of the creditors of the said James Wilson; and further, in respect that it was then judicially admitted by the said advocates that they had no claim, and could not compete for the fund in medio as such trustees, unless it should be found that all the arrestments founded on by the other competitors were bad, and that they accordingly made no appearance in the original advocacy, as to the preferences of the said arresters inter se, remits the cause to the Sheriff simpliciter, in so far as his judgment totally excludes the claims of the present advocates to the fund in medio, and decerns; finds the claimant, Mrs Bryan, entitled to her expenses in this last advocacy.'

Note.—'The Lord Ordinary has not the least doubt of the substantial justice of this judgment, and is not aware of any authority upon which it can be technically impeached. He is inclined to think, though there seems to be no precise decision on the point, that a disposition omnium bonorum in a cessio, if never taken up or acted on by the trustees for twelve or twenty years, will not tie up the hands of individual creditors, (whether oited in the cessio or not,) from attacking the funds, in the uncontrolled administration of which the common debtor is left by such trustees for the full period of forty years after the granting of this latent and dormant conveyance. But he humbly conceives it to be clear, that if the trustees themselves not only judicially admit their deliberate neglect and repudiation of this conveyance, (no one creditor appearing to complain of such neglect,) but individually use separate

Note.

19 May 1836. to assume that character. A short delay to act would have been of no consequence; but here they allowed ten years to elapse before they appeared as trustees in any shape.

Young and
Morton v.
M'Lean or
Bryan and
Others.

Opinion of
Court.

Lord Medwyn.—There is no doubt that a trustee is not bound to act immediately in order to maintain his official character. But the case is quite different when a trustee lies by for such a length of time as to shew that he had no intention of ever acting in that character. I go farther than Lord Glenlee, who seems to hold that mere delay would not furnish a sufficient objection to the trustee's title, unless accompanied by acts on their part inconsistent with the idea of trusteeship. I think that, if trustees allow such a length of time to elapse without acting, as to induce the public to believe that no cessio had been granted, they are not entitled to avail themselves of the latent deed, and start into action at any moment that pleases them.

Lord Meadowbank concurred.

Lord Ordinary, *Jeffrey.* Act. *Mailand, Cowan.* *Donaldson & Campbell, W. & Agents.* Alt. *Dean of Fac. (Hope,)* *James Anderson.* *M'Intosh & Gemmell,* S. S. C. Agents. F. Clerk.

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SECOND DIVISION.

No. CXXXI.

19th May 1836.

JOHN CAMPBELL OF GLENSADDELL

against

THE DUKE OF ARGYLE AND HIS TRUSTEE.

PROPERTY.—IMPLIED RIGHT.—SERVITUDE.—*A tenant of a coal-work having leave to carry a canal through the lands of a proprietor, on a verbal understanding that he was to indemnify the tenants of the lands for damage sustained; and such payments having been made for upwards of fifty years, both by the tenant of the coal-work and by the proprietor, by whom it was subsequently wrought; the proprietor of the lands having raised an action of removing before the Sheriff, which was advocated, and having thereafter raised a process of declarator of property and for violent profits;—circumstances in which found, that no permanent right had been thus acquired to the property of the land covered by the canal, nor any right of servitude established.*

PROCESS.—REMOVING.—*In an action of removing under such circumstances,—found, that the pleading a defence of an heritable right was incompetent before the Sheriff-court.*

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Campbell v.
The Duke of
Argyle and
Trustee.

Narrative.

THE lands of Moy and Drumore, in the parish of Campbelton, county of Argyle, now belonging to the pursuer, belonged, in 1793, to Campbell of Glencarradell, at which period they were held by two tenants on leases from him. The leases contained a stipulation, that in case a canal should be formed through the lands, the tenants should not be entitled to obstruct it, and should receive reasonable damages. M'Dowall of Crichen held a lease from the late Duke of Argyle of the farm of West Drumlemble, with the coal-works, about four miles distant from Campbelton. To facilitate the transportation of his minerals, he applied to the proprietors of the lands between the coal-works and that town to grant him permission to make a canal through their grounds; and, with the consent of the late Campbell of Barbreck, M'Dowall, about 1787, or some years before, cut such a canal for carrying coals through the lands of Strathmore to the village of Lintmill or Bigstrath, about one mile and a half distant from Campbelton, where there was a ravine and deep stream in the direction in which the canal was proceeding. In 1791 or 1792, M'Dowall was permitted to continue it farther through Barbreck's lands of Knockrioch, to which Moy lay adjacent; and about the same time was permitted to use a part of his lands as the site of a continuation of the canal. He did so, without receiving any right or title to the ground of which he assumed possession, and on an understanding, that so long as he should be permitted so to use that part of the ground, he should indemnify the proprietors or the tenants, by paying to them annually the rent or value of the land so used by him. The sum which M'Dowall was to pay annually to the tenants of Moy was estimated at L.2 : 9 : 2 to Smith, one of the tenants, (being L.1, 10s. 2d. as the rent of the land used as the site of the canal, and 19s. 2d. for damages done to the tenant otherwise,) and L.2, 10s. 6½d. to Macmurchy, the other tenant, (being L.1 : 1 : 6½ as the rent of the land, and L.1, 9s. for damages otherwise,) but that sum was to be restricted to L.1, 17s., in case two bridges should be built. These bridges were built, and the payments were restricted to L.1, 18s., being 1s. more than had been proposed in the state made on the plan. On the other hand, an additional allowance of 8s. 8d. was added to Smith's, making L.2 : 12 : 10. These sums continued accordingly to be paid by M'Dowall and his heirs till the expiry of their possession of the Drumlemble coal-works, at Whitsunday 1798. On M'Dowall's removal at that time, the late

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[Narrative.]

Duke of Argyle took possession of the canal, and continued to use it for conveying coals from Drumlemble works to Campbelton; but never obtained from the pursuer or his authors any conveyance to that canal, or to that part of the property which forms the site of it, or to any servitude thereon. But during the remainder of the leases to Smith and Macmurchy, the two tenants of Moy, his Grace continued to pay to them annually the same sums as M'Dowall had paid them for rent and damages. The receipts taken by his Grace bore, that the sums so paid by him were the yearly damage occasioned by the canal, or the yearly 'value of the 'damages for the ground taken up by the coal canal on our pos- 'sessions.' When the leases of Smith and Macmurchy terminated, they removed from the lands of Moy. The pursuer was then in childhood, and his guardians, during his minority, allowed the Duke of Argyle to continue to use the canal without any title, upon his continuing to pay the damages occasioned to the property. His Grace accordingly made such payments, and the receipts which he took bear sometimes to be for the damage generally occasioned by the canal, and sometimes to be for the damages for 'the ground occupied 'by the coal canal.' The receipts which his Grace latterly took for the yearly payments generally bore, that they were made as being the yearly rent of the ground so occupied by the canal. The lands of Moy having increased in value, the pursuer, considering the annual payments too small, then raised an action of removing before the Sheriff of Argyle, against the defenders. The action concluded that they should be decreed to remove at Whitsunday 1834. The Sheriff, without closing the record, dismissed the action, on the ground that the defenders, in their defence against it, had made an allegation that they had an heritable right to the part of the subjects in dispute. The process was advocated by the pursuer; and he then brought an action of declarator and violent profits, with which it was conjoined.

Pursuer's
Pleas.

The pursuer *pleaded*, inter alia,—That the canal, with the banks, belonged to him, in respect that it was part of the lands of Moy, of which he was proprietor, and that no conveyance of, or servitude over, the same was ever granted by him or his authors: That as the defenders had no title to that part of the pursuer's property which was used as a canal, and as they have never even been allowed to use it, except upon the footing of their paying the yearly damages occasioned by their making such use of the ground, or of the yearly rent of the ground so used, and had thereby acknowledged that they were possessing precariously, without any title, or latterly as yearly tenants, their pretensions to

have a permanent right to continue to use that part of the pursuer's property were groundless: That the defenders had no right by prescription in this part of the pursuer's property.

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Defenders'
Pleas.

The defenders *pleaded*—That the pursuer's predecessor, by his purchase of the lands of Moy in 1792, acquired no right to the solum occupied by the canal. At all events, the pursuer's predecessor having purchased the lands, with the burden of the canal then subsisting, subject only to a claim for damage suffered, could not insist in the conclusions of the present action: That the pursuer was further barred by the acquiescence of himself and his predecessors: That the defenders had a valid and effectual right of servitude over the lands for the use of the canal.

It was also *pleaded*, that as the summons of removing before the Sheriff rested exclusively on the Act of Sederunt, 14th December 1756, and that act being totally inapplicable to the circumstances of the case, which, besides, involved a question of heritable right, it was properly dismissed by the Sheriff. The pursuer *answered*—That the action of removing was competent before the Sheriff, in respect that, being an action of removing, it was of a possessory nature, and that, by the Act of Sederunt 1756, such actions were declared to be competent before the Judge Ordinary. It was not rendered incompetent, by the defenders pretending to have an heritable right to the canal, in respect that the competency of an action depends, not upon the nature of the defence stated, but upon the nature and grounds of the demand in the action itself; and since the removing was competent when instituted, and when it came into Court, the defenders could not render it incompetent by such a defence.

The Lord Ordinary pronounced this interlocutor and note:

'The Lord Ordinary having resumed consideration of the debate, with the closed record, productions, and whole conjoined processes; In the advocacy, advocates the cause, alters the interlocutors of the Sheriff complained of, and decerns in the removing, in terms of the original action: In the declarator and violent profits, decerns in the declarator and removing, (de novo,) in terms of the conclusions of the libel: But before answer as to the claim for violent profits, appoints the cause to be enrolled, that parties may be heard thereon.'

Lord Ordinary's
Interlocutor.

Note.—'The annual payments which the defender (or his tenants) has uniformly made, very plainly for the use of the ground occupied by the canal for upwards of fifty years, are inconsistent with his right to the possession being any other than the right of

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Trustee.

Note.

‘ a tenant. Such a payment for the use of a servitude right is
‘ without precedent, and might often turn what the law holds to be
‘ the servient, into the truly dominant tenement; and as to its being
‘ considered as a feu-duty or ground-annual, it is enough to say,
‘ that those are payments only incident to proper feudal rights; for
‘ the constitution of which, in the absence of all written title or
‘ right by prescription, there are here no elements. It was strongly
‘ argued, that it was absurd to suppose that any man would lay out
‘ a large sum in constructing a canal, upon so precarious a right as
‘ a verbal, and consequently annual lease of the ground which it
‘ occupied. But really it is not much less absurd, that such a work
‘ should have been carried through a neighbour's property, without
‘ a scrap of writing to settle the terms of occupancy; and where
‘ neighbours are on good terms, and there is both a desire to ob-
‘ lige, and a common interest to keep the work going, instances
‘ are to be met with of a rash and exuberant reliance on the result.
‘ Accordingly, the defender has actually had the undisturbed use
‘ of this ground, on very favourable terms, for upwards of fifty
‘ years, though it is apparent that, for the latter half of that period,
‘ the pursuer, at least, and his agents were fully aware of the true
‘ state of the right. The Lord Ordinary does not think it doubt-
‘ ful that the annual payments were, from the very first, in great
‘ part for the use of the ground taken up by the canal, and not for
‘ damage done to adjoining ground. If this was not the case, then
‘ the land must have been given gratuitously; a thing never to be
‘ presumed, and which is distinctly contradicted by the whole cir-
‘ cumstances of this case, which demonstrate that the transaction
‘ was strictly onerous and exclusive of all notion of donation. It
‘ was not immaterial perhaps for the tenants, who probably had no
‘ power of subsetting, to call the payments made for the land taken
‘ off their possessions damage, rather than rent; but as soon as their
‘ leases are out, and the proprietor comes to draw those payments
‘ for himself, they take the proper name of *rent*; and it is very re-
‘ markable that, when (probably from copying the old form) the
‘ word damages had been first written, it appears that the word *rent*
‘ is anxiously added and interlined before the receipt is given up
‘ to the defender. The parties (when this interlocutor is final) will
‘ of course settle for a more permanent lease at a new rent; and it
‘ will probably be thought right to adjust the claim for violent pro-
‘ fits at such settlement, without farther litigation.’

The defenders *reclaimed*.

Maitland founded on the case of Lord Melville v. Douglas' Trustees, 29th May 1830, *F. C.*

Dean of Faculty answered, that in that case there was a verbal contract of excoambion.

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Opinion of
Court.

Lord Glenelg.—It has been stated, both on record and by the counsel for the defenders, that the summons of declarator is rested just on the same grounds as the original process of removing before the Sheriff, and that the cases must therefore stand or fall together; but there is really no foundation for that statement. The summons of declarator, no doubt, narrates, and very properly narrates, the procedure in the process of removing, and sets forth, that the ground occupied by the canal had been let to the defender for hire or rent; but then it proceeds, ‘that the defender having, in the course of the said proceedings, objected to the competency of the action of removing, and maintained, that the question there raised resolved into one of feudal title, it has been deemed expedient, with the view of removing all ground for the said objection, and of bringing the whole matter in dispute between the parties sub judice of the Court of Session, to institute the present action of declarator;’ then, after subsuming that the pursuer had often required the defender to relinquish possession of his property, the first conclusion is, ‘that it ought and should be found and declared, that the foresaid portion of the two merk land of Moy, and others above mentioned, which is possessed by the defenders as a canal or aqueduct, with the banks thereof, is a part of, and comprehended within the lands and others contained in the foresaid charter of resignation and infeftment in favour of the pursuer, and that the same pertains heritably in property to the pursuer,’ in virtue of the titles libelled. The summons then proceeds, ‘And this being so found and declared, the said defenders ought to be ordained to cede possession and remove.’ The summons is therefore quite correctly framed, as a declarator of property, with a conclusion for removal against the alleged intruder, and does not at all depend on the process before the Sheriff. I incline to think that the Sheriff was right in holding the process of removing to be incompetent, there being truly a question of heritable right at issue, and that the process of declarator was the proper mode of trying that question; and I would therefore be for recalling the Lord Ordinary’s interlocutor, in so far as it alters the Sheriff’s judgment in the original action.

With regard, again, to the merits of the declarator, it appears to me to be quite clear, that the ground in dispute is the property of the pursuer, and that no right was ever given to the Duke of Argyle. Indeed, it is not ever alleged that there even was any transaction of any sort between Campbell of Carradale, the original pro-

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prietor, and the Duke, and, in that respect, the case differs from Lord Melville's. Any transaction that took place was between Carradale and Mr Charles Macdowal, who seems to have been his personal friend. Mr Macdowal was only a tenant of the Duke's coal-works; and his obtaining a favour from Mr Campbell surely could confer no right, and far less a perpetual right on the Duke.

As to the annual payments being termed damage, and not rent, I really do not think that was of any importance. It may be admitted, that if the proprietor had allowed the possession to go on for forty years, and taken the yearly payments as damage simply, the Duke might have prescribed a servitude right, for payment of a certain annual sum. But there is no room for prescription here, and the case is quite clear otherwise.

Lord Justice-Clerk.—I am quite of Lord Glenlee's opinion as to the incompetency of the original action of removing, and agree; therefore, that the interlocutor should be recalled to that extent. But I am equally clear that the judgment in the declarator is correct. This, in fact, is just a case of possession of land without a title. It is clear that there never was any transaction with the Duke of Argyle. He was not even bound to take the canal off his tenant's hands, and appears at first to have declined to pay for making it. How then could he have compelled Mr Campbell of Saddell to continue to give his ground for it?

Lord Medwyn.—I also agree with Lord Glenlee, in thinking that the Sheriff's judgment in the removing was correct. But then, in the declarator, I am equally clear that the pursuer is entitled to succeed. I certainly think, that, under his radical title as superior, the Duke might have prescribed a right to the solum occupied by the canal; but then there is no room for prescription, when Glensaddell's annual payments shew the nature of the possession. It is clear, indeed, that the Duke had nothing to do with the original transaction. It was entered into with Macdowal, who agreed to pay the damage or loss sustained by the tenants, as fixed by Langlands. As to the name of the payments, I really don't care whether they are called damage or rent. On looking at Langlands' state and estimate, it appears that the items are made up, 1st, By ascertaining the quantity of ground occupied by the canal and banks; 2^{dly}, By ascertaining the quality of the ground, whether arable or green pasture, and fixing and stating the yearly value of these respective portions; and after summing these, which are more properly of the nature of rent. There is very properly added the sums estimated, as the loss occasioned by stagnant water, injuring the grounds, &c. which are certainly more of the nature of what are commonly called damages. The whole are then added together, and called yearly

damage. But really, in all cases where a tenant gives up part of the ground of his farm, whether for a public road, or otherwise, the compensation given him is always, and properly, entitled damage.

I concur entirely with what the Dean of Faculty has said as to Lord Melville's case, founded on by the defender. There his Lordship distinctly admitted that there had been a verbal contract of excambion. Here there was no agreement or transaction with the Duke at all: on the contrary, it appears, from the decree-arbitral produced, that his Grace did not wish to pay for the canal, and he meant undoubtedly to have thrown it upon Mr Macdowal's hands, a circumstance quite inconsistent with the notion of his having acquired the sort of right he is now contending for.

Lord Meadowbank concurred.

'The Lords recall the interlocutor of the Lord Ordinary submitted to review, in so far as it alters the interlocutor of the Sheriff, and decerns in the removing, in terms of the original action; but quoad ultra, adhere to his Lordship's interlocutor, and decern; reserving all questions as to expenses of process for the decision of his Lordship, and remit to him to proceed accordingly, and do therein as to him shall seem just.'

Lord Ordinary, *Jeffrey*. Act. Dean of Fac. (*Hope*,) *Marshall*. Alt. *Maitland*,
A. *Dunlop*. Lockhart, Hunter & *Whitehead*, W.S. and *Tod* & *Romanes*, W.S.
Agents. R. Clerk.

R.

SECOND DIVISION.

No. CXXXII.

20th May 1836.

DAVID SCOTT

against

THE EARL OF MORAY.

FEU.—CLAUSE.—SUPERIOR AND VASSAL.—REPARATION.—*A clause protecting both parties from abatement from, or addition to feu-duties, or any other claim whatever arising from variation of measurements, having been introduced into a feu-contract,—found,*
1. *That the superior was thereby protected against an action of damages, founded on alleged deficiency of surface; and, 2. That while no action of reduction of the contract was brought, any allegations of fraud in the introduction of the clause were incompetent.*

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Campbell v.
The Duke of
Argyle and
Trustee.
Opinion of
Court.

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Scott v. Earl
of Moray.

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Narrative.

IN 1822, Lord Moray proposed feuing for building Drumsheugh, then called Moray Park; and in a feuing plan prepared by Mr Gillespie Graham, architect, a triangular piece of ground adjoining the defender's lands, the property of the pursuer, Scott, was included, as being available for building, upon an understanding that it would be for the mutual benefit of the pursuer and defender to adopt joint measures in regard to the disposal of their respective properties. The pursuer being applied to by Gillespie Graham, expressed his readiness, on receiving adequate consideration, to enter into an agreement; whereupon a negotiation was entered into between the pursuer and defender, the result of which was, that the pursuer was taken bound to feu out a certain portion of his ground, according to the manner and form delineated upon the ground-plan, and was to allow the remainder to be appropriated to the use of the defender, to enable him to carry into effect his intention of widening and enlarging a street, lying to the south-east of Moray Park; and in return for that concession on the part of the pursuer, he was to be allowed a certain portion of the ground belonging to the defender, so as to make his ground of an even and equal depth from east to west,—that is to say, of an oblong in place of a triangular shape; and it was further agreed that the pursuer should take in feu from the defender eighteen stances on the south-east portion of Moray Park. In terms of this arrangement, the parties entered into a written agreement, dated 6th July 1822, whereby the pursuer was taken bound to build according to an elevation to be approved of by the defender, and to comply with the feuing articles; and the pursuer was also taken bound to commence building forthwith. The defender then feued out the remainder of his lands by roup, the conditions bearing, 'that the houses to be erected on the several lots shall be built on a regular plan, conform to an elevation prepared by the said James Gillespie, approved of by the said Earl, and signed by his Lordship as relative hereto.' By the conditions of roup it was further declared, 'That notwithstanding the measures marked upon the feuing plans as the extent in front, as they may differ a little in the execution, a measurement, certified under the hand of the said James Gillespie, or other architect to be appointed as aforesaid, shall be made and considered as the true measure of the respective lots.' It was also provided, 'That none of the purchasers shall have it in their power to stake off their lots, but the said James Gillespie, or such other architect to be appointed as aforesaid, shall attend and stake off the areas and determine the levels, and all matters connected therewith.' The pursuer's lots were accordingly staked off by Gillespie Graham.

The pursuer, in the beginning of July 1822, commenced building

upon that part of the ground fronting the street now called Forres Street. He then made several applications to the defender and his agents for a feu-charter, in order to make up his title, in the meantime disposing of several of the houses he had built. At last, on 13th July 1824, two years after the pursuer had been in possession, and had to some extent built on the ground, a feu-contract was entered into between the defender's commissioner upon the one part, and the pursuer upon the other. The conditions of the previous agreement were embodied in this feu-contract, which also contained a clause, 'that as the measurement of the said several areas or lots of the plot or piece of ground hereby feued out to the said David Scott, as marked on the said plan, are ascertained with as much exactness as can at present be done, no claim shall lie at the instance of the one party against the other, of abatement from, or addition to the feu-duties after mentioned, nor any other claim whatever, for or on account of any variation that may appear from those measures, after the different houses shall be erected, and on the said plot or piece of ground, and more accurate measurements made thereof.' In 1829, the pursuer complained to the defender's agents of an alleged shortcoming in the dimensions of part of the ground which he had feued. The defender's agents did not admit that there was just ground for complaint. Nevertheless both parties were satisfied that it was proper that the pursuer's buildings should proceed; and the defender's agents addressed a letter to him, dated 15th December 1829, in which they stated they considered him bound to build, so as to fulfil his obligation, and that his doing so would not affect any ground for abatement which he might consider he had against the defender.

After an interval of nearly four years, the pursuer's complaints were renewed; and in March 1833, he again applied to the defender's agents, repeating his allegation of a shortcoming in the dimensions of the ground, and wishing to know how he was to be refunded. Some correspondence ensued, in the course of which the defender's agents maintained, that any claim on account of alleged shortcoming in the dimensions of the ground was excluded by the time which had elapsed before it was stated, and still more by the express terms of the feu-contract. The pursuer then raised an action of damages against the defender, concluding alternatively for L.52,000 as the value of the houses built upon the ground, or for L.12,000 as loss and damage sustained by the alleged shortcoming. And he *pleaded*—1. That the ground not being the same as that contracted for, and embraced by the defender's warranty in the agreement of July 1822, and in the articles of roup, and ground-plan and elevation, signed with reference thereto, the defender had

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been guilty of a direct breach of contract, and was liable in damages. 2. As the deviation from the original ground-plan on the part of the defender, and the architect employed by him, rendered matters irretrievable thereafter, owing to the necessity there was of observing uniformity throughout the whole of the buildings upon the grounds agreed to be feued, all the damage which subsequently occurred was attributable to the defender's deviation from the ground-plan and breach of agreement. 3. The feu-contract also contained an express warranty as to the ground in question, specially referring to the articles of roup, and ground-plan and elevation; and in so far as any of the clauses were inconsistent with, or apparently contradictory, or subversive of the said warranty, the latter, being the essence of the contract, must prevail. 4. The pursuer was entitled, both in law and equity, either to payment of the damages he had sustained from the acts and deeds of the defender, or to be relieved of all the consequences of the defender's proceedings, by the defender purchasing from him the whole property built on the ground, at the price concluded for in the summons, or such a sum as should be ascertained to have been the value of the work, time, and labour expended in erecting the buildings, on the faith of obtaining implement of the contract.

Defender's
Pleas.

The defender *pleaded*—1. That the feu-contract, executed in 1824, must be held to embody the deliberate and final agreement of the parties respecting the subject in question; and that the pursuer, while he did not venture to bring a reduction of that contract, could not shake himself loose from its conclusions. 2. The feu-contract excluded all claims of the nature of those set forth in the summons. 3. The whole ground in question having been long occupied by the pursuer, and the houses in Forres Street having been actually built under his personal superintendence, before the feu-contract was executed, there was no room for maintaining that, at the date of executing the contract, the pursuer was not fully informed respecting the dimensions of the subjects: And, 4. Even independently of the express terms of the feu-contract, the circumstances of the case, and, in particular, the pursuer's long silence and acquiescence after the ground in question had been for years in his possession, and by far the greater part of it actually built upon, were sufficient to debar him from insisting in either of the conclusions of the present action.

Lord Ordinary's Inter-
locution.

‘ The Lord Ordinary having resumed consideration of the debate, with the closed record, plans and correspondence produced by the parties, and whole process, finds, *inso*, That on the 26th day of

July 1822, the pursuer and defender entered into a contract and agreement, by which the pursuer became bound to fen from the defender a certain plot or piece of ground, as exhibited on a plan therein referred to: Finds, *2do*, That the said plot of ground was bounded on the south and east by certain fixed or admitted lines, as to which there is now no dispute; but that its extent towards the north and west was only capable of being ascertained by measurement, or by transferring to the ground the delineation on the said plan, by the help of the scale of feet by which it was accompanied: Finds, *3do*, That though it was stipulated by the said agreement and relative articles of roup, that the building stances or areas on the said plot should be staked off by an architect appointed by the defender only, the pursuer had undoubted right, interest, and opportunity to see that they were so staked off, according to the measurement on the said plan; and, generally, that the boundaries of the said plot on the north and west sides were laid down and marked off on the ground, at their true distances from, and in their proper bearings to the fixed and undisputed boundaries on the south and east parts, as shewn on the said plan, and ascertained by the application of the scale of feet thereto annexed: Finds, *4to*, That in the course of the two succeeding years after the said 26th of July 1822, and between that date and the date of the feu-contract libelled, of 1824, the pursuer had built, (or begun to build,) without murmur or complaint, about all the houses in Forres Street, on the west of the said plot, and also the centre house in that portion of Moray Place included in the said plot, whereby both the *total length* of Forres Street to the north, and its *actual line*, as forming the west boundary of the whole plot so feued, and also the actual line of his said portion of Moray Place, must necessarily have been known to the pursuer, and the means of ascertaining their correspondence, with the plan and accompanying scale, placed completely in his power: Finds, *5to*, That after the said houses were so built, or in the course of building, the pursuer, at his own desire, entered into, and executed a regular feu-contract with the defender's commissioner, by which he became vassal to the defender in the whole plot of ground described, as in the original agreement of July 1822, and with reference to the same plan and scale of measurement then adopted by the parties; and became bound to pay certain feu-duties for the eighteen several stances or areas, these specified by their numbers, and described as extending each to a certain number of feet in front, therein set forth; and also to pay a certain smaller amount of feu-duty per foot for the remainder of the said plot of ground then feued by the said pursuer, the ex-

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inary's Inter-
locution

'tent of number of feet in the said remainder of the feued ground
'not being mentioned: Finds, 6to, That this regular feu-contract;
'after setting forth the particulars above mentioned, contained the
'following express declaration and provision, viz. 'That as the
'measurement of the said several areas or lots of the plot or piece
'of ground hereby feued out to the said David Scott, as marked
'on the said plan, are ascertained with as much exactness as can
'at present be done, no claim shall lie at the instance of the one
'party against the other, of abatement from, or addition to the feu-
'duties after mentioned, nor any other claim whatever, for or on
'account of any variation that may appear from those measures,
'after the different houses shall be erected, and on the said plot
'or piece of ground, and more accurate measurements made there-
'of: Finds, 7mo, That the provision and declaration above cited
'cannot be construed as applying only to the case of there being
'both deficiencies and excesses (balancing each other) in the speci-
'fied extent of front in the eighteen stances or areas set forth as
'severally of certain extents in the said contract, or as intended only
'to fix on each such area the feu-duty specified for it in the said
'contract, notwithstanding any relative excess or deficiency, as com-
'pared with each other; but plainly extended, and was meant to
'apply to the case of the whole stances or feuing areas on any one
'line of front, or on all the separate lines; and consequently, the
'total length of each such line turning out to be longer or shorter
'than the frontage appearing on the said plan, either by the sum-
'mation of the several extents of front there specified, or by appli-
'cation of the annexed scale of feet to the distances from the fixed
'boundaries on the south and east: Find, 8vo, That though the
'pursuer's averments on the record, that he was led to enter into
'the feu-contract, containing the above declaration and provision,
'by and through the defender's improper and mala fide concealment
'of certain deviations from the true line of the plan, and certain
'consequent encroachments on the plot of ground feued to the pur-
'suer, clandestinely made by the defender's architect in staking off
'the said plot, and building areas thereon, might be relevant to in-
'fer the reduction of the said feu-contract in toto, or of the parti-
'cular declaration and provision in question, they cannot be taken
'as grounds for setting aside the said contract, or declaration and
'provision, per exceptionem, and without a reduction in proper
'form: Finds, 9no, That so long as the said feu-contract, and pro-
'vision and declaration therein contained, stand unreduced, they
'afford a complete defence against all the conclusions of this action,
'and totally exclude all the grounds thereof. The action being
'distinctly rested (as explained in the record, and by the plan, No.

‘30. of process, lodged by the pursuer,) on the ground, that, in consequence of the line of front being about nine feet too short in Forres Street and Wemyss Place, the frontage in Moray Place and Darnaway Street is thrown back nearly all that distance to the south; and that, in consequence of the line of front in Moray Place being three feet too short, the line of Forres Street is in like manner thrown back that distance to the east; the total ultimate deficiency of square feet in the back areas and otherwise thus plainly resulting from a corresponding deficiency of frontage; the alleged over-depth of the curve in Darnaway Street, though stated as a separate objection, having been occasioned, according to the pursuer’s own statement, by an attempt to repair or disguise the deficiency of frontage in other quarters; and therefore, and on the whole matter, sustains the defence founded on the feu-contract, and the above-recited declaration, and provision therein; assoilzies the defender from the whole conclusions of the action, and decrees: Finds him entitled to expenses.’

20 May 1836.

Scott v. Earl of Moray.

Lord Ordinary’s Interlocutor.

Note.—‘The grounds of this judgment seem sufficiently explained in the detailed findings of which it consists. The conclusion is much confirmed by the long acquiescence of the pursuer, who admits that he made no complaint till 1829, by which time almost all the houses had been built. But as there are contradictory averments in this respect on the record, it was thought better not to make it a ground of decision. The pursuer at one time proposed that this process should be sisted till a reduction of the feu-contract and declaration should be brought and conjoined with it. But as this would obviously have required a new record, and as that remedy would be equally open to the pursuer after the present action was disposed of, the Lord Ordinary could not refuse to take it up on the record, which had been deliberately closed, and on which parties were ready to debate. The case was heard accordingly, at great length; the pursuer strenuously contending that the clause in the contract did not bear the construction alleged by the defender, and that it was not necessary either to bring a reduction, or to offer to prove mala fides. The Lord Ordinary was farther induced to refuse the motion for sisting, from foreseeing the great difficulty that would come, in practically disposing of the case, even if decree of reduction were obtained,—our law generally rejecting the principle of the *actio quanti minoris* in such cases,—and an actual restitutio in integrum being almost impossible in the circumstances.’

The pursuer reclaimed.

20 May 1836.

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Court.

Lords Glenlee and Medwyn quite concurred in the Lord Ordinary's interlocutor.

Lord Justice-Clerk.—This is a case of some importance; but it would require a great deal to enable me to comprehend the clause in the feu-contract in any other way than the Lord Ordinary has done. On the face of it, it equally protects both parties, whether there was a mistake on one side or other. That contract subsisted; and while there is no reduction, the Court cannot listen to any allegations of fraud. Upon the grounds stated by the Lord Ordinary, and not considering the point of acquiescence at all, the judgment must stand.

Lord Meadowbank concurred.

Judgment.

The Court unanimously adhered, with additional expenses.

Lord Ordinary, <i>Jeffrey.</i>	Act. Dean of Fac. (<i>Hope,</i>) <i>Wilson, Crawford.</i>	Party,
Agent.	Alt. Sol. Gen. (<i>Cuninghame,</i>) <i>Rutherford, Walker.</i>	<i>Walker,</i>
<i>Richardson & Melville,</i>	W. S. Agents.	<i>F. Clerk.</i>
		R.

FIRST DIVISION.

No. CXXXIII.

24th May 1836.

PATERSON'S TRUSTEES

against

JAMES CORBETT PORTERFIELD.

INTEREST. — TAILZIE. — (PROVISIONS TO CHILDREN.)—*Circumstances in which the Court found, that the arrears of interest due on a bond of provision, granted by an heir of entail in favour of his younger children, were to be accumulated with the principal, as at the second term subsequent to the date of citation; and that interest was due on the accumulated sum from that term until payment.*

THIS is the sequel of the case, formerly reported on the 17th June 1834, (ante, vol. ix. p. 383.)

The case having been remitted to the Lord Ordinary to determine the remaining points, his Lordship pronounced the following interlocutor: 'The Lord Ordinary having heard parties' procurators on the amount of the rental, by which the sum exigible under the bond is limited, finds the said rental, under the deductions as now ascertained, to be L.783 : 18 : 11½ sterling, and decerns

Lord Ordinary's
Interlocutor.

‘ against the defender for three years’ amount of the said rental, being 24 May 1836.
 ‘ L.2351 : 16 : 11½ sterling, with legal interest on said sum from
 ‘ the 11th November 1815 until the date of decree, and legal in- Paterson’s
 ‘ terest on the accumulated sum from the date of decree until pay- Trustees v.
 ‘ ment; and further, finds no expenses due to either party.’ Porterfield.

The pursuers *reclaimed*, in so far as they were not found entitled Pursuers’
 to the legal interest on the sum in the bond, and the arrears due Pleas.
 thereon, accumulated into one sum, from the date of citation in the
 action, *pleading*—that they were fully entitled to this, on the prin-
 ciples of the decision in *Ranking of Parton*, 1st Dec. 1829, espe-
 cially as the defender in this case had, by every means, delayed its
 final decision; in the meantime drawing the rents.

The defender *pleaded*—That the pursuer’s claim was unwarrant- Defender’s
 able, when it was considered that he had been in mora in bring- Pleas.
 ing his action from 1815 to 1833. Besides, the point in dispute
 was one of great difficulty, and accumulation, as sought for, would
 be extremely hard: That the case of *Parton* did not apply, as
 there the party was called in a multiplepounding, where he might
 have consigned the money, the point in dispute being in regard to
 the title only; but the present case relates to a simple contract debt.

Lord President.—The pursuers could not bring their action Opinion of
 sooner, because there was a dispute as to who was the proprietor; Court.
 and it was not certain against whom it should be brought. I think
 it must be accumulated as from the date of citation.

Lord Mackenzie.—I think the question must be decided just as
 if the bond was a common heritable bond, and therefore I concur.

Lord Balgray.—I think it would be hard to take the date of ci-
 tation as the period, and would be inclined to allow a reasonable
 time for making arrangements for paying the money.

The Court accordingly pronounced the following judgment: Judgment.
 ‘ Alter the interlocutor of the Lord Ordinary, in so far as inte-
 ‘ rest is allowed on the accumulated sum from the date of decreet
 ‘ only; and find and decern against the defender for interest on
 ‘ the accumulated sum, from the term of Candlemas 1833, being
 ‘ the second term subsequent to the date of citation.’

Lord Ordinary, Fullerton.

Act. Anderson, G. G. Bell.

Alt. Dean of Fac.

(Hope,) H. J. Robertson.

Pearson & Robertson, W.S. and Gibson & Donald-

son, W. S. Agents.

S. Clerk.

C. R.

FIRST DIVISION.

No. CXXIV.

24th May 1886.

JOHN MACARTHUR
against
 MATHIE AND THEAKSTON.

PROCESS.—STAT. 1. WILL. IV. c. 69, § 25.—*A process having been transferred from the Admiralty-Court, after an interlocutor pronounced by the Judge-Admiral had become final in that Court, to the Court of Session, by consent of parties, in terms of the statute 1. Will. IV. c. 69, § 25,—held, that it was competent, hoc statu, to challenge the said interlocutor without any separate process of review.*

Narrative.

THIS was an action which depended originally in the Admiralty-Court, but which, on the abolition of that Court, was transferred, by consent of parties, to the Court of Session, in terms of 1. Will. IV. c. 69, § 25. That section enacts, that the cause shall be enrolled before the Lord Ordinary, ‘and shall thereafter be heard ‘and determined in the same way as if such cause had been instituted in the Court of Session, in terms of this act.’ The 21st section enacts, ‘that the High Court of Admiralty be abolished, and ‘that hereafter the Court of Session shall hold and exercise its original jurisdiction in all maritime, civil causes and proceedings of ‘the same nature and extent, in all respects, as that held and exercised in regard to such causes by the High Court of Admiralty ‘before the passing of this act.’

Previous to the abolition of the Court of Admiralty, the Judge-Admiral had pronounced various interlocutors, and one in particular of great importance in the cause, which had been allowed to become final in that Court, though at the time protested against by the pursuer.

A record was made up in the Court of Session, in which the pursuer stated the plea, that it was competent for him, under this process, *hoc statu*, to challenge the interlocutors of the Judge-Admiral. The Lord Ordinary ordered cases on the point, and reported to the Court.

Pursuer's Pleas.

The pursuer *pleaded*—The Court of Session was, prior to the act 1. Will. IV. c. 69, a court of review in relation to all cases depending in the Court of Admiralty, and original jurisdiction is conferred by

that statute in reference only to new cases. The office and functions of Judge-Admiral are not devolved on this Court, but are entirely abolished. This cause has, by consent of both parties, been submitted to the consideration of this Supreme Court of review, under the provision in relation to the transference of depending causes; therefore, in these circumstances, it is not only competent to, but incumbent on, this Court to exercise its powers of review, without compelling the parties to have recourse to another and different process before the same tribunal, even supposing such different process was competent in reference to the provisions of the statute. The point at issue has been decided in the analogous class of cases of advocations under the 6. Geo. IV. c. 120, where the sum in dispute is above L.40, after an interlocutor allowing a proof has been pronounced, by a party conceiving the case ought to be tried by a jury. There the interlocutors allowing the proof have not only been reviewed, but, in some instances, the case has been remitted with instructions to dismiss the action. Further, in the following cases, *Sands*, 20th Jan. 1829, and *Blair*, 9th June 1830, and in *Cobb and Mitchell v. St Patrick Insurance Company*, 11th July 1833, a principle was established which distinctly negatives the plea of the defenders, that the Lord Ordinary acts merely as Judge-Admiral.

24 May 1838.

Macarthur v.
Mathie and
Thomson.

The defenders *pleaded*—The pursuer cannot competently challenge any of the interlocutors pronounced by the Judge-Admiral in this action, without bringing them before this Court by a regular process of review. The statute 1. Will. IV. c. 69, has produced no change of the law on this point. Under that statute the Lord Ordinary comes in place of the Judge-Admiral, merely to finish the processes which he had begun; and the interlocutors previously pronounced, being the judgments of a competent court, cannot be set aside or disregarded by this Court on taking up the case, unless they are challenged by some regular process of review brought for the purpose. Supposing a summons of reduction to be now raised by the pursuer, as it would, in *hoo statu*, have been incompetent in the Court of Admiralty, it must also be held incompetent in this Court, which is a mere substitute for the former. Besides, if it were competent, it is an Inner-House process, and under the statute 1. and 2. Geo. IV. c. 59, § 3, it cannot be entertained by any Lord Ordinary. In regard to the cases cited by the pursuer, they are not applicable, as in them the whole process was brought up by an advocacy, which is the regular process of review; but in the present case the process has been transferred into this Court as an original process, and thus there can be no power of review. This position is confirmed by the

Defenders'
Pleas.

24 May 1836.

Macarthur v.
Mathie and
Theakston.

Opinion of
Court.

case of Cobb and Mitchell, which was dealt with in the same manner as if it had originated in this Court.

Lord Mackenzie.—Though I think the statute defective, and that the situation has not been provided for, into which it brings certain cases, yet it is our duty to execute it, and to put the best interpretation possible upon it. I am therefore of opinion, that when cases are brought here under this statute, we are not bound to follow out the judgment of the Admiralty Court, in so far as we consider it wrong. It would have been a new thing in the law of Scotland, if, when an inferior court's proceedings were brought into the Supreme Court having a power of review, it must finish out these proceedings right or wrong, and then begin and review them, as if they had all taken place in the inferior court. So inexpedient and inexplicable in its consequences would such an interpretation of the statute be, that we cannot adopt it, for if we were to play as it were the quasi Admiralty Court, then also the House of Lords, on an appeal against our judgment, must act in the same character; and the judgment which might be given on that appeal would, at a subsequent stage of the case, come before us equally with the other proceedings, supposing the case to be brought before us as a court of review. An interpretation leading to such anomalous consequences cannot be adopted, and therefore I am inclined to hold, that we are to proceed just as if the cause was brought before us by advocacy; that we are to give effect to as much as we consider has been done right in the Admiralty Court, and no more; in a word, to review the proceedings as a necessary preliminary to our pronouncing a good judgment,—a judgment which I also hold must not be subject to review by us, but must be irreversible in this Court. I think this is an interpretation which presents less difficulty than that which makes us follow out a wrong proceeding with the intention of afterwards reversing it, and I therefore am inclined to adopt it.

Lord Balgray.—The intention of the statute was certainly to prevent review in this Court of our own proceedings. It would be excessively hard to proceed on a mistaken view, and thus to force the parties to bring a reduction.

Lord President.—I was formerly doubtful, but I am now inclined to concur with Lord Mackenzie.

Judgment.

The Court pronounced the following interlocutor: ‘The Lords having advised the minutes for the parties, and heard counsel, find
‘it competent to the pursuer to challenge the Judge-Admiral’s interlocutor under this process, reserving full power to the parties to

‘ amend the record and pleas in law, and all claims of expenses, and 24 May 1836.
 ‘ remit to the Lord Ordinary to proceed accordingly.’

Lord Ordinary, Fullerton.
 (Cunninghame,) Thomson.
 Agents. D. Clerk.

Act. Dean of Fac. (Hope,) Shaw.
 James Burnside, W.S. and Robert Welsh, S.S.C.

Alt. Sol.-Gen.
 Theakston.

Macarthur v.
 Mathie and
 Theakston.

C. R.

FIRST DIVISION.

No. CXXXV.

24th May 1836.

JAMES COMB'S TRUSTEES *against* ROBERTSON NOBLE AND OTHERS.

PROCESS.—(MULTIPLEPOINDING.)—*An action of multiplepoinding and exoneration, raised in the name of two trustees, to the competency of which it was objected, that one of the trustees had disclaimed the action, and that there was no double distress, whilst, on the other hand, it appeared that the objectors had refused to exoner the remaining pursuer,—found competent, reserving all objections to its propriety.*

THE facts of the case, and the pleas maintained by the parties, will be found clearly stated in the note added by the Lord Ordinary to his interlocutor of the 26th February 1836.

Note.—‘ The proceedings in this multiplepoinding are of a very unusual nature. Taylor and Flucker, trustees under the settlement of James Comb, intromitted in that character with a certain share of his property, partly heritable and partly moveable, which they held for behoof of the children of his daughter, Mrs Noble, who predeceased him. Those children were five in number, four sons and a daughter; and the trustees were also appointed the tutors and curators of such of them as were minors. When Alexander, one of the children, came of age, he raised an action of count and reckoning against the trustees, which, after some proceedings, was submitted to the Auditor of Court, by whom the amount of Alexander's share, and of the other four children incidentally, was ascertained. After this nothing remained to be done but to pay over those shares, and to exoner the trustees, for the amount had been settled; and there neither was nor could

Lord Ordinary's Note.

24 May 1836.

Comb's Trustees v. Noble and Others.

Note.

‘ be any dispute as to the parties entitled to take them. But Alexander, while he consented, on receiving payment, to discharge his action of count and reckoning, refused to grant a discharge and exoneration to the trustees for their intrusions. The form of the discharge was made the subject of a second reference, and the referee was of opinion that Alexander was bound only to discharge his action of count and reckoning. The trustees therefore had no alternative but to call the four sons and the children of the daughter, who had died some time before, in a process of multiplepinding and exoneration, to have the further claims, if there were any, against them ascertained, and to obtain a judicial exoneration. The present action, with these conclusions, was accordingly raised by Taylor, one of the trustees; but when it came into Court, the defenders objected that it was incompetent, 1st, Because Flucker, the co-trustee, did not concur; and, 2dly, Because Comb Noble, the youngest child, then in his minority, and for whom the trustees themselves were tutors and curators, was not cited. The Lord Ordinary gave effect to these objections, and directed that a supplementary summons should be raised at the instance of both Taylor and Flucker, and that the minor should be cited. When this second summons came into Court, Flucker, the co-trustee, a fisherman in Newhaven, was brought forward to disclaim the action, apparently with no view but to render the whole proceeding abortive, and various objections are now stated against the competency of the actions.

‘ First, It is said that Flucker disclaimed; but it is plain that his disclamation could not operate to the prejudice of his co-trustee, who was entitled to exoneration judicially, since he could not obtain it extrajudicially. Then it was said that the process was unnecessary, because there was no double distress,—there being no question either as to the amount of the shares, or the parties entitled to them. This is very true, if the defenders had admitted that they had no other claim against the trustees except what the Auditor had ascertained, and were willing to exoner them on payment, in terms of the Auditor’s award. But so far was this from being the case, that there is written evidence that Alexander refused to grant an absolute discharge; and all the other defenders, as well as he, concur in stating now, that ‘ this action relates only to a portion of the trust-funds, where there cannot be any partial process of exoneration, nor can exoneration be granted while the trust-funds are not wholly disposed of, which they are not in the present case.’ That statement is of itself sufficient to shew that the present action is not only competent, but absolutely necessary for the safety of the trustee, who insists in it.

‘ The last objection is, that all parties are not called ; for it is said, 24 May 1836.
 ‘ that although the minor Comb Noble is cited in the supplement-
 ‘ tary action, the other defenders, who were cited in the original Comb’s Trustees v. Noble
 ‘ action, are not cited in the supplementary action also. Perhaps and Others.
 ‘ there might have been something in this if Flucker had not dis-
 ‘ claimed ; but in consequence of his disclamation, there is but one
 ‘ pursuer, and that pursuer has confessedly cited every individual
 ‘ interested in the fund. It appears to the Lord Ordinary that this
 ‘ multiplepointing is not only competent, but that it has been ren-
 ‘ dered necessary by the conduct of the defenders, and that all parties
 ‘ are in the field. Nota.

‘ It is much to be regretted that the slender provisions left to
 ‘ the defenders by the truster, amounting only to about 100 guineas
 ‘ for each, should be squandered in a litigation as useless as it is ex-
 ‘ pensive.’

The Lord Ordinary pronounced an interlocutor repelling the ob-
 jections.

The objectors *reclaimed*, and the Court *adhered*, reserving to the Judgment.
 defenders all objections to the propriety of bringing the action into
 Court.

Lord Ordinary, *Corehouse*. Act. *Robertson*. Alt. *Dean of Fac. (Hope)* *Pattison*.
James Taylor, S.S.C. and *Alex. Simson*, S.S.C. Agents. S. Clerk.

C. R.

SECOND DIVISION.

No. CXXXVI.

24th May 1836.

HUGH MENZIES

against

HIS CREDITORS.

CESSIO BONORUM.—(ASSIGNING PENSION.)—*A sergeant of artillery
 found entitled to the benefit of this action, without assigning any part
 of a pension of 1s. 5½d. per day.*

THE pursuer, a sergeant of artillery, who had been discharged with
 the above pension, after twenty-one years’ service, and who had
 received wounds which incapacitated him for hard work, craved
 the unqualified benefit of the cessio,—founding on Fraser, 12th June

24 May 1836. 1824, 3 S. & D. 131. To this a creditor objected, unless a certain portion of his pension should be assigned. The Court, however, were of opinion, looking to the decision in the case of Fraser, that he was entitled to the benefit of the cessio, without assigning any part of the said pension; and decerned accordingly.

*Menzies v.
His Creditors.*

Act. C. Robertson. Alt. W. Forbes. John Hunter, W. S. and George Cumming,
W. S. Agents.

R.

SECOND DIVISION.

No. CXXXVII.

26th May 1836.

JAMES CURRIE AND MANDATARY
against
PETER ANDERSON.

BILL OF EXCHANGE.—SOCIETY.—PROOF.—(ONUS PROBANDI).—

The indorsee of a promissory-note, granted by a company, having given a charge of horning to a party as a partner of the company, whose name was not included in the firm, and who denied that he was a partner—In a suspension of the charge, found (altering the interlocutor of the Lord Ordinary) that the charge was competent, and that the onus of proving his averment lay on the suspender.

Narrative.

CURRIE charged Peter Anderson, as a partner of Alexander Anderson and Company, on a promissory-note for L.450, subscribed by the firm of Alexander Anderson and Company, in favour of James Martin, who indorsed it to the charger. A bill of suspension by Peter Anderson, denying that he was a partner of the company, or that he had subscribed the bill, was passed on caution.

He *pleaded*, that the onus of proving that he was a partner lay on the charger; that as the bill did not bear the suspender's name, and neither the protest nor the extract decree proceeding thereon, nor the letters of horning, had any reference to the suspender, the messenger had no authority to charge him; that, if this were a question with Martin, the payee, he could not, by summary diligence, proceed to recover from the suspender (supposing him to be a partner) any part of the sum due by him as such partner, but must proceed by an ordinary action, and so must the charger.

The charger *pleaded*—That the suspender, being a partner of the

firm of Alexander Anderson and Company, was directly liable for the amount of the note charged on, and the diligence was competently used against him in that character. As the indorsee of Martin, the charger was at any rate entitled to the presumptions of onerosity and bona fides, which could not be competently redargued otherwise than by his writ or oath.

26 May 1836.
Currie and
Mandatory v.
Anderson.
—
Narrative.

The Lord Ordinary pronounced this interlocutor and note :

‘ The Lord Ordinary, in respect that the name of the suspender does not appear on the bill charged upon ; that the said bill is accepted only by a company firm, confessedly adhibited by a person different from the suspender ; that the said firm does not include the name of the suspender ; that he positively denies that he is, or ever was a partner of the said company ; that it is not alleged that any evidence whatever of his being such partner was exhibited to the messenger employed to execute the charge, and that the charger has not produced, even with the record, any conclusive evidence to instruct that fact, but only offers to establish it in this process of suspension, before a jury, at which trial, though now actually proceeding to execution as on a decree of registration, he admits that he must stand exactly as if he were the pursuer of an ordinary action, finds the proceeding by summary diligence against the suspender incompetent, and therefore suspends the letters and charge simpliciter, and decerns : Finds the suspender entitled to expenses.’

Lord Ordinary's Interlocutor.

Note.—‘ If this charge is supported, it will be in the power of any one who holds a bill drawn, accepted, or indorsed by a company firm, to charge any individual he pleased in the united kingdom for payment, and to drive him to the remedy of a suspension ; a form of process in which the natural position of the suspender is that of a pursuer, or a party bound to instruct his reasons for resisting the charge, and not that of a defender, having nothing to do till a case is made out against him. The charger relied almost entirely on the case of Liddell, 2d July 1812. But there it is manifest from the report, that the fact of the suspender being a partner was fully and throughout admitted ; and the charge was accordingly supported in argument upon that assumption ; and not by an offer on the part of the chargers, (as in the present case,) to prove the fact in discussing the merits of the suspension. The short note of the Judges’ opinions in the close of the report plainly proceeds on the supposition, that any individuals who could be charged individually on a horning against a company must at all events be partners ; and when it is said that the messenger must discover whether they were so or not, this seems at least to imply

Note.

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‘ that some evidence of the fact must have been laid before him, other than the allegation, or mere mandate, rather, of his employer. The cases of *Anderson v. Bolton*, 26th Jan. 1810, (*F. C.*) and of *Collier*, 30th June 1810, there referred to, though also cited by the charger, are, in so far as they go, decidedly against him. In both these cases, a party charged as a partner, and denying that he was so, was found entitled to have his bill of suspension passed without caution, which was all the relief he could possibly get in that stage of the proceeding, and it is not alleged that the chargers in these cases ever proceeded farther with their diligence. On the other hand, there is a variety of cases in which it has been held sufficient to protect a party against any summary or privileged course of proceeding, and to drive his opponent to the ordinary remedies of the law, that he denies or does not admit that he is in the situation which would justify such summary or privileged proceeding. Such was the case of *Thorburn and Grahame*, 17th June 1825, (4. *Shaw*, 101,) which related to the Act of Sequestration, 6th February 1806, as to the summary recovery of agents’ accounts, and where it was expressly found by the Court, that “ where the party denied the employment, the agent must constitute his debt by an ordinary action ;” and such also was the case of *Brown and Turner*, 9th Feb. 1827, (5. *Shaw*, 321,) which related to the privilege of members of the College of Justice to sue in this Court for sums under L.25 ; and where the mere denial of the opposite party, that the pursuer was pursuing in his own right, though he averred that he was, was held to exclude the privilege. And truly this seems accordant to plain principle. Privilege and summary forms of proceeding are allowed against parties in a certain situation ; but if it be not either admitted, or instanter verified, that they are in such a situation, it would plainly be more unjust to subject them in the first instance to the disadvantage of these forms, than to refuse an extraordinary remedy to a party who cannot shew, at the moment of seeking it, that he is entitled to that benefit. Nothing more was settled by the decision in *Liddell’s case*, than that it was competent to charge individual partners on a horning against a company, that being the only point there presented for judgment. If the dicta ascribed to the Judges in the short note of the reporter are to be held as carrying the law further, they cannot well be held, in any view, to amount to more than this, viz. that even though persons do not admit that they are partners, they may still be charged as such, if, before charging them, the messenger has such strong *prima facie* evidence of the fact as would put the onus of proving the contrary in a suspension on them. In the present case, it is

‘not pretended that any evidence whatever was exhibited to the messenger; and it certainly appears to the Lord Ordinary, that it would be inverting the natural relation of parties in such a process if a charge was allowed, against which it was only necessary to oppose a mere denial, and which left the charger, after a suspension was passed without caution, under the very same necessity of proving his case, as if he were the pursuer in an ordinary action. It naturally occurs, that, if this be his position in the suspension, he ought to have proceeded in the course of ordinary action, and that he had no right, by a summary charge, to force his opponent, who is substantially a defender, to take the initiative in litigation for his necessary protection. It occurs also, that it is rather a startling proposition, that the king’s writs for summary execution may be put in force by a public officer against parties not only not named in the warrants, but of whose connection with such warrants the officer has no shadow of evidence but the mandate of his employer. If the charger had any such means of verifying the alleged partnership *de plano*, as might have justified him in proceeding by summary diligence, he ought, at all events, to have applied for his *horning* by bill, and exhibited his evidence in the Bill-Chamber, as the ground of craving warrant against the suspender individually, instead of merely taking out a *horning* on the registered protest against the company, ‘and the individual partners thereof,’ without naming any one of them, and summarily charging the suspender thereon, on his own naked allegation, that he was one of these partners.’

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Note.

The charger reclaimed.

Lord Justice-Clerk.—I think it is our duty to alter this interlocutor. I cannot think this an incompetent charge against Anderson. His averment is, that he was not a partner; but look at the case of Bolton and Anderson in 1810, and the other decision in Collier’s case, in June of the same year; the decisions in which were pronounced under precisely similar circumstances. The suspender in the present case must make out his proposition. The onus lies upon him, where the question turns upon the matter of fact; and there is no hardship in the case. The charge is given at the peril of the party and the messenger. We can have no difficulty in deciding that this is a competent charge.

Opinion of
Court.

Lords Glenlee and Meadowbank concurred.

Lord Medwyn.—In Bolton and Anderson’s case there was no question as to the competency; the want of caution only was objected to. The present question is not so favourable; for the bill

26 May 1836. here has been passed on caution, because there is a *prima facie* case against the party.

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Judgment.

The Court altered the interlocutor of the Lord Ordinary; found the charge competent; found the charger entitled to the expenses of this discussion, and quoad ultra remitted to his Lordship to proceed further in the cause as to him shall seem fit.

Lord Ordinary, Jeffrey. Act. Dean of Fac. (Hope,) Pyper. Alt. D. M'Neil,
Shaw. J. B. Gracie, W. S. and W. B. Campbell, W. S. Agents. T. Clerk.
R.

SECOND DIVISION.

No. CXXXVIII.

26th May 1836.

JAMES STUART AND COMPANY AND MANDATARY
against
JOHN AND JAMES MILLER.

PRINCIPAL AND AGENT.—PROOF.—*A defender found entitled to the production of letters which passed betwixt the pursuer and his confidential agents, in reference to matters which thereafter gave rise to a suit,—these letters not having been written in contemplation of, and not bearing reference to any action whatever against the defenders.*

Observed on the Bench, 1. That the privilege, whereby a party is exempted from producing, in modum probationis, communications passing between him and his agent, is limited to those made to law-agents, or other members of the profession of the law, in relation to an existing or meditated law-suit. 2. This privilege of exemption is not founded on the nature of the communication, as being confidential, but on the character of the party to whom, and the circumstances in which it is made.

Narrative.

MATTHEW BELL held certain leases of salmon-fishings in the Tay. By an arrangement with him, James Stuart and Company of London, in 1832, accepted bills for the rents of the fishings, on the faith of having the fish consigned to them in London. On these bills a balance was due to the pursuers, at the end of 1832, of L.518. In 1833, the pursuers again accepted bills to Bell for the rents of the fishings. To relieve them of these obligations a deed was executed by Bell, binding him to consign the produce of the fishings to them; and also containing an assignation to the leases,

entitling them to enter into possession of the fishings, if they should judge it expedient, on Bell's death or bankruptcy. This deed was prepared by the defenders, and was executed in January 1833. Bell became insolvent in the following May.

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Narrative.

In 1834, the pursuers brought the present action of damages against the defenders, libelling that they, as their agents, had either failed to reveal to, or concealed from them, (the pursuers,) the true nature of the assignation in security of the leases above mentioned, whereby they were induced to advance money to Bell upon an imperfect or insufficient security; or, at least, that the defenders had culpably failed or neglected to complete the said assignation by proper intimation, so as to render it a valid and preferable security to the pursuers, by which they were, on the bankruptcy of Bell, deprived of their expected security; and concluding against the defenders for the amount of the sum lost through their wrongful or negligent conduct, amounting to L.1006 : 12 : 6, exclusive of interest.

The defenders *pleaded* generally, that they were not guilty of any wrong or negligence in regard to the assignation, so as to subject them in repetition or damages to the pursuers; and, more particularly, that the security had proved inoperative, in consequence of the pursuers themselves having improperly neglected to make the assignation effectual at the period of Bell's bankruptcy, they having, as is alleged, then declined claiming upon the leases assigned, and actually refused to connect themselves with these leases. It appeared, in reference to this part of the case, that the pursuers, Stuart and Company, had employed James Bell, factor at Kinfauns, who was acquainted with salmon-fishings, to look after their interests, and that they also sent down a connection of their own, who was in a counting-house in London, with the same object. It was stated, that these parties being satisfied, upon inquiry, that the leases were disadvantageous, rejected them. The statement upon the subject was as follows: ' Mr Bell became insolvent on the 10th day of May 1833, and his insolvency was immediately known to the pursuers. ' The pursuers intimated to the defenders that they had dispatched ' a friend to Perth to act for their interest, and that the defenders ' were not to act for them. Mr Elmslie, the friend mentioned in ' the letter, arrived at Perth, and along with Mr James Bell, whom ' the pursuers also employed to look after their interest, engaged ' Mr James Condie, a highly respectable practitioner in Perth, to ' act for them.'— ' Those who acted for the pursuers advisedly abstained from making any attempt to enter into possession under ' the leases, well knowing that these leases were held under extremely unfavourable contracts. No step was taken to make the

26 May 1836. ' assignment available, and no notice was given to the defenders of any such intention or desire.'

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Narrative.

The pursuers having revised their condescendence, the defenders moved for a diligence, in order to recover a great variety of documents enumerated in a specification, and embracing, inter alia, the following: ' 1st, All letters, memorandums, or instructions, by the pursuers, or Mr W. F. Stuart, to Mr Elmslie, or others, their agents in Perth, in the months of May, June, or July 1833. 2d, All letters from Mr Elmslie or others, the pursuers' agents, or in their employ, to the pursuers, or to the said Mr W. F. Stuart, regarding the fishings held by Mr Bell at the date of his insolvency, in the said months of May, June, or July 1833. 3d, All letters from the pursuers or Mr Stuart, in relation to said fishings, addressed to the said Mr Elmslie, or others, their agents in Perth, in the year 1833.'

The diligence was granted, ' reserving the objection of confidentiality, if made to the commissioner, in regard to the letters and other documents contained in the two first articles of the list.' Under this diligence, the pursuers and the havers objected to the production of the correspondence between them and Mr James Bell and Mr Elmslie, on the ground that that correspondence having passed between the pursuers and the said parties, acting in the capacity of agents for the pursuers, and being confidential in its nature, production of it could not be demanded by the defenders. The pursuers' objections were reported by the commissioner to the Lord Ordinary, and a remit was made by his Lordship to Mr Duncan M'Neill, with directions to consider and report upon the objections stated in the report of the commission. Mr M'Neill returned a report, in which he stated, inter alia, ' From the correspondence, it appears to the reporter, that Mr James Bell and Mr Elmslie acted as the confidential agents of the pursuer, charged with his interest in the matter of Matthew Bell's bankruptcy, and matters arising out of that event; that the correspondence in question was had with them in that character and upon that footing.'

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: ' The Lord Ordinary having resumed consideration of the debate, with the reports of the commissioners appointed to take the examinations of havers, together with the subsequent report of Mr D. M'Neill, advocate, on the matters remitted to him by the interlocutor of 23d day of June last, and having, in virtue of the mutual minute of parties of the 15th current, again opened up the four sealed parcels, containing the letters, to the production of which the pursuers have objected, on the ground of their being

‘ confidential, In respect that there is no reference in any of these letters, except the letter—and a press copy of the same—from the pursuers to James Bell at Kinfauns, dated London, 20th July 1838, and the letter from the said James Bell to the pursuer, James Stuart, dated Kinfauns, 26th October 1838, to the existing action, or to any action whatever against the defenders, as then in contemplation of the pursuers, repels the objection so stated to the production of these letters, with the exceptions above mentioned, and ordains the sealed parcels to be opened up, and the said letters, with the exceptions, as above, to be made part of the defenders’ productions in process : Quoad ultra approves of the report of Mr D. M’Neill, in so far as it expresses his opinion upon any of the other objections taken in the course of the examinations,’ &c.

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Note.

Note.—‘ The Lord Ordinary, in spite of the case of Gavin and Montgomery, 17th Dec. 1830, 9. *Shaw*, 213, would have been inclined, in the circumstances of this case, to repel the objection of confidence, as to the letters to and from Elmslie and James Bell, in respect that neither of these persons were law-agents. But, as the point may be thought attended with difficulty, and the letters which have been excepted are truly of no consequence, he thought it better to rest his deliverance on the ground expressed in the interlocutor, to which he thinks no objection can be stated, and to confine the production, *hoc statu*, at least, to what falls under that rule. Some parts of the correspondence may, in a certain popular sense, be regarded as confidential, but not in the sense which can alone entitle them to protection. No part appears to be of the nature of consultations as to an existing or expected law-suit, or communications made *eo intuitu*, still less of consultations or communications having any reference to the particular suit in dependence, to which alone the protection would seem to be limited. See *Bowes v. Russell*, 26th May 1810, *Fac. Coll.*’

The pursuers having *reclaimed*, the Court appointed minutes of debate to be given in upon the objection of confidentiality. The defenders *pleaded*—1. There is no authority for holding that communications, though not meant to be divulged, passing between parties other than clients and their law-agents, are sacred, and that communications between other parties not holding that particular relation are not privileged. It is not the nature of the communication itself, but the character of the party to whom it is made, as of the profession of the law, counsel, solicitor or attorney, that excepts it from the general rule, that all evidence tending to instruct the truth is admissible. Hence communications to other parties, however confidential in their nature, as to physicians or clergymen,

Defenders’
Pleas.

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are not protected. In the case of Gavin, referred to by the pursuer, the party to whom the communication was made was a law-agent. 2. The privilege of confidence attaching to the communications with agents or counsel is exclusively confined to communications made with them in a professional character, touching matters strictly professional, and has no relation to those of a different nature coming under their cognisance, or in which they are actors, not legal advisers. Thus, in the present case, the letters sought to be recovered go to prove the *fact* of repudiation of the leases, by the actings of Messrs Bell and Elmslie for the pursuer, and were not merely written with the view of obtaining legal advice. 3. Communications are not privileged, unless they bear reference to a suit in dependence, or in contemplation, or to questions of contested rights. Hence, even communications to law-agents, unless when relating either to raising an action or to one already raised, so as to be of the nature of consultations about judicial proceedings, are not protected by the privilege. (1.) *Phillips on Evidence*, i. 144; *Duchess of Kingston*, 20. *Howell, St. Tr.* 613, 614; *Wilson v. Rastall*, 10th June 1792, 4 *T. R.* 753, and 18th June 1792, 4 *Dunford and East's Rep.* 758; *Fountain v. Young*, 1807, *Trin. Term. Espin. Rep.* vol. vi.; *Bramwell v. Lucas*, 31st May 1834, 2 *Barn. and Cress.* 748; *Broad v. Pitt*, 26th June 1828, 1 *Moodie and Malk.* 233; *Wright and Others*, 15th Dec. 1831, 10 *Sh.* 139; *Peake on Evidence*, 197; *Burnett*, 439; 2 *Hume*, 338, 2d edit.; *Tait*, 396, 2d edit. (2.) *Phillips*, i. 145, 146; *Duffin Peake*, *N. P. C.* 108; *Robson*, 5 *Esp. N. P. C.* 52; *Comp.* 845; *Peake on Evidence*, 195; *Burnett*, 438; *Tait*, 395, 2d edit. (3.) *Sir A. Kinloch*, *Burnett*, 436, 438, 439; *Bower*, May 26, 1810, *F. C.*; *Campbell*, 21st Jan. 1823, 2 *S.* 140; *Ratcliffe*, 10th Feb. 1730, 2 *Brown's Cases*, 514; *Preston v. Carr*, 12th Dec. 1826, *Equity Exch.*; 1. *Young and Jervis*, 175; *Bolton*, 3 *Sim.* 457; 4. *T. R.* 431; *Williams v. Mundie*, 26th Feb. 1824, 1. *Ryan and Mood.*; *Broad v. Pitt*, *sup.*; *Clark v. Clark*, 13th Dec. 1830, 2 *Moodie and Malkin*, 3.

Pursuers'
Pleas.

The pursuers *pleaded*—The principle of the protection is not founded on the mere situation of the party, as being an attorney or other person acting professionally, but properly upon the character of the communication made. There is no authority for excluding from the protection statements or letters of a confidential nature, made or written to a person acting in the duty generally intrusted to a law-agent; and the general dicta of our writers and judges refer more to the nature of the communication, than to the actual situation of the individual receiving it, as the ground of the privilege. Nor is it essential to protection of communica-

tions as confidential, that they relate either to an existing or to a meditated suit: the privilege equally applies to communications passing between agent and client, relative to the transaction of matters of private business; and this protection arising from confidentiality is permanent, not ceasing with the cause or business in which the communication took place; Gavin, 17th Dec. 1830, 9. *S. and D.* 213; Executors of Lady Bath, 12th Nov. 1812, *F. C.*; Fisher, 22d Dec. 1827, 6. *S. and D.* 330; Earl of Fife, 1. *Murray*, 106; 1. *Phillips*, 134; cases cited in 1. *Harrison's Index*, 517; 3. *Murr.* 141; 4. *Murr* 587; 1. *Phillips*, 131; 2. *Starkie*, 229.

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Pleas.

Lord Justice-Clerk.—Upon considering these minutes, I think the Lord Ordinary's interlocutor is well founded. I know no rule applying the doctrine of confidentiality to any other than professional persons, counsel, agents and attorneys. I think the case of Gavin, decided in the other Division, is not applicable. Webster, there, was a professional man; and the only question was, whether, in the matter in question, he was entitled to the protection arising from confidentiality. In the case of an accountant, it has been found that the objection of confidentiality cannot be applied. In this case there is nothing to authorise me to overturn the doctrine laid down by the Lord Ordinary. James Bell was only a man of skill, in friendship with this party. We cannot view him in the light of an agent more than Elmslie, who also was acting for Mr Stuart. These parties were not employed in any particular case; and, on the whole, I can see no grounds for altering this interlocutor.

Opinion of
Court.

Lord Meadowbank.—I am of the same opinion. Every one cited to give evidence in a court of law is bound to give his evidence. If he plead an exception, he must shew that he is in a situation which prevents him from so giving it. There is no dictum to apply this exception to a confidential friend, so as to exclude him from giving evidence. There is no difference on this point between our own and the law of England, which excepts only counsel and agents. This is the distinct law of England laid down in the highest authorities, and decided by most able Judges, giving full opinions on the point, and I see nothing in the law of Scotland to sanction a contrary rule.

Lord Glenlee agreed in adhering to the interlocutor as it stood.

Lord Medwyn did not concur generally with the Court, but was of opinion, that if an unprofessional party was employed, and put in the situation of a professional person, he was protected.

The Court adhered.

Judgment.

Lord Ordinary, *Jeffrey*. Act. *Dean of Fac. (Hope,) Patton*. Alt. *Graham Bell*.
William Spalding. W.S. and *Wotherspoon & Mack*, W.S. Agents.

R.

FIRST DIVISION.

No. CXXXIX.

27th May 1836.

MRS CATHERINE MUNRO OR ROSS

against

MRS MARIA MURRAY HAY MACKENZIE.

PROCESS.—(DECLARATOR.)—*An action of declarator, concluding that the rights of parties should be declared in terms of a certain interlocutor, on the assumption that other subsequent interlocutors, not reduced, and not alleged to be obscure, were ‘utterly illegal, null and void, and incapable of operating or securing legal effect,’—held to be incompetent.*

THE point which arose in this case is clearly stated in the following note, added by the Lord Ordinary to his interlocutor of 15th January 1836 :

Lord Ordinary's Note.

Note.—‘It is competent to bring an action of declarator for the purpose of ascertaining the meaning of an interlocutor of this Court; but the present action is of a different nature. It sets forth, that certain interlocutors were pronounced in this Court, which were afterwards affirmed in the House of Lords; that this Court, notwithstanding, proceeded to pronounce subsequent interlocutors inconsistent with their first interlocutors; and it assumes that these subsequent interlocutors, the meaning of which is not said to be doubtful or obscure, ‘are utterly illegal, null and void, and incapable of operating or receiving legal effect;’ and it concludes, that the rights of parties should be declared in terms of the first interlocutor, in contradiction to the subsequent interlocutors, with which they are said to be inconsistent.

‘Whatever might be the case in a reduction, it is thought that this is clearly incompetent in a declarator. It is calling on the Court to declare, that their own final judgment, which is regular and probative in every respect, shall be held as null and void, because it proceeded on error. But one judgment of this Court is equally effectual with another judgment, (neither being impeachable as informal or improbate,) however incorrect one of them may be in reality, or erroneous in point of law, while both remain unreduced. A reduction, therefore, is the form of action to which the pursuers ought to have resorted.’

The Lord Ordinary pronounced the following interlocutor :

' 15th January 1836.—The Lord Ordinary having considered the 27 May 1836:
 ' summons and defences, and heard counsel for the parties, finds, that
 ' the summons as laid is incompetent; and to that effect sustains
 ' the third and fourth defences, dismisses the action and decerns :
 ' finds the pursuers liable in expenses,' &c.

Munro or
 Ross v. Mac-
 kenzie.

The pursuer *reclaimed*, but the Court unanimously *adhered*, giving Judgment.
 additional expenses.

Lord Ordinary, *Corehouse*. Act. Sol.-Gen. (*Cunninghame*,) *Buchanan*. Alt.
 Dean of Fac. (*Hope*,) *H. J. Robertson*. Sang & Adam, W. S. and James
Burness, S.S.C. Agents. D. Clerk.

C. R.

SECOND DIVISION.

No. CXL.

27th May 1836.

MAURICE CARMICHAEL AND OTHERS, HERITORS OF
 THE PARISH OF SYMINGTON,
against
 THE REV. ALEXANDER HUGH M'LEAN.

MANSE.—*A manse requiring thorough repairs to render it habitable, and the heritors of the parish having offered to repair it, and also to make certain additions, but which offer was rejected by the minister and Presbytery; in a suspension of a threatened charge on a decree of the Presbytery, for additions to the manse, by an architect who had originally been employed to report by the heritors, but whose report they had rejected, as being extravagant in the circumstances of the parish—Before answer on the general question of the minister's right to additions, remit made by Court to another architect to report what was necessary and sufficient to render the manse not unsuitable to the benefice, and whether the addition to it, proposed by the Presbytery, was required.*

THE parish of Symington, in the Upper Ward of Lanarkshire, is Narrative.
 of small extent, containing a population of 364 persons. Its gross rental is to about L.2400; and the teinds being exhausted by payment to the minister of a stipend of L.75, he takes the benefit of the parliamentary allowance, which raises his stipend to the minimum of L.150.

Previous to 1790, a new manse and offices were built by the

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heritors, under the decree of the Presbytery, who, in May of that year, approved of the same, and declared 'the said manse sufficient in terms of law.' This manse was occupied by five successive incumbents, as sufficient and suitable for the accommodation of themselves and their families.

In 1824, it was represented to the heritors by the minister, that the manse and offices were in need of repairs, and that, being desirous of having some additional accommodation, he was willing to accept of a separate building, having a chimney, and about fifteen feet square within the walls, as affording the accommodation which he required. To this proposal the heritors agreed, and the Presbytery sanctioned it, and assessed the heritors for the necessary expenses. Soon after the present minister's induction, the heritors being aware that some repairs on the manse were necessary, at a meeting, on 4th October 1834, resolved to make a thorough repair on the manse and offices, and appointed estimates to be given in, in terms of a detailed specification. The minister did not attend this meeting, but the result was immediately communicated to him. A meeting of Presbytery was summoned on 6th January 1835, upon an application of the respondent, for repairs and additions to the manse; but it was adjourned to the 27th of the same month, until it should be seen whether the heritors might there extend their proposals, which seemed to have been unsatisfactory to the respondent. At this meeting the heritors resolved, that 'as they have always declared their willingness to do what was proper for the accommodation of the minister, so they now particularly agreed that Mr M'Lean, the minister, should have a new kitchen and a room above it, in addition to the present manse; and whatever repair may be necessary, the same should also be executed.' This resolution was only verbally stated at the time, and some discussion took place upon it, but without any decision. It was understood that it should be stated in writing, and transmitted to the Presbytery at their next meeting; and it was accordingly communicated to the Presbytery. The heritors, in the meantime, for their own satisfaction, applied to Mr Angus, architect in Edinburgh, to inspect the manse and report to them. Meantime it was not inhabited by the respondent.

Angus made his inspection, attended by the respondent and two neighbouring clergymen, and his report shewed that the house was susceptible of repair; but that, notwithstanding the alterations and repairs which might be made, 'the accommodation thereby required would be too limited for the proper accommodation of the minister; and under all the circumstances of the case, I am further of opinion, that the kitchen and back kitchen should continue in

‘ their present situation, subject to the general repairs, and that
 ‘ two new rooms and a staircase should be added to the present
 ‘ manse, each room to be 18 feet by 16 feet or thereby, having 10½
 ‘ feet ceiling.’

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—
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The heritors disregarded this report, and proceeded to procure another specification and plan, comprehending the new kitchen, with the drawing-room above, as formerly proposed, and various alterations and improvements upon the offices, estimated at about L.300; and they intimated to the minister their willingness to execute these improvements. Mr M'Lean declined this offer, and returned the plans and specifications, intimating, that at his request the Presbytery were again to inspect the manse, for the purpose of determining what repairs and additions he was entitled to by law, with which alone he stated that he would be satisfied. The heritors, on 29th June 1835, resolved, ‘ That they consider
 ‘ the present manse and offices have been accepted and approved of
 ‘ as affording sufficient accommodation to the last five ministers of
 ‘ the parish,’ including ‘ the Rev. Mr Smith, now deceased, in
 ‘ whose time the heritors were at the expense of building a new
 ‘ washing-house, with boiler attached thereto, united with the
 ‘ house, of 17 feet 8 inches long, by 8 feet 10 inches in depth, this
 ‘ addition having been made in the year 1824 : That the walls of
 ‘ the manse and offices are good and sufficient, while the doors, win-
 ‘ dows, roof and interior are all capable of being substantially re-
 ‘ paired, so as to render the house and offices as complete and com-
 ‘ fortable as ever they were : That they consider that the manse and
 ‘ offices, when so repaired, will be quite sufficient and suitable for the
 ‘ accommodation of the minister of this parish, which is so small as
 ‘ to only afford a stipend of under L.100 a-year : That none of the
 ‘ offers, which the heritors have, for the sake of avoiding dispute,
 ‘ made to the present minister and the Presbytery of Biggar, have
 ‘ been acceded to by them. The heritors therefore resolve, that to
 ‘ put an end to all further delay in the matter, they do now, agree-
 ‘ ably to the offer which they originally made to the minister in the
 ‘ month of October last, make the following offer, to which they de-
 ‘ clare they now restrict themselves, and will abide by, viz. That
 ‘ they will proceed to put the manse and offices in a complete state
 ‘ of repair according to law, which they declare themselves willing
 ‘ instantly to do.’

A copy of this minute was delivered to the minister, who communicated the same to the Presbytery, on 30th June 1835, whose minutes of that date bear, that, ‘ as the Presbytery could see no-
 ‘ thing in this communication to induce them to depart from the re-
 ‘ gular course of proceeding, they resolved to proceed in the mat-

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‘ters for which the meeting was appointed, according to law.’
 ‘And Mr M'Lean was then asked, Whether, agreeably to ap-
 ‘pointment of Presbytery, he had summoned tradesmen to at-
 ‘tend this meeting for the purpose of assisting the Presbytery?
 ‘He answered, that he had summoned Mr G. Angus, architect,
 ‘Edinburgh, who was now in attendance. Mr Angus was then called
 ‘and appeared, and being approved of by the Presbytery, the oath
 ‘de fideli was administered to him; and it was remitted to him,
 ‘and to a committee, consisting of the following members of Pres-
 ‘bytery, viz. Messrs Hope, Aiton, Christison, and Proudfoot, to
 ‘inspect the manse and offices of Symington, and to report, *first*,
 ‘How far the manse is defective in accommodation and comfort for
 ‘the use of the minister of the parish of Symington: *secondly*,
 ‘Whether by any, and if by any, by what reparation it may be
 ‘rendered a sufficient and commodious manse, and at what expense:
 ‘next, To inspect and report as to the state of the offices, and to
 ‘give in an estimate of the expense necessary to make them proper
 ‘and sufficient.’ Angus and a committee inspected the manse and
 offices, and gave in their report, being a copy of that previously given
 in to the heritors by Angus.

The Presbytery then appointed Angus to prepare plans, specifications and estimates, to be laid before them at their next meeting on the 25th of August, and resolved not to agree to the plans and specification communicated to them by the heritors. The heritors refused to accede to Angus's plans and specifications, ‘in respect that they comprehend additions and alterations of the most extravagant nature, which the heritors are not bound by law to make; that the heritors, however, take this opportunity of stating that they adhere to, and repeat the offer which they made at their last meeting, to put the manse and offices in a complete state of repair, according to law.’

The Presbytery afterwards, on 22d September 1835, decerned for the repairs and additions, in terms of Mr Angus's report, when the heritors presented the present bill of suspension and interdict, *pleading*, that they were not bound to make any additions to the manse and offices, these being capable of repair, and that they were under no further obligation than to execute such repairs upon them as were necessary.

The respondent founded on the following authorities: Case of Methven, 14th May 1828, 6. *Shaw*, 791; Neilson, 1st Feb. 1831, 9. *Shaw*, 370, affirmed on appeal; Dalmeny, in note to case of Lochcarron, 30th Nov. 1833, and 30th June 1835, *F. C.*; Channelkirk, 18th June 1818.

The Lord Ordinary reported the case to the Court, with the following note: 27 May 1836.

‘ The Lord Ordinary takes the course of reporting the cause to the Court, as the most beneficial to the parties. The case seems to be sufficiently prepared, in the facts of it, to enable the Court at once, either by confirming the judgment of the Presbytery, or by any remit, with instructions, if they are not prepared to do so, to settle the whole matter. The Lord Ordinary cannot bring himself to the opinion, that there is any fixed general rule laid down, such as the complainers insist upon, which renders it incompetent for the Presbytery, in such a case as the present, to give decree for any additions to the manse and offices. He thinks that the case is extremely similar to that of Strathblane, 10th July 1827, in which certainly the Court did not hold themselves to be tied up by any such unbending rule; and in the case of Lochcarron, while Lord Jeffrey, in his note, expressly recognised the case of Strathblane as establishing a principle for such a case, though in contrast with that of Lochcarron, the Court expressly waived the decision of any general rule as involved in the latter. The present is a case in which, on the clearest evidence, it must be assumed that the manse requires very considerable and universal repairs to render it habitable at all; in which it has not been repaired in the respondent’s incumbency; in which it has undergone no general revision since it was built forty-six years ago, the small addition made in 1824 appearing to the Lord Ordinary to be of very little consequence; and in which the heritors themselves were so sensible of the necessity of some very considerable operations to render it ‘ a competent’ manse, that they employed an Edinburgh architect to examine and report on it. The question is, whether, in such a case, it is not within the power of the Presbytery to consider, generally, whether it is a ‘ competent’ manse; what may be necessary to render it such, if it is not; and whether they have done wrong when they adopted the report of the architect so employed by the heritors. The Lord Ordinary must say, that the heritors bring the case before the Court in a very unsatisfactory form. To state, in answer to the specific demands made by the Presbytery and the minister, that they will do what the law may require of them, and neither to put in the records of the Presbytery, or even in their own minutes, any precise proposal of the repairs which they will execute, nor to produce any report, specification, or estimate of work to be performed, which it was clearly their duty to obtain when they objected to those approved of by the Presbytery, seems to be a very unreasonable way of asking the interposition of this Court, which,

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‘ even though the Court should think that the decree of the Presbytery should not be wholly approved of, may leave them in great difficulty as to what order should be made, without sowing the seeds of farther litigation.’

*Opinion of
Court.*

At the advising, the heritors intimated their willingness still to make the addition of a room and kitchen to the manse.

Lord Justice-Clerk.—We have doctrines of the parties on both sides carried to extremities. In the Lochcarron case, the Court considered it unnecessary to decide the abstract principle, that a minister was entitled, from change of circumstances, to ask for an addition to his manse, suited to the altered circumstances ; and we are warranted in waiving that question here ; but we may decide from cases parallel, that the minister is entitled to be accommodated with a suitable manse, and that question is in the discretion of the Court. Because his stipend is small, there is no ground for allowing only a corresponding small manse : it must be quite suitable for a clergyman. This is not like the case of Lochcarron, which was a very particular one. There most extensive repairs had been executed during the incumbency of the minister, only ten years before the Court found him not entitled to the additional accommodation he demanded ; but here is a person newly inducted, who finds the manse totally insufficient, requiring a thorough repair. The heritors meet him, and say it shall be put in repair ; and they propose additions, and an obligation to put the remainder of the manse into repair ; and one end of the garret is open, which they are also willing to repair and fit up. Having this offer on the one side, and the demand of the minister on the other, the Court is to determine, looking at other cases, what is to be given ; and I think that a suitable and commodious manse is all that can be awarded ; and if the heritors are not satisfied with Mr Angus's report, another may be appointed. It is a strong circumstance that Mr Angus was selected by the heritors themselves to inspect and report ; but, *de jure*, they are entitled to have another appointed, and I am clear he ought to act under suitable instructions from the Court. The case of Channelkirk will form the rule here. In that case, where there were reasonable offers, the majority of the Court thought that a right rule had been laid down. The judgment denied the right of the Presbytery to give large additions, as found by Lord Pitmilley, the Ordinary.

Lord Glenlee.—The heritors here are willing to furnish repairs and additions. They are bound, in the circumstances of the parish, to furnish a competent provision for the clergyman's residence. That former incumbents were content, is *prima facie* evidence of sufficiency ; but if extending additions or repairs are necessary now

to render it competent, this must be done, and the minister is entitled to have his manse made suitable.

Lord Meadowbank.—On the general point I have nothing to add. It is clear law that it is incumbent on the heritors of a parish to furnish a suitable manse for the minister. The sum originally fixed was L.83 sterling, and one gentleman thought that a fixed rule, and he went to the House of Lords; and the result of their judgment has been a rule, that the sum of L.1000 is not to be exceeded. Practice has introduced exceptions. It is at present very indefinite what is the obligation to keep up a free manse; but when a minister has taken his manse as a free manse, it would be unjust to allow him to increase his demands. In the Dalmeny case, where a new incumbent came to the parish, the Court would not entertain his demand for additions, because the house was built shortly before. But where the minister requires a thorough repair to make the manse suitable,—looking to the cases of Kirkliston and Strathblane, where the manse required a thorough and complete repair,—the Court will take this case into their consideration, with a view to the decent, respectable, and comfortable residence of this clergyman within his parish; and it is a sound, fair and equitable principle. The rule that regulates the case of a church is not the same. The heritors are only called on to have a church suitable at the time it was built, not according to fluctuating changes of population. With respect to the present case, it appears to me that we are entitled to proceed and confirm the decree of the Presbytery. No objection to the report of Mr Angus has been stated. We have nothing to do with the accommodation furnished for the parliamentary ministers in the Highland parishes, which have been referred to in argument. We must decide by the rule of law as it stood before these were thought of. We must look whether Mr Angus has given in his plan any accommodation not suitable and proper. The heritors themselves admitted that an addition was necessary. They employed a tradesman to report, and then say, ‘You are to have additional accommodation, but we are to be the judges: we won’t allow you to be heard.’ That is totally unreasonable. If Mr Angus’s report is carried too far, remit it to the Presbytery, but proceed immediately. I would not remit to the Presbytery or any reporter, until the heritors say the accommodation proposed by Mr Angus is too much.

Lord Medwyn.—This case relates solely to the claim of the incumbent to an addition to his manse, which, though small, is admitted only to require repairs, and whether the decree of the Presbytery, for the addition awarded by them, is well founded in law. Originally manses were built and repaired by the beneficiaries who

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enjoyed the teinds of the parish; and this obligation was specially laid upon them by 1612, c. 8. This was not a fit state of things when the incumbent became a stipendiary, and the teinds passed into the hands of others; and the act 1663, c. 21, after the Restoration, repealed the act 1649, c. 45, which had been passed at a most favourable time for the interests of the church; and this statute is our rule at the present day. Where competent manse have been once built no authority is given for claiming an addition. The best exposition of the law, I think, is to be found in the remit in the case of Kirkliston by the late Lord Meadowbank: ‘No minister is entitled to have a new manse, or his present one altered, merely from the size, form, or arrangements of the apartments being ill suited to the improved fashion of the times, but he has a right to have a substantial dwelling, not unsuitable to the revenue of the benefice, and decently and comfortably finished without and within; and if an old manse has become ruinous in whole or in part, so that renovation rather than reparation has become necessary, such renovation may, with propriety, be adapted to the taste of the times, moderation in dimension, and simplicity in ornament, being always rigidly observed.’ The result of that case was, that the decree of the Presbytery for a new manse was set aside, and the old manse, with certain additions and repairs agreed to by the majority of the heritors, was found all that the minister could claim. Now, in the present case, it is not alleged that the manse is ruinous and needs renovation. All the requisite repairs can be executed for L.80 or L.90. It was built in 1790, and then declared sufficient by the Presbytery; so that I think the minister has no legal claim to an enlargement of it, nor the Court any power to award such. But the heritors have very properly renewed their offer to make a certain addition; and, in all respects, I cannot conceive any two cases to be so like as this and the case of Channelkirk, where your Lordships adhered to an interlocutor of Lord Pitmilley, and held, that the Presbytery, in going beyond the offer of the heritors, had exceeded their powers; and I am of opinion, that, in the present case, the Presbytery of Biggar have also exceeded their powers, and that since the manse is admitted only to require repairs, the minister should have been satisfied with the addition offered by the heritors.

Lord Justice-Clerk.—I cannot concur with Lord Medwyn, that we are bound to go into the general question; but I think we ought to have a new report.

Judgment.

The following interlocutor was then pronounced: ‘On report of Lord Moncreiff, Ordinary, before answer, remit to Mr Thomas Brown, architect in Edinburgh, to inspect and examine the manse

' in question, and to report whether, besides repairing the manse of Symington, the additions offered by the heritors in their said minute are sufficient to make the said manse not unsuitable to the benefice, and a competent residence for the minister, or whether the additions decreed for by the decree of the Presbytery are required, or part thereof, for the above purpose,—moderation in dimension, and simplicity in ornament, being always rigidly observed.'

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Lord Ordinary, *Moncreiff*. Act. Sol.-Gen. (*Cunninghame*), *Pyper*. Alt. Dean of Fac. (*Hope*), *W. Bell*. *Mackenzie & Sharp*, W. S. and *M'Lean & Giffen*, W. S. Agents. Bill-Chamber Clerk.

R.

No. CXLI.

SECOND DIVISION.

31st May 1856.

JAMES BROWN against JOHN HAY.

PROCESS, ALIMENTARY.—TRUST, (EXECUTION OF).—*An action for payment of a suitable sum as aliment, by a trustor against a trustee in a voluntary trust for behoof of creditors, founding on a clause of aliment in the trust-deed,—found not a proper process of aliment; and not competent to proceed in it as such in a summary way.*

THE pursuer was possessed of property, principally consisting of houses in the Old Town of Edinburgh, to the amount of about £15,000; but having, about 1830, fallen into embarrassments, he granted a voluntary trust-deed, for behoof of his personal creditors, in favour of the defender. By one of the conditions of the trust, and as such entering the defender's sasine as trustee, it was provided and declared, that during the subsistence of the present trust, I, the said James Brown, shall be entitled to require and receive, and the said John Hay, or other trustee or trustees, shall be bound and obliged to pay me, out of the annual produce of the subjects, means and estate hereby conveyed, such sums of money as may be necessary for providing a suitable maintenance to myself and my family; such payments being so regulated as not to interfere with the proper execution of the purposes of the trust.'

The pursuer having raised an action against his trustee for payment of a suitable sum as aliment, the defender pleaded want of funds, for the last three years, sufficient to enable him, as the trustee, to pay the aliment as he had done for some time after entering on the management of the trust.

The case having been enrolled by the pursuer before the Lord Ordinary to have great avisandum made with the process to the Inner-House, as being one of aliment, his Lordship ordered accordingly in the following interlocutor, but added the subjoined note:

' Upon the pursuer's motion, makes great avisandum to the Lords of the Second Division of the Court with this process of aliment.'

Note.—' The Lord Ordinary is by no means satisfied that this is one of those proper actions of aliment, which, being Inner-House processes, can only be disposed of by making great avisandum. It rather appears to him to be an ordinary action for execution of a trust, or for specific implement of a particular in-

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‘struction or condition in a trust-deed. That the sum directed to be paid by the trustee is stated to be for the maintenance of the truster himself and his family, will scarcely make the action for implement a proper process of aliment, any more than a similar statement, as to the object or motive for granting a legacy or annuity in an ordinary testament, would give this privileged and peculiar character to any action for payment which the legatee might bring against the executor. As the pursuer, however, expressed much anxiety to have the point settled, and his circumstances are obviously such as to make it material for him to obtain a final judgment with the least possible delay and expense, the Lord Ordinary has thought it better to bring the case before the Inner-House in this form, that their Lordships may be enabled, in case they should adopt the views of the pursuer, (and even perhaps though they should not,) at once to dispose of the case upon its merits.’

Judgment.

The Court, in respect it was not a proper process of aliment, and that it was not necessary to make great *avisandum*, *remitted* to the Lord Ordinary to proceed as he should think fit. (See papers.)

Lord Ordinary, *Jeffrey*. Act. *Shand*. Alt. *More*. John *Shand*, W. S. and
Campbell & Mack, W. S. Agents.

R.

No. CXLII.

SECOND DIVISION.

31st May 1836.

JANE HAGGART *against* WILLIAM CROLL.

PARENT AND CHILD.—PROOF.—(SEMIPLENA PROBATIO).—(ADMISSIBILITY OF WITNESS).—Case where the circumstances were found to amount to *semiplea probatio*.—Observed on the Bench, (1.) A party, against whom an action for the aliment of a bastard child had been brought, not having denied, either in his judicial declaration, or in the record, that he had connexion with the mother, this held to amount to a substantial admission that he had such connexion. (2.) It is no objection to the admissibility, but only to the credibility of a witness in a case of this description, that he admits having had connexion himself with the mother of the child, and that he had repeatedly said, ‘he would do what he could to get the child fathered on the defender.’ (See papers.)

Lord Ordinary, *Jeffrey*. Act. *Maidment*. Alt. *D. McNeill, Moir*. J. *Burn*,
W. S. and *Joseph Mitchell*, W. S. Agents.

R.

FIRST DIVISION.

No. CLXIII.

1st June 1836.

THOMAS MACKENZIE
against
 WALTER FERRIER.

PROCESS.—JUDICIAL FACTOR.—RANKING AND SALE.—*It is competent for a judicial factor on a trust-estate to appear in a ranking and sale, and require lands, conveyed by the trust-deed, to be struck out of that process, although he has not completed a feudal title to the said lands in his person.*

THE petitioner was appointed by the Court judicial factor on a Narrative. trust-estate on the death of the trustees. The trust-deed conveyed certain lands to the trustees, in which, however, they were never infest. Some portions of the said lands having been included in the ranking and sale of Gigha, the petitioner presented a petition, praying the Court to authorise and empower ‘ the petitioner, as judicial factor foresaid, to institute and follow forth all processes and proceedings necessary for completing a feudal title to the said lands in the person of the petitioner, as judicial factor foresaid, and for vindicating his right thereto.’

To this petition the defender, the common agent in the ranking and sale, objected, as unusual and incompetent.

The Court pronounced the following judgment: ‘ In respect it Judgment. is legal and competent for the petitioner to appear in the ranking and sale, and to require the lands in question to be struck out of that process, refuse, hoc statu, the desire of the petition, and reserve all questions of expenses.’

Act. Dean of Fac. (*Hope*,) Ivory. Alt. Keay, Wood.
 W.S. and Walter Ferrier, W.S. Agents. S. Clerk.

Thomas Mackenzie,

C. R.

FIRST DIVISION.

No. CXLIV.

1st June 1836.

THE HON. DOUGLAS GORDON HALLYBURTON
against
 ANDREW BLAIR.

PROCESS.—ADVOCATION.—PRELIMINARY DEFENCE.—*Circumstances in which a party was held to be barred from pleading, in an advocacy of a final interlocutor on the whole cause, an objection to the competency of the action, which had been repelled in the inferior court, although at the time, and frequently in the course of the proceedings, he protested that he should be entitled to insist therein.*

Narrative.

In October 1828 the respondent presented a summary application to the Sheriff; to the competency of which, the advocator stated an objection, which was repelled by the Sheriff,—the advocator always protesting, both then and repeatedly afterwards at subsequent stages of the proceedings, that he should still be entitled to insist in the said objection. In the meantime the advocator had presented a petition for sequestration of the stock and cropping of the respondent, to which answers were lodged. In September 1830 the two actions were conjoined, and shortly thereafter fell asleep. On the 26th December 1833 the conjoined actions were, of consent of parties, awakened; and after various procedure, in the course of which the advocator made sundry appeals to the Sheriff-depute, they were finally disposed of in December 1834. The present advocacy was then brought, in which the advocator, besides other pleas on the merits, insisted on his original objection to the competency of the summary application of the respondent.

The Lord Ordinary pronounced an interlocutor, sustaining the objection to a certain extent.

The respondent *reclaimed*.

Opinion of
Court.

Lord President.—I am prepared to decide only the case before the Court; and I am quite clear, that, in the circumstances, the advocator is barred from now objecting to the competency of the respondent's application. His protesting will not preserve that right, after the manner in which these proceedings have been allowed to go on, on his part, for such a length of time. On looking to the procedure, I find that, in December 1833, he consented to the

wakening of the conjoined actions, not, as it appears, for the purpose of insisting on his preliminary objection, but to proceed as in a competent process. Subsequent to the waking I find various interlocutors, some of which are appealed against by the advocator; and I cannot allow all these proceedings to go for nothing.

1 June 1836.

Hallyburton
v. Blair.Opinion of
Court.

Lords Balgray and Mackenzie concurred, on the understanding that no general point was decided, but that the judgment went entirely on the special circumstances of the case.

The Court accordingly pronounced judgment, altering the interlocutor of the Lord Ordinary.

Lord Ordinary, *Fullerton*.
(*Hope*.) *Neaves*.
B. Clerk.

Act. *Rutherford, Coventry*.
J. Gordon, W. S. and *M'Intosh & Ducat*, W. S. Agents.

Alt. *Dean of Fac.*

C. R.

FIRST DIVISION.

No. CXLV.

1st June 1836.

CHRISTIAN ANDERSON *against* GEORGE MOON.

PROCESS.—ADVOCATION.—FINAL JUDGMENT.—*Circumstances in which an advocacy was found competent, in respect that the interlocutor advocated was held to have exhausted the cause; although, from the terms in which it was expressed, it could not be extracted.*

GEORGE MOON, Esq. presented a petition to the Sheriff of Fifeshire, stating that Anderson had left his service contrary to agreement, and praying him, 'upon the premises being admitted or proven, to grant warrant for imprisoning her person in Cupar tolbooth, therein to remain, on her own expenses, until she shall find sufficient security, acted in your court books, to return to the petitioner's service, and to remain there until Martinmas next, and faithfully perform her usual work; as also to find her liable in L.10, or such other sum as your Lordship shall fix, in name of damages, to the complainer; as also in the expenses of this application and procedure to follow hereon; or otherwise to order and do as to your Lordship may seem proper.' To this petition defences were given in by Anderson; and a record having been made

Narrative.

1 June 1836.

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up, and a proof taken, the Sheriff pronounced an interlocutor, in which, after various findings, he ‘repels the defences, and ordains her to return to her service at Russell Mill upon Thursday next, at ten o’clock forenoon, and to continue therein, or at Hospital Mill, as the petitioner may think fit, until the term of Martinmas next, with certification; it being understood, however, that a person, if she insists upon it, must be provided by the petitioner to carry her victuals as long as she works at Russell Mill, and the respondent being entitled, under said regulations, to give warning, on the 1st day of August next, that she is to leave the petitioner’s service at the said term of Martinmas; finds her liable in expenses, and allows an account thereof to be given in; and when lodged, remits the same to Mr John Givan, to be taxed by him in presence of the parties or their agents, reserving to the petitioner any claim of damages he may have against the respondent for deserting her service, and her defences as accords.’ To this interlocutor the Sheriff adhered, upon which Anderson brought the present advocacy as of a final judgment.

The respondent, Moon, stated the following objections on the competency of the procedure: This advocacy is incompetent, in respect that the judgment of the Sheriff is an interlocutory, and not a final judgment: 1st, The judgment of the Sheriff does not dispose of the whole conclusions of the petition, and merits of the cause: 2d, The order pronounced upon the advocator, to return to her service, is with certification, thus implying that the Sheriff was to do something further in regard to the merits: 3d, The interlocutor of the Sheriff contains no decerniture, and was not extractable. In these circumstances, the advocator should, previous to bringing her advocacy, have presented a minute, craving the Sheriff to pronounce such judgment as would be final; *Darling*, 279; *Seymour v. Thomson*, 20th Jan. 1829; *M’Kechnie v. Griffin*, 27th May 1829.

Lord Ordinary’s Interlocutor.

The Lord Ordinary pronounced the following interlocutor: ‘The Lord Ordinary having heard the counsel for the parties on the respondent’s plea, that the advocacy is incompetent, repels the said plea of incompetency; finds the advocacy competent; and in respect the respondent states his intention to reclaim against this interlocutor, finds him liable in the expense of this discussion, and remits to the Auditor to tax the amount thereof, and to report: Quoad ultra, appoints parties to debate on the merits.’

Note.

Note.—‘The objection to the competency of the advocacy, that the Sheriff’s judgment is interlocutory and not final, appears groundless. The whole merits of the cause were disposed of, for

‘ the advocator’s defences were repelled absolutely, and she was found liable in expenses. There is indeed no warrant for extract, because the Sheriff has not added a decerniture; but when the advocator’s cause was given against her on every point, it was certainly not incumbent on her to move the Sheriff to decern against her before she had a right to advocate. It is said, that one of the prayers of the respondent’s petition was not exhausted, because warrant was craved for imprisoning the advocator’s person, until she should find caution to return to her service; but that prayer was virtually refused by the Sheriff, because he ordains her to return to her service at Russell Mill, ‘ on Thursday next, at ten o’clock forenoon,’ and to continue there until Martinmas. She could not have obeyed that order if she had at the same time been imprisoned at Cupar. Neither does it render the judgment interlocutory, that it is pronounced under certification in general terms, for that merely imports, that if she disobeys she will be exposed to the legal consequences of her disobedience, in any action that may be brought against her for that purpose. It could never be intended that she should be kept in Court in this action, until the whole period of her service should be expired.’

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Note.

The respondent *reclaimed*. At advising,

Lord President.—I am clearly of opinion that the Sheriff’s judgment exhausted the cause. It would have been idle in the advocator to have craved a decerniture against herself, in terms of the petition. I am therefore for adhering.

Opinion of
Court.

Lord Balgray concurred.

Lord Mackenzie.—I am of the same opinion. I think the cause was exhausted on the merits by the judgment; and the expression, ‘ ordain,’ which is therein used, though not a warrant for extracting, is quite enough for the purpose of advocacy.

The Court *adhered*, giving additional expenses.

Judgment.

Lord Ordinary, *Corehouse*.

Act. *Mailand, E. Mailand.*

Alt. *Graham Bell,*

Jamieson.

Mackenzie & Macfarlane, W. S. and D. M. Adamson, S. S. C.

Agents.

D. Clerk.

C. R.

FIRST DIVISION.

No. CXLVI.

3d June 1836.

THE CONVENERY OF THE INCORPORATED
TRADES OF EDINBURGH
against
THE GOVERNORS OF HERIOT'S HOSPITAL.

CLAUSE.—STAT. 3. & 4. WILL. IV. c. 76.—*It being declared by the statutes for regulating the government of Heriot's Hospital, that the perpetual Governors of the said Hospital shall be the Lord Provost, Bailies, Ministers and Ordinary Town-Council of Edinburgh for the time being, and their successors ; and the Incorporated Trades of Edinburgh having, previous to the act 3. and 4. Will. IV. c. 76, elected six Deacons and two Trades' Councillors, who were members of the Ordinary Council, and Governors of the said Hospital,—circumstances in which a claim brought subsequent to the act of 3. and 4. Will. IV. c. 76, by the Incorporated Trades, to elect the same number of Deacons and Trades' Councillors as Governors of the said Hospital, was rejected,—and it was held, that the term ' Ordinary Council ' applied to the Council as elected under the provisions of the 3. and 4. Will. IV. c. 76.*

Narrative.

PRIOR to the seventeenth century, in which the Hospital after mentioned was founded, and until the passing of the act 3. and 4. Will. IV. c. 76, the Ordinary Town-Council of Edinburgh consisted of the Provost, four Bailies, twelve Merchant Councillors, six Deacons elected out of the fourteen Deacons of the Incorporated Trades, and two Trades' Councillors, in all twenty-five persons. The Ordinary Council, with the addition of the eight Extraordinary Deacons, constituted what was called the Council. By chapter third of the statutes for regulating the government of George Heriot's Hospital, it is ordained, in conformity with the will of the founder, that the perpetual Governors of the said Hospital shall be the Lord Provost, Bailies, Ministers, and Ordinary Council of Edinburgh for the time being, and their successors. By chapter sixth of the said statutes, it is ordained, that there shall be chosen yearly, four Auditors of his and all other accounts belonging to the said Hospital, viz. one of the Bailies of the said burgh, one of the ministers of the same, one of the merchants, and one of the craftsmen of the Council of the said burgh. By chapter eighth it is or-

dained, that the common seal shall be kept in a chest with four locks, having separate keys, whereof one is to be kept by the Dean of Guild of the said burgh for the time being, and the Governors are to choose three more of their own number to keep the other three keys, of which the one shall be one of the ministers of the town, the other a merchant of the body of the Council, and the third, one of the deacons of the crafts. By chapter thirteenth it is declared, that the boys who shall be admitted into the Hospital shall all be children of freemen and burgesses of the said burgh.

3 June 1836.

Convenery of
Edinburgh v.
Heriot's Hos-
pital.

Narrative.

By the 3. and 4. Will. IV. c. 76, sect. 19, the official titles and functions in Councils are abolished. By sect. 20. it is enacted, 'That where any trust, management or direction is, by the terms of any public or local act, or of any charter or deed of foundation, or other deed, conferred on any members of the Council under the denomination of Old Provost, Old Bailie, or Old Dean of Guild, or of Merchant or Trades' Baillies, or Merchant or Trades' Councilors, respectively, the Town-Councils to be named and elected in terms of this act shall immediately, after their own acceptance and induction into office, nominate and elect from their own body such a number of persons, to be such trustees, managers or directors, as are by such acts, charters or deeds appointed to those offices under the said denominations; and the whole powers and functions now belonging to the said offices of trustees, managers or directors, shall belong to, and be as fully vested in the persons so elected, as if they had possessed the denominations used in the said acts, charters or deeds.' Sect. 21. reserves the rights of crafts, trades and guildries to elect their own officers. Sect. 23. enacts, 'That where any trust, management or direction of any charitable or other institution is vested in any number of Deacons, or in a Deacon-Convener, or Convener of Trades, or of any Dean of Guild, or other office-bearers, elected, or hereafter to be elected, by the several crafts, trades, guildries, or merchants, or trades'-houses, then, and in all such cases, the person so elected as such Deacons, Conveners, Deans of Guild, or other officers, shall always be and continue trustees and managers of such charities and institutions, whether such persons shall hereafter be members of Council or not; and the Town-Councils shall in no such case have power to elect from their own body any other trustees or managers in place of such Deacons, Conveners, Deans of Guild or other officers. Provided always, that in any burgh in which Trades' Councilors or Merchant Councilors are or may be ex officio trustees or directors of any such institutions or charities, the Convenery or Trades'-house, and the Guildry or Merchants'-house in such burghs shall elect an equal number from their own bodies respectively, to be

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Narrative.

‘such trustees or directors, any thing herein contained to the contrary notwithstanding.’ And sect. 31. enacts, ‘That the Magistrates and Council and office-bearers to be elected under the provisions of this act shall in all respects stand, in relation to the administration of the affairs and property of such burghs, or of property under the care and management of such burghs, in the same situation in which the Magistrates and Council and office-bearers of such burghs did stand previous to the passing of this act.’

The Convenery of the Trades of Edinburgh brought this action against the Governors of Heriot's Hospital and the Town-Council of Edinburgh, to have it declared, that ‘under the nomination by George Heriot, of the Lord Provost, Bailies, and Ordinary Council of Edinburgh to be Governors of the Hospital, that nomination comprised only twenty-five individuals, namely, the Lord Provost, four Bailies, six Ordinary Deacons, two Trades' Councillors, the four Old Bailies, the Dean of Guild and Old Dean of Guild, the Treasurer and Old Treasurer, the Old Provost, and three Merchant Councillors: That the number of Governors eligible from the Town-Council was not increased by the Burgh Reform Act, and that the Lord Provost and Bailies, being named Governors in the foundation deed and statutes of the Hospital, are Governors ex officio without being elected, and had no claim to be elected by the Town-Council: That the Incorporated Trades had a vested interest in the management of Heriot's Hospital, to the extent of having six Deacons Governors thereof, and that such number of Deacons are and shall always be and continue managers of the said Hospital, whether such persons shall hereafter be members of the Town-Council or not; and that the right of selection of these six Deacons is vested in, and shall henceforward be exercised by the pursuers, the Convenery of Edinburgh: And farther, as two Trades' Councillors were, ex officio, managers of Heriot's Hospital, the Convenery of Edinburgh is entitled to elect an equal number from that body to be such managers, any thing in the said Act of Parliament contained to the contrary notwithstanding. And that the Town-Council of Edinburgh shall in no case have power to elect from their own body any other managers of Heriot's Hospital, in place of the Deacons and Trades' Councillors so to be elected by the Convenery; but, on the contrary, that, in computing the twenty-five Governors, the said Town-Council must deduct the Lord Provost and four Bailies as being, ex officio, Governors, and the eight members of the trades to be chosen as aforesaid, and shall annually, immediately after their own induction into office, nominate and elect, from their own body, such a number of persons to be Governors of Heriot's Hospital as were

‘governors under the said denominations of Old Bailies, Dean of Guild, Old Dean of Guild, Treasurer, Old Treasurer, Old Provost, and Merchant Councillors, and as shall complete the number of twenty-five, being the number of the former Ordinary Council.’

3 June 1836.

Conveyer of
Edinburgh v.
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pital.

The pursuers *pleaded*—1. The will and statutes of George Heriot having vested a share of the management of the Hospital founded by him in the Ordinary Council of the town of Edinburgh, then composed of twenty-five persons, and among others of six Deacons of Trades and two Trades' Councillors, and the purpose of the institution being the education of boys, the children of freemen and burgesses, it must be held to have been the founder's intention that the Incorporated Trades should have, to that extent, an influence and voice in the management. 2. Any subsequent enactments by the Legislature must, if possible, be so construed as to give effect or not to do prejudice to that intention, and to the vested and substantial interests of the Trades, arising from the long established constitution of the foundation. 3. By the said will of George Heriot, and by the statutes of the Hospital, which, in particular, require that certain of the offices should be bestowed on Managers who are Craftsmen or Deacons of the Crafts, it is an essential part of the management that the Deacons and Trades' Councillors originally introduced continue to act; and the Town-Council, as now constituted, and eligible from the inhabitants at large, whether freemen or not, is not entitled to send more than the number of seventeen who formerly acted along with the representatives of the Trades. 4. Under the act 3. and 4. Will. IV. c. 76, and, in particular, the 32d section of that act, it is competent for the Conveyer to elect, as Managers of the Hospital, six Deacons and two other members of the trades, being the same number of representatives of the trades that formerly composed the Ordinary Council; and the Town-Council has no power to elect from their own body any other Governors in place of such Deacons and Trades'-Councillors. 5. The resolutions and proceedings of the Governors of the Hospital, and of the Magistrates and Council of Edinburgh, inconsistent with the pursuers' claims, were illegal and void.

Pursuers'
Pleas.

The defenders *pleaded*—1. As neither the will of George Heriot nor the statutes of the Hospital specify any particular number of Governors, but merely declare that the Ministers of Edinburgh for the time being, and the Lord Provost, Bailies and Council of the city of Edinburgh for the time being, without regard to their number or to the mode of their appointment, shall be the Governors of the Hospital, the present Town-Council, duly elected under the

Defenders'
Pleas.

3 June 1836.

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pital.

Defenders'
Pleas.

authority of the statute 3. and 4. Will. IV. c. 76; are the proper and lawful Governors of this Hospital. 2. Neither the Deacons of the Incorporations, nor any Trades' Councillors, as such, having ever had any right under the will of George Heriot or the statutes of the Hospital to act as Governors; and any right which was ever claimed by any persons who happened to be Deacons or Trades' Councillors to act as Governors of the Hospital, having arisen solely from their being at the same time members of the Town-Council, the claim now made on the part of such of the pursuers as are not members of the Town-Council to act as Governors is altogether untenable and groundless. 3. Under the express terms of the said statute of Will. IV, the present Provost, Bailies and Council, as representing the community of Edinburgh, have succeeded to all the rights and privileges of the former Town-Council elected under the previous system, and consequently they are necessarily the Governors of George Heriot's Hospital, along with the ministers; and, in reality, the present action resolves into a complaint, that the Corporations have, by the statute 3. and 4. Will. IV. above mentioned, been deprived of the right which, it is alleged, they formerly enjoyed, of electing some of the members of the Council of Edinburgh.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the closed record and the process, and heard parties thereon, sustains the defences, as soilzies the defenders, and decerns; finds the pursuers liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the Auditor, to tax and report.'

Note.

Note.—'When Heriot's Hospital was founded the Town-Council of Edinburgh was composed of various classes, in certain portions, and known by certain peculiar names, such as Trades' Councillors, Merchant Councillors, &c. &c.; but the foundation is not in favour of the *component parts* of the Council, or of any portion of them, but of the *Ordinary Council for the time being*; and however worthy of the founder's trust any of the Trades or Merchants may have been *identically*, or in their vocation, it was not in these characters that they attracted the donor, who makes them Governors merely as *Members of the Council*. The statutes and ordinances by Dr Balcanqual contain passages which make it plain that he was aware that the Council was composed partly of craftsmen; and it cannot be questioned that these persons must also have formed part of George Heriot's idea of the Town-Council of Edinburgh in the year 1623: Nevertheless, neither of them express any limitation of their confidence to the Council, as com-

‘ posed in their day ; but though aware of the possibility of its ele- 3 June 1836.
 ‘ ments being changed, they connect the governorship, partly to
 ‘ the Council generally for the time being, exactly as they con- 
 ‘ nected it partly to ‘ Ministers’ for the time being, although this
 ‘ class of public officers have been greatly increased in numbers,
 ‘ and much changed in their qualifications and circumstances.

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Edinburgh v.
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pital.

Note.

‘ The 3. and 4. William IV. cap. 7, therefore, required to
 ‘ make no special provision on this subject, because the alteration
 ‘ which it introduced in the mode of the members’ appointment
 ‘ would have produced no change in the right of the Council, as such,
 ‘ to govern the Hospital. But it does make provisions *which meet*
 ‘ *the pursuers’ idea*, that the foundation is not in favour of the Coun-
 ‘ cil, whatever it may consist of, but of its original parts.’

‘ The 19th section destroys the distinction between certain mem-
 ‘ bers of the Council, and thus makes the keeping up of the classes
 ‘ of the Governors, for which the pursuers contend, *impossible*.
 ‘ There may be no Deacons in the new Councils ; and if the pur-
 ‘ suers be right in saying, that because there were Deacons in 1623,
 ‘ there must always continue to be Deacons among the Governors
 ‘ of the Hospital, then there must always be Merchant Councillors,
 ‘ and an Old Provost, and Old Bailies, all of whom were necessary
 ‘ to constitute a Town-Council anciently, but who cannot now be
 ‘ got. These names and characters are all extinguished. But then
 ‘ the 20th section enacts, that where any trust has been conferred
 ‘ on any members of the Council, *under any of the old names or de-*
 ‘ *nominations*, persons selected by the new Council shall come in
 ‘ place of these. The 23d clause, referred to by the pursuers, does
 ‘ not apply to this subject, but to trusts, not in favour of Town-Coun-
 ‘ cillors, but of officers of crafts.

‘ Cases may possibly emerge hereafter which may create difficul-
 ‘ ty, by producing a repugnance between the foundation and the
 ‘ modern constitution of the Council. The complaint of the pur-
 ‘ suers, that their Deacons may be altogether excluded from the
 ‘ management, if it be stated as a mere grievance, is not for the
 ‘ Court, which is only to settle rights. But they ought to recol-
 ‘ lect, that formerly only eight of them could ever be Governors,
 ‘ whereas now the whole thirty-three, of which the Council con-
 ‘ sists, may. It is said that there are more than eight of them in
 ‘ the Council now.’

The pursuers *reclaimed*, but the Court *adhered*.

Judgment.

Lord Ordinary, Cockburn.	Act. Dean of Fac. (Hope,) M'Naill.	Alt. Ruther-
furd, More.	Alex. Cunningham, W. S. and M'Ritchie, Bayley & Henderson,	
W. S. Agents.	S. Clerk.	

C. R.

FIRST DIVISION.

No. CXLVII.

4th June 1836.

EARL OF MORAY

against

THOMAS MANSFIELD, (STUART'S TRUSTEE).

BANKRUPT. — COMPETITION. — *A party possessing two separate estates, who had granted two heritable bonds over both of them, and subsequently three more over one only, having sold the estate, which was not separately burdened, and shortly thereafter become bankrupt; and the purchaser having, after the sequestration of the seller, acquired right to the two catholic securities, and executed a renunciation thereof, in regard to the estate which he had bought,—held, affirming the judgment of the trustee on the sequestrated estate, that the purchaser was not entitled to rank primo loco on the price of the other estate, for the whole sums contained in the catholic securities, so as to relieve his own estate.*

Narrative.

THE present petition and complaint was presented against a judgment of the trustee on the sequestrated estate of James Stuart of Dunearn. The facts are clearly stated in the judgment, which was as follows:

‘ In 1815 Mr James Stuart was heritable proprietor of the two separate estates of Cullelo and Hillside in the county of Fife.
 ‘ On 29th August 1815, he granted an heritable bond over both these estates, for L.1000, in favour of Mrs Catherine Banks; and
 ‘ on 14th August 1816, he granted another heritable bond, also over both these estates, for L.515, in favour of Mr Peter Forest.

‘ On 17th December 1823, Stuart granted three bonds over the estate of Hillside alone, to rank *pari passu* thereon, viz. L.6000 in favour of Professor Walker, L.3000 in favour of Colonel Sinclair, and L.1500 in favour of Misses Mary, Amelia and Anne Ramsay, making together the sum of L.10,500.

‘ In 1828 Stuart sold the estate of Cullelo to the Earl of Moray, and received for it the sum of L.29,000 in money, and also the mill and mill lands of Aberdour; and on 8th April 1828, his Lordship executed an entail of the lands of Cullelo, which is recorded on 14th July 1828.

‘ On 20th August 1828, Stuart's whole estates were seques-

‘trated, at which time the five foresaid bonds remained unpaid and 4 June 1836.
‘undischarged, both as to Cullelo and Hillside.

‘The lands of Hillside, and the mill and mill lands of Aberdour, Earl of Moray
‘were sold in cumulo along with certain other lands, forming part v. Mansfield.
‘of the sequestrated estate of the said James Stuart; and in order
‘to ascertain their respective values, a reference was made to Mr
‘David Low, professor of agriculture, and Mr Thomas Lawrie,
‘land-valuator, who, on 3d March 1836, pronounced their final
‘award, fixing the value of Hillside at L.1819, 2s., and of the mill
‘and mill lands of Aberdour at L.4437 : 14 : 10, as at 11th No-
‘vember 1835.

‘After Stuart’s bankruptcy, the creditors in right of the foresaid
‘bonds for L.1000 and L.515, secured over the estates of Cullelo
‘and Hillside, applied to the Earl of Moray for payment, which
‘having been made by his Lordship on 11th May 1829, the foresaid
‘bond for L.515 in favour of Mr Peter Forest, and on 11th No-
‘vember 1829, the foresaid bond for L.1000 in favour of Miss
‘Catherine Banks, were regularly vested, by disposition and assign-
‘ation, in Sir Francis Walker Drummond, as commissioner for the
‘Earl of Moray; and on 4th January 1830, Sir Francis executed
‘a renunciation of these bonds, in so far as they affected Cullelo,
‘but still leaving them a burden on the estate of Hillside.

‘Under the circumstances above detailed, the Earl of Moray
‘claims to be ranked for the two foresaid bonds of L.1000 and
‘L.515 primo loco on the price of Hillside, which, if sustained, will
‘exhaust the price.

‘It appears to the trustee to be quite clear, that the original cre-
‘ditors, in whom the two bonds for L.1000 and L.515 were vested
‘at the date of Stuart’s sequestration, could not, by any arbitrary
‘application of their catholic securities, take full payment from
‘either of the estates of Cullelo or Hillside, so as completely to re-
‘lieve the other estate from the burden of any portion of these
‘debts. They were bound, if they received from either property
‘more than a rateable proportion of their debts, to grant an assign-
‘ation to the party thereby injured, so as that party might ope-
‘rate his relief from the other estate.

‘Lord Moray’s position at the date of Stuart’s sequestration
‘was that of absolute proprietor of Cullelo, with a personal claim
‘against Stuart’s estate, under the clause of warrandice in his
‘disposition of Cullelo, for relief of all debts affecting that estate.
‘The secondary creditors on Hillside held their heritable securities
‘over that estate from Stuart, with a personal claim against his
‘estate for the balance of their debts not covered by that security.
‘There is therefore no substantial difference between those parties,

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Narrative.

‘ so far, as they had to look to Stuart’s personal obligation; and
 ‘ it does not appear to the trustee that it was competent for either
 ‘ of them to acquire right to the catholic debts, originally in the
 ‘ persons of Forest and Mrs Banks, so as to obtain, by an arbitrary
 ‘ application of them, any higher degree of preference than they
 ‘ formerly enjoyed or was naturally due to them; and that equity
 ‘ could not protect the party so acquiring the catholic debts from
 ‘ granting assignations to creditors who are excluded by such
 ‘ application, the subject having previously become litigious, which
 ‘ prevented the assignee from obtaining any further right than was
 ‘ formerly in himself or his cedent; *Ersk.* ii. 12. 66. The trustee
 ‘ is therefore of opinion, that Lord Moray’s restriction of the secu-
 ‘ rity is ineffectual to throw on Hillside the whole debts of L.1000
 ‘ and L.515, or any greater share of them than would have been
 ‘ ranked, had the debts remained in his Lordship’s authors, and
 ‘ consequently affected Cullelo and Hillside pro rata.

‘ Under the circumstances, and for the reasons above stated, the
 ‘ trustee finds that the Earl of Moray is entitled to be ranked, in
 ‘ right of the debts originally vested in Forest and Mrs Catherine
 ‘ Banks, with interest and expenses at 20th August 1828, the
 ‘ date of Stuart’s sequestration, for the sum of L.1565 : 2 : 5, upon
 ‘ the price of Hillside, being L.1319, 2s., after imputing to ac-
 ‘ count of said debts a rateable proportion of the value of Cullelo,
 ‘ which, taking the said sum, paid to Stuart, of L.29,000, and the
 ‘ value fixed by Messrs Low and Lawrie, for the Aberdour mill and
 ‘ mill lands, of L.4437 : 13 : 10, amounts to L.33,437 : 14 : 10. The
 ‘ trustee therefore finds, that of the price of Hillside, the Earl of
 ‘ Moray falls to draw the sum of L.59, 8s., reserving to his Lord-
 ‘ ship a right to rank as a personal creditor on Mr Stuart’s seques-
 ‘ trated estate for the balance of his debt, and that the creditors,
 ‘ in right of the foresaid bonds of L.10,500, are entitled to draw
 ‘ and rank *pari passu* on the balance of said price, being L.1259,
 ‘ 14s., and that the Earl of Moray, and the creditors in right of the
 ‘ said debts of L.10,500, will be entitled to draw the free annual
 ‘ returns from the lands of Hillside since 20th August 1828, the
 ‘ date of Mr Stuart’s sequestration, in proportion to the said shares
 ‘ of the price respectively allocated to them.’

Against this judgment of the trustee the Earl of Moray pre-
 sented a petition and complaint, in so far as it found that the peti-
 tioner was not entitled to draw the whole debts of L.1000 and L.515
 out of the estate of Hillside. The petitioner averred, that when the
 sale took place, the year prior to Mr Stuart’s bankruptcy, that gen-
 tleman furnished what was stated to be a complete list of the debts
 affecting the estate; and as the searches made agreed in all respects

with lists so furnished, the petitioner considered himself in safety, after discharging these debts, to pay the balance of the price to Mr Stuart.

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Earl of Moray
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The petitioner *pleaded*—That the judgment of the trustee was erroneous, as it was laid down by Erskine, ii. 12. 66, that a party who was in possession, either as the original creditor, or as assignee of a catholic security, cannot be called upon to resign his right, except in cases where the assignation will not operate to his own prejudice; which doctrine has been supported by the following cases: Miln v. Hay, 6th Nov. 1678, *M.* 3367; Scotland, 3d Jan. 1696, *M.* 3367; Preston, 22d Feb. 1715, *M.* 3376. The circumstance of Mr Stuart having been sequestrated does not affect the present question. The petitioner's purchase of the lands of Cullelo was completed long prior to Mr Stuart's bankruptcy, and it was entirely from this bona fide transaction, entered into for a full price paid at the time, that the petitioner's interest to recover the debt on Hillside or Cullelo arose. The petitioner's coming into the place of the original catholic creditors, was, on his part, an involuntary act, and was the necessary consequence of the bona fide and onerous transaction entered into long prior to Mr Stuart's sequestration. *2dly*, As matters actually stood prior to the bankruptcy, although the lands of Cullelo, purchased by the petitioner, were de facto affected by the heritable bonds in question, yet Mr Stuart was the principal debtor, and the lands of Hillside still belonged to Mr Stuart; and therefore the plea of the petitioner, who must be looked upon merely as cautioner, to be ranked *primo loco* on the estate of Hillside, without giving any assignation, is completely borne out by the decision of Stewart v. Maxwell, 11th Jan. 1814, *F. C.*

Petitioner's
Pleas.

The respondent *pleaded*—That the petitioner, by purchasing the estate of Cullelo, after it stood burdened with securities, is in the same situation, quoad that estate, as if he had had a postponed heritable bond over it. In this situation, after the bankruptcy of Stuart, and long after the effects of his estate had been rendered litigious by the sequestration, he acquires right to the claim of the catholic creditors over both estates, and he does so with the view of giving to that debt, in his own hands, a preference to which it was not entitled, whilst it stood in the person of the original creditor; but in such a condition it is laid down expressly by Mr Erskine, ii. 12. 66, that after litigiousness by sequestration, he is not entitled to make good that preference in the way now proposed by the petitioner. In the cases which are cited by the petitioner, the interest had been acquired bona fide prior to the bankruptcy, and not for the purpose

Respondent's
Pleas.

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Respondent's
Pleas.

of making use of it so as to obtain an advantage at the expense of others, so that they evidently do not apply to the present case. Besides, Mr Bell, ii. 525, has serious doubts of the soundness of those judgments, noticing a point which is of importance in the present case, that these were cases where a catholic creditor, subsequently acquiring a secondary security, was found entitled to refuse an assignation to his own prejudice; and stating, that the same effect has been refused, where, as in the present case, it was the secondary creditor who had acquired the catholic right. The consequences of the petitioner's doctrine would be, that whichever party could first settle with the catholic creditors, would thereby relieve the estate in which he was interested, and throw the burden on the other without relief. The second ground of the petitioner's argument is completely unfounded, for this is not a case where two parties are standing in the situation of principal debtor and cautioner. Indeed, if the plea were well founded, it might be argued with equal effect against the petitioner, that Mr Stuart being the principal debtor, and the lands of Hillside the surety, the bondholders should have drawn their debt out of Cullelo. In point of fact, the two estates here were equally sureties for the debt; and if payment be exacted out of the one, those interested in it were entitled to an assignation.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered this petition and complaint, with the answers thereto, refuses the desire of the petition; affirms the judgment of the trustee complained of; dismisses the said petition, and decerns; finds the petitioner liable in expenses, and remits the account, when lodged, to the Auditor to be taxed.'

Note.

Note.—'The reasons assigned by the trustee for his judgment appear to be sound and sufficient. The noble petitioner endeavours to give plausibility to the plea, by assuming, that when he paid the price of Cullelo to Mr Stuart, he did so in the bona fide belief that there were no such securities affecting those lands. As mere matter of fact, this no doubt must be true; but, as matter of law, he is not entitled to the assumption. The securities being in the record, he was bound to know of them, and in this question must be taken to have known of them. The case, then, is this, that he purchased lands which stood burdened with these two debts,—that he rashly paid the price, throwing himself on Mr Stuart's personal responsibility,—that Mr Stuart became bankrupt, and after sequestration, the petitioner tries to better his position against the respondents, as secondary creditors on Hillside,

‘ by paying and taking assignations of the two catholic securities affecting both Cullelo and Hillside. But can he do this? The creditors in these securities, as they stood at the sequestration, could not have claimed their whole debts from Hillside without assigning their securities, so as to give relief to that estate pro rata against Cullelo. Can the petitioner, as their assignee, be in a better situation, merely because incidentally he would thereby be relieved of the consequence of his having paid the price of Cullelo, without retaining the sum corresponding to its proportion of these debts? The Lord Ordinary thinks that he cannot. If it were enough for the holder of such catholic securities, *acquired by assignation after bankruptcy*, to say that he is not bound to assign or to allow the rateable ranking, because he will have an advantage in not doing so, being proprietor of one of the estates, or having a separate security over it, it is evident, as well argued by the respondents, that whichever party could first settle with the catholic creditors would thereby relieve the estate in which he was interested totally, and throw the burden on the other without relief. It is impossible that this can be law, as it would certainly be neither justice nor common sense. Whether the cases referred to stand on sound principle or not, it is manifest that the case of a person *standing before bankruptcy in the right of a catholic security over two estates*, adjudging one of them for a separate debt, also before bankruptcy, is essentially different in principle from that on which the petitioner’s argument must be raised.’

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Earl of Moray
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Note.

The Earl of Moray *reclaimed*, and the Court *adhered*, giving additional expenses.

Lord Ordinary, *Moncrieff*.
Rutherford and Moir.
Stewart, W. S. Agents.

Act. Sol.-Gen. (*Cunninghame*), *Walker*.
Walker, Richardson & Melville, W. S. and *William*
S. Clerk.

C. R.

FIRST DIVISION.

No. CXLVIII.

4th June 1836.

JOHN JOHNSTON
against
 EDWARD HENRY.

PROCESS. — BANKRUPT. — TITLE TO PURSUE. — CAUTION. —
 WAKENING.—*The accepting trustee in a disposition omnium bonorum by an insolvent debtor, having refused to act, but granted him authority to insist in a summons of wakening of an advocation brought against him ; and it appearing that the whole of his creditors, by a letter, declared they had no claims against him, and granted him liberty to carry on the action,—held that the defender could not insist on caution from the pursuers on raising the summons of wakening.*

Narrative.

JOHNSTON obtained decree against Henry, before the Sheriff of Edinburgh, for payment of the sums of L.99 : 7 : 6, and L.1 : 11 : 2; with interest and expenses. Henry advocated in December 1832; but the process having fallen asleep in the Outer-House, Johnston raised a summons of wakening. Johnston had been incarcerated in the tolbooth of Edinburgh, on letters of caption at the instance of Peter Taylor, and was arrested in prison by Phineas Deseret, S. S. C. He thereon granted to these creditors a disposition omnium bonorum, for behoof of creditors.

It however appeared that the latter refused to act, and the former granted a letter, intimating that he declined ‘ interfering in ‘ the process depending between the said John Johnston and Mr ‘ Edward Henry, cattle-dealer in Edinburgh, and I have no objection to John Johnston carrying on the said process himself, if ‘ he pleases.’ It also appeared that the whole creditors (though this was not admitted at the bar) signed a letter to the following effect: ‘ Understanding that in the action at your instance against ‘ Henry, now brought under advocation by Henry, it is still objected that you have no title to pursue, notwithstanding the re- ‘ trocession granted by us, your whole creditors, in your favour, in ‘ respect the same is not stamped as a discharge, we now declare ‘ that we have no claims against you, that you are at liberty to ‘ carry on your action against Henry for your own behoof, and that ‘ we have no interest therein.’

Henry appeared in the summons of wakening, and lodged defences, *pleading*, (1.) That the action could not proceed, in respect the pursuer is divested of his estate; and, (2.) At all events, the pursuer could not insist therein, without finding caution for expenses. 4 June 1836.
Johnston v.
Henry.

Johnston denied that caution was necessary, founding on *Barry v. Geddes*, 14th Nov. 1829, and *Megget v. Scoular*, 24th Jan. 1832.

The Lord Ordinary, by his interlocutor, 'in respect of the letters produced, repels the defences to the wakening,' and 'wakens the action accordingly.'

Henry *reclaimed*, but the *Court adhered*.

Lord Ordinary, Fullerton.

Act. Sol.-Gen. (Cunninghame,) Wilson.

Alt.

A. McNeill.

David Brown, W.S. and Robert Johnston, W.S. Agents.

B.

Clerk.

C. R.

FIRST DIVISION.

No. CXLIX.

4th June 1836.

JAMES BURNES, S. S. C. PETITIONER.

FACTOR LOCO TUTORIS.—AN application was made by the petitioner, as factor loco tutoris of Robert Elder, for authority 'to sell and dispose, either by public roup or private sale, of such parts or portions of the subjects belonging to the pupil as might be requisite to enable him, from the proceeds thereof, to make payment of the balance of the price of the lands of Spencerside, belonging to the pupil, and to complete the purchase thereof, and titles thereto, and for payment of debts.'

It was stated that there were large debts affecting the property, and that unless the subjects, or some part of them, were sold, the estate would be swamped by the debts and the expenses incurred in litigation. There being no opposition, the *Court* granted the prayer of the petition.

Act. George Monro.

James Burness, S. S. C. Agent.

D. Clerk.

C. R.

FIRST DIVISION.

No. CL.

4th June 1836.

EWEN ALEXANDER CAMERON
against
 WILLIAM SKIRVING COCKBURN.

TITLE.—TRUST.—SALE.—CLAUSE.—*A progress of titles to certain heritable subjects, founded on a sasine, on which prescription had run, which bore to be in absolute and unlimited property, whilst the warrant on which it proceeded was an assignation to a precept, in favour of certain trustees, 'and their assignees, but in trust always, 'and under the burdens, &c. before written:' The said precept, however, being granted in a trust-deed in favour of the said trustees, and their assignees or disponees, and the heirs of the disponees, but excluding the heirs and executors of the trustees, whereby power was given the trustees to sell and grant dispositions to purchasers, who were declared to have no concern with the application of the price or the conditions of the trust,—held to be a progress to which a purchaser could not object.*

Narrative.

THE question in this case regarded the sufficiency of a progress of titles to a villa and two acres of ground in Haddingtonshire. The subject had originally belonged to Mr Ramsay, who had in 1764 conveyed it, together with his other property, to certain persons, as trustees, 'for the uses and purposes after specified, and with the 'power herein after granted, and under the burdens, reservations, 'power and faculty and conditions and provisions herein after written; and to the assignees or disponees of the said accepting trustees or trustee, and to the heirs of such disponee, but excluding 'the heirs and executors of the said trustees.' Among the powers conferred on them, he authorised them to dispose of his property, 'and to grant dispositions or other writs necessary for such purchaser or purchasers, who shall be nowise concerned with the application of the prices, nor burdened with any of the provisions 'or conditions before contained, but shall be obliged to pay the 'price to my said trustees or trustee foresaid.' The deed likewise contained an obligation to infeft the trustees, and their assignees, by a public holding. There was a clause of absolute warrandice; and the precept of sasine was in favour of his trustees, 'and to 'the assignees of my said trustees or trustee, of all and whole, &c.,

‘ but that in trust always, for the uses, ends and purposes, with
 ‘ the power and the burden and conditions and provisions herein
 ‘ before written.’ The trustees did not expedite infestment on the
 precept contained in the trust-disposition, but sold the property in
 1776 to Mr Duthie, who took infestment on the unexecuted pre-
 cept, which they assigned to him. The instrument in his favour,
 though it narrates the trust-deed, and the precept therein contained,
 as its warrant, makes no mention of the sasine having been given
 under the burdens, conditions and provisions of the trust. After
 being vested in different persons, the subject came into the posses-
 sion of Cockburn, who was infest therein in 1820. Cockburn
 having concluded a bargain with Cameron, offered, as a title, the
 sasine taken in 1777 in favour of Mr Duthie, upon which pre-
 scription had run. To this title the pursuer objected; first, That
 as the infestment was, from the terms of the trust-deed, a public
 one, it was not a title on which prescription could run, until a con-
 firmation had been expedite, which did not take place until the year
 1817: 2d, That the investiture in the person of the defender in
 the subjects was null and void, in respect that the sasine of 1777,
 on which it depended, was disconform to its warrant, being a sasine
 in absolute and unlimited property, proceeding upon an assignation
 to a precept and infestment in trust only.

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Cameron v.
Cockburn.

Narrative.

The Lord Ordinary pronounced the following interlocutor and
 note:

‘ The Lord Ordinary having heard counsel for the parties, and
 ‘ having afterwards resumed consideration of the record, productions
 ‘ and whole process; In the action at the instance of William Skir-
 ‘ ving Cockburn, finds, that the defender, Ewen Alexander Ca-
 ‘ meron, is bound to implement the missives of sale, and to make
 ‘ payment to the pursuer of the sum of L.1360 sterling, with in-
 ‘ terest thereon since the 20th day of August last; and also of the
 ‘ sum of L.11, 17s. sterling, being the proportion of rent due by
 ‘ him, with interest thereon since the date of citation; and in the
 ‘ action at the instance of the said Ewen Alexander Cameron, as-
 ‘ soilzies the defender, the said William Skirving Cockburn, from
 ‘ the conclusions of the libel, and decerns: Finds the said Ewen
 ‘ Alexander Cameron liable in the expenses of the conjoined actions,
 ‘ and remits to the Auditor to tax the account thereof, and to re-
 ‘ port.’

Lordordi-
nary's Inter-
locutor.

Note.—‘ It is thought that there is no ground whatever for the
 ‘ objections which the purchaser has made to the progress of titles
 ‘ offered by the seller. By Mr Ramsay's settlement, dated in 1764,
 ‘ his whole heritable estate, including the subjects in question, is

Note.

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‘conveyed to trustees, and to the assignees or disponees of the trustees, and to the heirs of the disponees, but excluding the heirs and executors of the trustees. There is no power of assumption given to the trustees; but there is a power of sale and of granting dispositions to the purchasers, who, it is declared, shall nowise be concerned with the application of the prices, or with any of the provisions or conditions of the settlement. Then follows a precept of sasine in favour of the trustees, and of the accepting and surviving trustee, and to the assignees of the said trustees or trustee. The assignees here contemplated must necessarily have been the persons to whom the heritable subjects were sold by the trustees, for they had no power to assign to any other parties, and the parties to whom they should assign were declared to have no concern with the application of the price or the conditions of the trust. Even in the general case, it has been thought that a precept to infest one in trust, may, when such trustee has power to sell, be assigned to the purchaser. See *Bell's Principles*, 3d edit. 236. The reason is plain, because it is an established rule, that a precept may be assigned qualificatè; and if the trustee himself has power to sell to one who is not to be bound by the conditions of the trust, he may assign the precept to the purchaser under that quality expressed or implied. But, in addition to this, there is the speciality in the present case, that the precept is expressly granted to assignees; and as there could be no assignee but a purchaser, it must have been in the granter's view that the precept should be a good warrant of infestment to that purchaser, exempted from the conditions of the trust.

‘The other objection, namely, that the sasine, which was a public one, had not been confirmed before the years of prescription; is palpably groundless, because confirmation, when there is no mid-impediment, operates retro, and it is not alleged that there is any such impediment here.’

Judgment.

The pursuer reclaimed, and the Court adhered, awarding expenses from the date of the Lord Ordinary's interlocutor.

Lord Ordinary, Cockburn. Act. Robert Horn. Alt.

Daniel Fisher, S. S. C. and Davidsons & Syme, W. S. Agents.

D. Clerk.

C. R.

FIRST DIVISION.

No. CLI.

7th June 1836.

JOHN BARCLAY, Esq.
against
 MRS SHARPE AND OTHERS.

PROPERTY. — PUBLIC POLICE. — STAT. 3. GEO. IV. c. 78, AND
 2. GUL. IV. c. 87. — *Held, that the proprietor of an upper flat of
 a tenement in Edinburgh was not entitled to make use, for the pur-
 pose of water-closets, of a drain under the ground-floor of the tene-
 ment, communicating with the common sewer, without the consent of
 the proprietor of the said ground-floor.*

MRS SHARPE, proprietor of the southern half of the upper flat, en- Narrative.
 tering from the common stair, No. 8. South St David Street, pre-
 sented a petition to the Dean of Guild against Mr John Barclay,
 proprietor of the remainder of the tenement, consisting of various
 flats and shops, in the following circumstances: Having right to
 the ground behind the tenement, Mr Barclay erected a large build-
 ing, part of which is now occupied as the Turkish Divan. In the
 course of these erections, Mr Barclay constructed a drain under
 the ground-floor of the tenement, for the purpose of carrying off
 the contents of water-closets. Mrs Sharpe, wishing to have the
 advantage of a water-closet in her house, applied for authority to
 carry a pipe connected with the water-closet along the back wall of
 the tenement, to communicate with Mr Barclay's drain. To this
 Mr Barclay objected, alleging that he was entitled so to do under
 the terms of the Act of Parliament. The statute, 3. Geo. IV.
 c. 78, provides, by sect. 97, 'Whereas the practice of throwing out
 'foul-water and other filth upon the streets is a nuisance, which
 'the occupiers of houses divided into separate floors or flats, and
 'having no communication with the common sewers, cannot at
 'present easily avoid; be it therefore enacted, that in all streets,
 'or other places within the limits of this act, where common sewers
 'are now or may hereafter be constructed, it shall be lawful for
 'the proprietor or proprietors of one or more of the said floors or
 'flats to erect one waste or foul-water pipe along the back wall of
 'the tenement on the outside, communicating with the drain under
 'ground leading into the common sewer, where there is such drain,

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‘and with power to make such drain if there is not one already.’ Sect. 18. provides, ‘That it shall not be lawful for the proprietors of floors or flats to make use, for the purposes of water-closets, or such like purposes, of any drain or communication into the common sewer under the ground-floor of the tenement, without the consent of the proprietor of the said ground-floor.’

The act, 2. Will. IV. c. 87, intituled, ‘An Act for altering and amending certain acts for regulating the police of the city of Edinburgh and the adjoining districts, and for other purposes relating thereto,’ states in the preamble, ‘That from and after the first Monday in the month of July 1832, the said two recited acts of the third and seventh years of the reign of his late Majesty, King George the Fourth, excepting in so far as the same are hereby varied, altered or repealed, and all and every the powers and provisions therein contained, shall be as good, valid and effectual for carrying this act into execution, as if the same had been repeated and re-enacted in the body of this act.’ Sect. 61. is as follows: ‘And in order to avoid the nuisance occasioned by the throwing out foul water and other filth upon the streets, be it therefore enacted, that in all streets or other places within the limits of this act, where common sewers are now or may hereafter be constructed, it shall be lawful for the proprietor or proprietors of one or more of the said floors or flats to erect one soil or foul-water pipe in the common staircase, or along the back wall of the tenement on the outside, communicating with the drain under ground leading into the common sewer, where there is such drain.’

The Dean of Guild granted authority as craved, on the grounds explained in the following note:

Note by the Assessor, Mr L' Amy.—‘The act, 2. Will. IV. c. 87, sect. 61, ‘in order to avoid the nuisance occasioned by the throwing out foul water and other filth,’ authorises the proprietor of any flat or floor ‘to erect one soil or foul-water pipe in the staircase, or along the back wall of the tenement on the outside; communicating with the drain under ground leading into the common sewer, where there is such drain, and with power to make such drain if there is not one already.’ And there is no enactment in the statute requiring the consent of the proprietor of the ground-floor, as was required under the act, 3. Geo. IV. c. 78, sect. 98, where water-closets were to be erected.

‘There can be no reasonable doubt, that, by the above permission to erect a ‘soil-pipe,’ the power of constructing a water-closet is included, else how is it possible to avoid the nuisance against

‘ which the act is expressly directed, viz. that ‘ of throwing out 7 June 1836.
 “ *filth*’ upon the street.

‘ By section 97. of the act, 3. Geo. IV, the proprietors of floors
 ‘ or flats were to be empowered, *without* the necessity of their ob-
 ‘ taining the consent of the proprietors of the ground-floors, to erect
 ‘ one *waste* or foul-water pipe, (not a ‘ *soil* pipe’); and it was only
 ‘ in case they erected water-closets, that (by section 98.) they re-
 ‘ quired the consent of the proprietor of the ground-floor. But by
 ‘ the present existing act the expression (‘ *waste*-pipe’) is changed
 ‘ into ‘ *soil*-pipe,’ an expression usually applied to the pipe of a
 ‘ water-closet; and the party is authorised to erect such *soil*-pipe,
 ‘ without obtaining the consent of the proprietor of the ground-floor,
 ‘ in order to avoid the nuisance of throwing out *filth*’ on the street.
 ‘ This is a most important alteration of the enactments in the former
 ‘ statute, both in as far as the word *soil*-pipe in itself denotes the
 ‘ power to erect a water-closet, while the former act only allowed
 ‘ a *waste* or *foul-water* pipe, which does not necessarily imply that
 ‘ the contents of a water-closet might be discharged through such
 ‘ foul-water pipe; and, in so far as the restriction against water-
 ‘ closets, without consent of the proprietor of the ground-floor, is
 ‘ not, under those circumstances, re-enacted, which must have hap-
 ‘ pened if it had been intended to restrain the erection of water-
 ‘ closets without the consent of the proprietor of the first floor, the
 ‘ more especially as the *soil*-pipe was to be constructed in a man-
 ‘ ner that could prove no nuisance to the inferior heritor.

‘ The argument that, by section 1. of the existing act, it is de-
 ‘ clared, that all the provisions in the former act were to remain,
 ‘ except in as far ‘ as the same are hereby varied, altered or repeal-
 ‘ ed,’ and that there is no repeal of the clause 98. Geo. IV, which
 ‘ makes it necessary, before a water-closet is erected, to have the
 ‘ consent of the proprietor of the ground-floor, is quite inconclusive;
 ‘ for the enactments upon this whole subject in the present exist-
 ‘ ing act, as already explained, amount to a decided variation or
 ‘ alteration of the system introduced for the first time into the act
 ‘ 3. Geo IV.; and it was not, therefore, necessary that there should
 ‘ be any special repeal of clause 98. of 3. Geo. IV, because it was
 ‘ tacitly done away by the new power given to erect *soil*-pipes for
 ‘ carrying away the *filth* from the floors or flats without the consent
 ‘ of the proprietor of the ground-floor being required.

‘ It is a remarkable fact, too, that in the bill for the act 2. Will.
 ‘ IV, a clause was introduced, prohibiting the soil of water-closets
 ‘ being introduced into existing drains, without consent of the pro-
 ‘ prietor of the ground-floor, ‘ unless such drain be situated in

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“ a common passage, to which the proprietors of the tenement have
“ a mutual right ;’ but the clause was afterwards struck out.’

Mr Barclay brought this interlocutor under review by advocacy, when the Lord Ordinary pronounced the following interlocutor :

Lord Ordinary's Interlocutor.

‘ The Lord Ordinary having heard counsel for the parties, and
‘ having afterwards resumed consideration of the record, productions, and whole process, advocates the cause, alters the interlocutor of the Dean of Guild ; finds that the respondents cannot
‘ connect their soil-pipe with the drain under the ground-floor of
‘ the advocator's house without his consent ; refuses the petition of
‘ the respondents, and decerns ; but finds no expenses due.’

Note.

Note.—‘ The Lord Ordinary would have been glad to confirm
‘ the interlocutor of the Dean of Guild, because he thinks that the
‘ construction put upon the act of Parliament in that interlocutor
‘ would tend to the convenience and comfort of the proprietors of
‘ houses in the situation of that of the respondents, and for the
‘ benefit of the inhabitants in general ; but he conceives that he is
‘ not entitled to do so under the provisions in the police acts for
‘ the city of Edinburgh, referred to in the record. The 98th section of the 3. Geo. IV. c. 78, expressly prohibits such communications under the ground-floor, without the consent of the proprietor of that floor. The 2. of Will. IV. c. 87, re-enacts all the
‘ clauses of the 3. Geo. IV. which it does not repeal or alter, and
‘ there is no repeal or alteration of the 98th section of that statute.
‘ The attempt to shew that there is a virtual repeal of the section,
‘ by a comparison of the 97th section of the one act with the 61st
‘ section of the other, appears to the Lord Ordinary to have entirely
‘ failed. There is plainly no distinction between those two sections,
‘ except that the waste or foul-water pipe in the one is directed to
‘ be carried down the outside of the house, and in the other it is
‘ permitted within, that is, in the common staircase. As for the
‘ alleged difference between a waste or foul-water pipe for carrying
‘ off ‘ foul water and other filth,’ and a soil or foul-water pipe for
‘ the same purpose, on which the learned assessors of the Dean of
‘ Guild rest the judgment, the Lord Ordinary thinks it cannot be
‘ maintained. Holding these two clauses substantially the same, and
‘ that an express exception introduced with regard to the one in
‘ the former statute is re-enacted in the latter, he is of opinion that
‘ the greatest laxity that was ever sanctioned in the construction
‘ of a remedial statute, or statute for the benefit of a community,
‘ would not justify the interlocutor under review.

‘ Considering, however, that the operation of the respondents

' would tend to prevent, rather than create nuisance to the advoc- 7 June 1886.
' ator's house, and that the respondents were fairly entitled to try
' the question, it is thought that this is not a case for expenses.'

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Mrs Sharpe *reclaimed*, and the Court *adhered*, but gave no additional expenses.

Judgment.

Lord Ordinary, Corehouse.
J. Miller.
S. Clerk.

Act. Robertson, Shand.
John Shand, W. S. and M. & J. Lothian, S. S. C. Agents.

Alt. Dean of Fac. (Hope,)
S. S. C. Agents.

C. R.

SECOND DIVISION.

No. CLII.

7th June 1886.

SIR DAVID KINLOCH

against

THOMAS MANSFIELD, (RENNIE'S TRUSTEE.)

TACK.—CLAUSE.—REPARATION.—RES JUDICATA.—PROOF.—

Circumstances in which—found, (previous to a remit for trial by a Jury,) upon the construction of a stipulation in a tack, whereby, in the event of the tenant's bankruptcy, it should neither be competent to his creditors to possess the farm by a manager, nor for the tenant himself to continue the possession for their behoof, (1.) That it must be considered as a clause introduced for the benefit of the landlord alone, and with which he was entitled to dispense at his pleasure; and that if he did so dispense with it, and made it sufficiently known to the creditors that he was willing or desirous that they, or the bankrupt on their account, should still continue the possession, the tenor of the said clause could give them no warrant for relinquishing or deserting the possession, or exempt them from such claims of damages at the instance of the landlord, as might have been competent to him for such relinquishment or desertion, if the lease had contained no such clause or stipulation. (2.) That the landlord's acquiescence in, and adoption of certain judgments, and the tenor of his judicial statements in the proceedings which led to them, were not sufficient per se to prove that he had made his election to enforce and act upon said clause and stipulation, and still less that the creditors were in any degree induced to abandon or relinquish the lease, by any belief or opinion that he had so elected.

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Narrative.

JOHN RENNIE became tenant in one of the pursuer's farms, by tack for nineteen years, which commenced in 1826. Assignees and subtenants of every description were expressly excluded, and there was this declaration: 'In terms of the other leases on the estate, that in case of the bankruptcy of the tenant, his creditors shall have no powers, under the present lease, to appoint a manager, or in any manner of way to interfere with the subjects hereby let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors.'

Rennie became bankrupt, and was sequestered in August 1829, whereupon the landlord, in order to protect his right of hypothec, obtained sequestration of the crop and stocking. At a meeting of Rennie's creditors on 23d September 1829, the trustee was directed to abandon all the leases held by the bankrupt, and to make the best arrangement he could with the landlord. The landlord, upon this being communicated, proposed, upon 25th September, as an inducement to the creditors to give him certain advantages, in the manner of carrying the resolution into effect, that if they agreed to his suggestions, 'he will give up his claim to rank for any deficiency of the rent he may get from a new tenant, during the currency of the present lease, beyond what Mr Rennie is obliged for.' No conclusion was come to by the parties. Thereafter the trustee petitioned the Sheriff, in respect of the lease having terminated by the bankruptcy, for a sale of the crop and stocking, the proceeds to be applied, in the first place, in payment of the rent due. The Sheriff found, that the possession of the bankrupt under the lease did not terminate till Whitsunday 1830 as to the grass lands, and separation of the crop of that year from the ground as to the arable lands, and refused the petition, as contrary to the terms of the lease, and in an advocacy the Court of Session adhered, on 28th June 1831. During the proceedings, a judicial manager was appointed by the Sheriff to superintend the cultivation of the farm. In a minute for the landlord, presented in one of these incidental processes, it was stated, 'that from what had passed in course of these proceedings, it may be presumed, that the trustee does not intend to continue the occupation of the farm for another year, and after the regular terms of removal fixed by the lease, and in that event, the present crop, 1830, is to be considered as the waygoing crop;' and 'in the event of the trustee not continuing in possession, after the terms mentioned, the landlord is entitled to sow grass seeds with crop 1830, in terms of the lease; and as now is the proper time for doing so, it is craved that your Lordship will appoint the judicial manager to dung, sow and harrow in grass seeds along with the present crop, in terms of the

‘ clause in the lease, so as the management of the farm may be put
 ‘ as nearly in the same state as possible, as it would have been had
 ‘ the lease come to its natural termination.’

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The trustee finally relinquished possession of the farm at the separation of crop 1830 from the ground. In October 1832, the trustee instituted an action against the landlord, for the value of labour, and price of certain straw and dung, &c. and for the balance to the tenant, of so much per acre of fallow break, left during the last year of the lease. The Lord Ordinary found, 20th November 1834, that the trustee, ‘ in the circumstances, is entitled to ‘ make the same claims upon the landlord, as if the year 1829 ‘ had been the last year of the lease, and the crop 1830 the away-going crop,’ which interlocutor became final. The Lord Ordinary also found, that Sir David Kinloch was entitled to compensate and set off against the claims so competent to the trustee, any claims of damages or otherwise, which he can instruct, as arising from the provisions of the lease, at common law, in regard to such provisions.

Sir David Kinloch raised the present action in January 1835, in which, after setting forth the stipulation of the tack to Rennie, and the bankruptcy of Rennie and abandonment of the lease by the trustee, he *averred*, that fifteen years of the original lease were, from the date of such abandonment, still current; that at that time the lands were in a condition much less favourable for being let, than when they were originally entered into by Rennie; that loss and damage had been incurred through deterioration and managing the farm, till a new tenant could be got; that the lands were afterwards let to new tenants at a considerable fall of rent; that he was obliged to build new steading at the cost of L.3500, no part of which would have been required for fifteen years, had the terms of the lease to Rennie been implemented; and *concluding*, that the trustee should account to the pursuer for the loss and damage sustained by the failure of Rennie, and his not implementing the obligations incurred by him, and by the trustee failing to continue in and labour the farm, and to pay the rent, and implement the whole other obligations and provisions of the lease contracted in favour of the pursuer, from and after Whitsunday, and separation of crop 1830, till the full completion of the terms of the said lease at Whitsunday, and the separation of the crop 1845, and for the stipulated penalty; and concluding also, that the pursuer might be ranked for such sum, as damages and penalty, as might be found due to him, and that he might compensate and discharge from the

Action raised.

Pursuer's
Pleas.

7 June 1836. said sum all claims competent, and that might be found due to the trustee under the lease.

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Defender's
Pleas.

The defender, Rennie's trustee, *pleaded*—1. The pursuer is barred, by the judgment pronounced by the Lord Ordinary, on 20th November 1834, in the action at the respondent's instance, as well as by his own judicial statements before the Sheriff, from maintaining, that by the bankruptcy of Rennie the lease was not terminated at Whitsunday, and the separation of crop 1830 from the ground. 2. That point being *res judicata*, there are no relevant grounds condescended on to instruct that the pursuer is entitled to the conventional penalty, and to damages, because Rennie's creditors did not continue the possession of the lands as tenants after the term of Whitsunday, and the separation of crop 1830 from the ground. 3. As it was a condition of the contract of lease, that it should be terminated in the event of the tenant becoming bankrupt, the occurrence of that event does not give rise to any claim of damages to the landlord, on the alleged ground of failure to implement, or breach of contract. 4. As Rennie's creditors were not entitled, if they had so chosen, and could not be obliged to continue in the possession of the farm until Whitsunday, and separation of crop 1845 from the ground, they are not liable in damages for not having possessed the lands during that period. 5. As there was no failure to implement the provisions of the lease, the claims of damage now set up by the pursuer are wholly groundless. 6. And even if he were to instruct that he has sustained loss and damage through Rennie's failure to implement the provisions of the lease, such damage cannot be set off against the expenses incurred and advances disbursed by the respondent as trustee, in relation to the waygoing crop; *Bell*, ii. 129.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's
Interlocutor.

' The Lord Ordinary having resumed consideration of the debate, with the closed record, productions for the parties, and whole process, finds, *Imo*, That the clause in the lease to John Rennie, by which it was stipulated, that, in the event of his bankruptcy, it should neither be competent to his creditors to possess the farm by a manager, or for the said John Rennie himself to continue the possession for their behoof, must be considered as a clause introduced for the benefit of the landlord alone, and with which he was accordingly entitled to dispense at his pleasure, and that, if he did so dispense with it, and made it sufficiently known to the creditors that he was willing or desirous that they, or the bankrupt

‘ on their account, should still continue the possession, the tenor of 7 June 1836.
 ‘ the said clause, or its existence in the written lease, could give
 ‘ them no warrant for relinquishing or deserting the said possession, Kinloch v.
 ‘ or exempt them from such claims of damages, at the instance of Mansfield.
 ‘ the landlord, as might have been competent to him for such relin- Lord Ordinary’s Inter-
 ‘ quishment or desertion, if the lease had contained no such clause locutor.
 ‘ or stipulation: Finds, 2d^o, That it is not res judicata, either by
 ‘ the judgment of the Court of the 28th of June 1831, or by the
 ‘ interlocutor of the Lord Ordinary (now final) of 20th November
 ‘ 1834, that the landlord had made his election to enforce and act
 ‘ upon the clause and stipulation referred to; and that neither his
 ‘ acquiescence in and adoption of these judgments, nor the tenor of
 ‘ his judicial statements in the proceedings which led to them, are
 ‘ sufficient per se to prove that he had made such election, and still
 ‘ less that the creditors were in any degree induced to abandon or
 ‘ relinquish the lease, by any belief or opinion that he had so elect-
 ‘ ed: And therefore, and in respect that the averments of the parties
 ‘ upon this point of the case are contradictory, and cannot be satis-
 ‘ factorily disposed of on the documents and admissions in process;
 ‘ and also, in respect that the existence and amount of the damages
 ‘ which may be due, if it shall ultimately appear that the defenders
 ‘ did truly desert and relinquish the possession unwarrantably, can
 ‘ only be properly ascertained by the verdict of a Jury, repels the
 ‘ defences maintained on the effect of the clause in the lease herein
 ‘ referred to, in so far as they are at variance with the preceding
 ‘ findings, or are alleged otherwise to bar or exclude the whole claims
 ‘ and action of the pursuer, reserving to the defenders the full bene-
 ‘ fit of the said defences quoad ultra, when the whole cause shall
 ‘ come to be decided on its merits; and remits the cause accordingly
 ‘ to the roll of jury causes.’

Note.—‘ The Lord Ordinary was very much disposed to send
 ‘ this case at once to the Jury, and without any preliminary find-
 ‘ ings; but the defenders insisted that the clause in the lease on
 ‘ which they relied completely excluded the whole action; and as
 ‘ the pursuer also rather seemed inclined to have judgment on that
 ‘ point, the result has been this interlocutor. The Lord Ordinary,
 ‘ after hearing the parties very fully, had no difficulty in repelling
 ‘ the defence referred to, to the extent of the preceding findings.
 ‘ His only doubt was, whether it should not be repelled altogether;
 ‘ as, upon the evidence already in process, (and there is really no
 ‘ distinct promise of any more,) he thinks it abundantly clear that
 ‘ the possession was abandoned by the creditors before it was resum-
 ‘ ed by the landlord, and that the lease came to its practical termi-

Note.

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Note.

'nation, not by his excluding the defenders, but by their spontaneously repudiating all farther concern with the subject.

'The proofs of this are manifold. 1st, The first resolution the creditors came to (23d September 1829) was, 'that the lease should be abandoned;' the landlord having as yet done nothing but sequester for his arrears, and in security for the rent of the current year; a step by which he distinctly recognised the lease as still in operation, and certainly did not propose to extinguish it. 2^d, In his very first communication with the creditors, (25th September,) two days after their solemn resolution to abandon, he proposes, as an inducement to them to give him certain advantages, in the manner of carrying the resolution into effect, that, if they agree to his suggestions, 'he will give up his claim to rank for any deficiency of the rent he may get from a new tenant, during the currency of the present lease, beyond what Mr Rennie is obliged for;' which the Lord Ordinary takes to be a distinct enough intimation that he would not give up this claim, if they abandoned (as they have done) without complying with his conditions. 3^d, So far from the creditors wishing to retain the possession, and the landlord seeking to remove them, they actually applied for judicial authority to dispossess the farm, and leave it in the middle of a term; and were only compelled to remain till the end of the year, by a final judgment of this Court, obtained at the instance of the landlord. 4th, It is matter of notoriety, and is not denied in this case by the creditors, that the farm was a losing concern; and that they would never have thought of retaining it, or adopting the lease, although its terms had been such as to entitle them to have done this, independent of the consent of the landlord.

'Now, against all these decisive indications of the true state of the transaction, the defenders have only to state, 1st, That the landlord was bound to have made some formal and explicit intimation to them, that he dispensed with the clause of exclusion, and required them to continue the possession; and, having omitted this, has no right to say that they abandoned a lease to which they could have no right but by such a dispensation from him. To the Lord Ordinary it appears that no formal intimation of this kind was necessary, since the creditors began by abandoning; and the whole conduct of both parties demonstrated what were mutually their wishes, interests and intentions. But he thinks that the communication of 25th September, already referred to, was a direct intimation. 2^{dly}, The defenders say, that, by insisting on dealing with them, during the year of their compulsory retention of this farm, as if it had been the year of its natural or conventional termination, and consequently taking benefit to himself, and put-

‘ting disadvantages on them which would not have otherwise arisen, 7 June 1836.
 ‘the landlord (though it may be unintentionally) has actually brought
 ‘all its obligations to a close, and can no longer claim damages for
 ‘the alleged violation or non-implement of these obligations. The
 ‘Lord Ordinary has a strong impression that this ingenious view
 ‘can scarcely be supported. But it is more plausible than the pre-
 ‘ceding; and he is glad that he can, without impropriety, leave the
 ‘defenders to make what they can of it before a Jury.

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‘Another more subtle notion was suggested, derived apparently
 ‘from the analogy of certain modern doctrines in the law of entail,
 ‘viz. that as the landlord had stipulated one specific remedy for
 ‘himself, in the event of the tenant’s bankruptcy, so he must con-
 ‘fine himself to that, and is not entitled to betake himself to any
 ‘other. If the Lord Ordinary is right in thinking that he could
 ‘renounce and dispense with the special provision introduced by
 ‘his own act, it will not be easy to maintain this proposition.

‘The questions which he has decided were *prejudicial* questions
 ‘of pure law, as to the construction of the lease, and as to what
 ‘was or was not *res judicata* by the former interlocutors; and as
 ‘they would have settled the whole case, if decided in favour of the
 ‘defenders, it seemed, on the whole, to be expedient that they should
 ‘be separately determined, before any other part of the case was
 ‘gone into. The subordinate questions, however, which have been
 ‘raised upon the clause about bankruptcy, are all involved in mat-
 ‘ter of fact, and may possibly be farther elucidated by evidence to be
 ‘brought forward at the trial; at all events, as in the event of the
 ‘defence founded on that clause being repelled in toto, it would
 ‘plainly be necessary to go to a Jury with the question of damages,
 ‘it appeared to the Lord Ordinary not to be advisable, (especially
 ‘with the impression he has as to the probable fate of what remains
 ‘of that defence,) to exhaust that branch of the cause also, before
 ‘sending the whole merits of the case, which depended upon facts,
 ‘for final adjudication. It is a hard case undoubtedly for the cre-
 ‘ditors; and it is partly because his own impression is against them
 ‘that he rather wishes to give them the benefit of another judg-
 ‘ment, when the whole facts are certainly established.’

The trustee *reclaimed*.

Rutherford, in support of the note.—By the bankruptcy there was a break in the lease; and the landlord himself had treated it as such, by saying to the trustee, You are not entitled to leave the possession till the separation of crop 1830 from the lands,—meaning thereby, that he was legally entitled to leave it at that term.

Court.—Are you, on the part of the trustee, satisfied that the tenant was liable for damage and deterioration arising from the re-

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removal from the lands? and for sums expended in erecting houses under Rennie's lease, for which the new tenant may have no use? and for any loss on the change of cropping which may have ensued?

Rutherford.—I admit the relevancy of such claims; but object to the Court sustaining a claim of damages for the difference of rent betwixt what was payable by Rennie and that payable by the new tenant till 1845.

Lord Meadowbank.—I cannot make out the distinction, or why one claim should be competent, and not the other.

Lord Medwyn.—Nor can I do so.

The other Judges concurred.

Rutherford then proposed, that at least their Lordships ought to recall the last part of the second finding of the Lord Ordinary, viz. the words, 'and that neither his acquiescence in, and adoption of these judgments, nor the tenor of his judicial statements in the proceedings which led to them, are sufficient, per se, to prove that he had made such election; and still less that the creditors were in any degree induced to abandon or relinquish the lease by any belief or opinion that he had so elected.' There ought to be no finding upon documentary evidence, when it is not sufficient. The whole question ought to have been sent to the Jury.

Keay.—The trustee founded on these documents as sufficient to exclude the action.

Court.—There is nothing precluded by these words in the finding: they are merely to the effect that the documents are not sufficient per se.

Judgment.

The Court unanimously adhered.

Lord Ordinary, *Jeffrey.* Act. *Keay, Maconochie.* Alt. *Rutherford, Whigham.*
J. & A. Smith, W. S. and Thos. Johnstone, S. S. C. Agents. F. Clerk.

R.

SECOND DIVISION.

No. CLIII.

9th June 1836.

FRAME, SON AND COMPANY

against

JAMES CAMPBELL.

AGENT AND CLIENT.—REPARATION.—STAT. 4. GEO. IV. c. 34.

—Circumstances in which a provincial writer was found liable in relief of damages and expenses, to which his employers had been subjected, in consequence of illegal and incompetent proceedings instituted and carried on in their names,—the said illegality and incompetency having been occasioned by the negligence or want of professional skill of the agent while acting under such employment.

By statute, 4. Geo. IV. c. 34, entitled, ‘An act to enlarge the Narrative.

‘powers of Justices in determining complaints between masters and servants, and between masters, apprentices, artificers and others,’ it is declared, by the 1st section, (the rubric of which is, ‘Masters, or their stewards or agent, may make complaint against apprentices,’) ‘That it shall and may be lawful, not only for any master or mistress, but also for his or her steward, manager or agent, to make complaint, upon oath, against any apprentice, within the meaning of the said before-recited acts, to any Justice of the Peace of the county or place where such apprentice shall be employed, of or for any misdemeanour, misconduct or ill behaviour of any such apprentice; or if such apprentice shall have absconded, it shall be lawful for any Justice of the Peace of the county or place where such apprentice shall be found, or where such apprentice shall have been employed, and any such Justice is hereby empowered, upon complaint thereof, made upon oath, by such master, mistress, steward, manager or agent, which oath the said Justice is hereby empowered to administer, to issue his warrant for apprehending every such apprentice: And farther, that it shall be lawful for any such Justice to hear and determine the same complaint, and to punish the offender, by abating the whole or any part of his or her wages, or otherwise, by commitment to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months.’

And by the 3d section of the said act, (the rubric of which is, ‘Justices may issue warrants to apprehend servants in husbandry,

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‘artificers,’ &c.) it is declared, ‘That if any servant in husbandry, or
‘any artificer, calico-printer, handicraftsman, miner, collier, keel-
‘man, pitman, glassman, potter, labourer, or other person, shall
‘contract with any person or persons whomsoever, to serve him,
‘her or them for any time or times whatsoever, or in any other
‘manner, and shall not enter into or commence his or her service
‘according to his or her contract, (such contract being in writing,
‘and signed by the contracting parties,) or having entered into such
‘service shall absent himself or herself from his or her service be-
‘fore the term of his or her contract, whether such contract shall
‘be in writing or not in writing, shall be completed, or neglect to
‘fulfil the same, or be guilty of any other misconduct or misde-
‘meanour in the execution thereof, or otherwise respecting the same,
‘then, and in every such case, it shall and may be lawful for any
‘Justice of the Peace of the county or place where such servant in
‘husbandry, artificer, calico-printer, handicraftsman, miner, collier,
‘keelman, pitman, glassman, potter, labourer, or other person, shall
‘have so contracted, or be employed, or be found, and such Justice
‘is hereby authorised and empowered, upon complaint thereof,
‘made upon oath to him by the person or persons, or any of them,
‘with whom such servant in husbandry, artificer, calico-printer,
‘handicraftsman, miner, collier, keelman, pitman, glassman, potter,
‘labourer, or other person, shall have so contracted, or by his, her
‘or their steward, manager, or agent, which oath such Justice is
‘hereby empowered to administer, to issue his warrant for the ap-
‘prehending every such servant in husbandry, artificer, calico-print-
‘ter, handicraftsman, miner, collier, keelman, pitman, glassman,
‘potter, labourer, or other person, and to examine into the nature
‘of the complaint; and if it shall appear to such Justice that any
‘such servant in husbandry, artificer, calico-printer, handicrafts-
‘man, miner, collier, keelman, pitman, glassman, potter, labourer,
‘or other person, shall have fulfilled such contract, or hath been
‘guilty of any other misconduct or misdemeanour as aforesaid, it
‘shall and may be lawful for such Justice to commit every such
‘person to the House of Correction, there to remain and be held
‘to hard labour for a reasonable time, not exceeding three months,
‘and to abate a proportionable part of his or her wages, for and
‘during such period as he or she shall be so confined in the House
‘of Correction, or in lieu thereof to punish the offender by abat-
‘ing the whole or any part of his or her wages, or to discharge
‘such servant in husbandry, artificer, calico-printer, handicraftsman,
‘miner, collier, keelman, pitman, glassman, potter, labourer, or
‘other person, from his or her contract, service or employment,

‘ which discharge shall be given under the hand and seal of such Justice gratis.’ 9 June 1836.

The defender was employed by the pursuers to prepare petitions to the Justices of the Peace for Renfrewshire, at their instance, against two apprentices of the names of Hunter and Gilmour, belonging to their manufactory, for having deserted their work, and other misconduct; and the defender having accepted the employment, did prepare the petitions, founded on and proceeding exclusively upon the 3d section of the above act. The same were presented to the Justices, and warrants granted thereon; on which Hunter and Gilmour were brought up for examination; and after certain procedure and proof before the Justices, these parties were convicted, and committed to the House of Correction. They presented bills of suspension and liberation to the Court of Justiciary, contending that their imprisonment was illegal, and more especially so on the ground, that the section of the statute libelled on had no application to the case. Their Lordships, on considering the bill of suspension and liberation for Hunter, with answers, upon the 23d November 1833, pronounced an interlocutor quashing the conviction, and ordering the suspender to be liberated, and finding him entitled to expenses. Gilmour's suspension was disposed of in the same manner.

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Thereafter separate actions of damages were raised by Hunter and Gilmour against the pursuers, on account of the proceedings at their instance; which actions of damages were duly intimated by the pursuers, Frame, Son and Company, to the defender, Mr Campbell. The pursuers, after an arrangement with the defender, agreed to pay to each of the parties L.25 in name of damages, and also to pay L.55, 17s., the taxed expenses in Hunter's case, and L.30, 4s. 9d., the taxed expenses in Gilmour's. These payments were made in consequence of an agreement by the parties, that it should be without prejudice to the present action of relief, and the defender's defences thereto, or to the rights and pleas of the parties; all which should remain as entire as if no such payment had been made and agreed to, and as if the said sums had been found due by the verdict of a Jury or a final judgment. The pursuers, at the same time that the petition against Hunter was prepared by the defender, employed Messrs Hart and Hodge, writers in Paisley, to prepare petitions against two other apprentices, Houston and Crookshanks; and these petitions were prepared in similar terms, and libelled on the same section of the statute with the petitions against Hunter and Gilmour. Mr Rankine, who was the pursuers' ordinary law agent in Glasgow, was employed by the pursuers to precognosce certain witnesses in the cases of Hunter

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and Gilmour, and was present at several of the diets of procedure ; but Rankine's attention was not called to the terms of the petitions. No objection to the petition against Hunter, as founded on an erroneous section of the statute, was stated by any of the agents who attended on behalf of the parties. The petition against Hunter was prepared, and the proceedings thereon commenced in August 1833 ; and, in the same month, Hunter was convicted and imprisoned. The similar petition against Gilmour was prepared and presented by the defenders, in the month of November following ; and in the course of the proceedings against some of the other apprentices, under one of the petitions framed by Hart and Hodge, in terms similar to those prepared by the defender, and founded on the same clause of the act, the objection being taken, that an erroneous clause of the statute had been founded on, and that the complaint ought to have been laid upon the first section, Alexander Campbell, Esq. Sheriff-substitute of Renfrewshire, acting as a Justice of the Peace, delivered to the clerk of peace this opinion : ' I am clearly of opinion the whole objections ought to be repelled. ' As to the second objection, (the one relative to the section of the ' statute,) I should not be disposed to sustain it at any rate, considering that the provisions of the third section are of general application ; but any doubt on that score seems removed by the subsequent statute, 10. Geo. IV. c. 52, which has the effect of making ' all ' the provisions of the act founded on applicable to apprentices.' In this opinion the Justice and his assessor concurred, the objections were repelled, and Crookshanks being convicted, he was sentenced to be imprisoned for one month.

The nature of the defence to this action will appear from the following pleas :

Defenders' Pleas.

Pleaded for the defenders—1. On the supposition that the defender, who was consulted by the pursuers and employed by them, had committed an error in founding on the third section of the statute, this resolves merely into an erroneous opinion as to the law of the case ; and such an error is not relevant to infer any responsibility against him, either to the effect of paying damages, or relieving the pursuers from the action which has been instituted against them ; *Grant v. M'Leay*, 1st Jan. 1791 ; *Mather v. Mathie*, 4th March 1828 ; *Megget*, 2d Feb. 1827. 2. At all events, and on the same supposition, as the error was not of a nature implying gross negligence, or gross want of skill, but on the contrary was one participated in both by the Judge, his assessor, the Sheriff of the county, and by all the other parties, it is not relevant to infer liability against the defender ; *M'Lean v. Grant*, 13th Nov. 1805. 3. The

judgment of the Court of Justiciary is *res inter alios* as to the defender, and cannot affect him.

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A record having been made, and thereafter a special case prepared by the parties, in which the foregoing facts were admitted, the Lord Ordinary pronounced the following interlocutor and note :

' 27th February 1836.—The Lord Ordinary having resumed consideration of the debate, with the closed record, special case mutually agreed upon by the parties, and whole process, finds, that the defender is bound to relieve the pursuers of the damages and expenses to which they have been, or may be subjected, in consequence of the illegal and incompetent proceedings which he instituted and carried on in their names, against the apprentices named in the libel; the illegality and incompetency of the said proceedings having been wholly occasioned by the negligence or want of professional skill of the said defender, while acting in the employment of the pursuers; and repels the defences, and decrees accordingly: But before answer as to the specific sum for which decret for execution should pass against the said defender, appoints the cause to be enrolled, that parties may be further heard.'

Lord Ordinary's Interlocutor.

Note.—' It is certainly with regret, and not without some hesitation, that the Lord Ordinary gives this judgment. Where there is no suspicion of fraud, or reckless disregard of the client's interest, cases of this kind are always distressing; but on attending to the whole circumstances, he has not found it possible to come to any other conclusion.

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' In the first place, he must say, that he thinks the blunder, in libelling on the *third* section of the statute, instead of the *first*, was a very palpable and gross blunder. The one section dealt professedly with *apprentices*, and with them only; the other with *servants*, and other persons hired or engaged to work on special contracts; and being almost identical with the former in the substance of its enactments, could not be supposed *also* to relate to apprentices, without imputing to the Legislature the most absurd and preposterous repetition. But the whole style and substance of the two sections point out the distinction in the clearest and plainest manner. The section about apprentices gives its remedies to the *masters* or *mistresses* of such apprentices, and uses this, and no other phraseology throughout. But the section about servants and persons employed to work never once uses these expressions, and gives *its* remedies only to ' *the person or persons with whom such servant, &c. may have contracted,*' &c.; and in the fourth section, which contains regulations common to *both* classes, the dis-

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‘ tinction is still most anxiously and carefully preserved, that section setting forth, that as such *masters, mistresses* or *employers*, ‘ may sometimes reside at a distance, by which the said *apprentices* ‘ or *servants*, artificers, &c. may be put to inconvenience in recovering their wages, certain facilities should be provided, &c. But ‘ the very substance of the third section might have shewn any attentive (even though unprofessional) reader, that it could not relate to apprentices, since it speaks exclusively of persons whose ‘ *only* contract with their employers is a contract to work for hire, ‘ and who are contemplated as persons *sui juris*, and completely ‘ capable of binding themselves by such a contract. Now, the contract with an *apprentice*, though it may include a contract to work ‘ for hire, is primarily a *contract to teach* and *to learn* a certain trade ‘ or handicraft; and, being generally entered into with persons under age, is almost invariably concluded, not only with them, but ‘ with their parents or other guardians, expressly *taking burden for* ‘ *them*, as is the case with the indentures referred to, and produced ‘ with the original petitions by the defender; and yet libelling only ‘ on the third section relating to independent contractors, not with ‘ a master or mistress, but with an employer for him.

‘ In these circumstances, it is quite idle in the defender to say, ‘ that the first section related only to apprentices of a *particular* ‘ *description*, and that he, conceiving that the third was intended to ‘ reach *all descriptions*, was therefore induced to select it, as the ‘ safest for his purpose. In the *first* place, it is manifest, that the ‘ apprentices excluded from the operation of the *first* section were ‘ not intended to be affected by the statute at all, as belonging, like ‘ apprentices to surgeons, attorneys, &c. to a higher class of persons, for whose misconduct it was not thought necessary to provide such summary remedies. But, *second*, whoever might be ‘ *without* the provisions of the first section, the defender could not ‘ possibly doubt that the persons he was to prosecute were *within* ‘ it. It extended, in express terms, to all who had not paid an apprentice-fee of L.25 or upwards. But, *first*, it is matter of notoriety to every one in Paisley, that no such fee was ever paid in ‘ the trade of calico-printing; and, *second*, the defender *had the indentures before him*, which shewed there was no such fee.

‘ But strong as this ground is, the Lord Ordinary would have ‘ had great difficulty in subjecting the defender on it alone, considering the apparent novelty of the proceeding, the acquiescence ‘ not only of the Justices, but of the legal advisers of the apprentices, and, above all, the deliberate opinion of the respectable ‘ Sheriff-substitute, (given, no doubt, *after* the defender was committed to the course he had taken,) in favour of all that had been done.

' The sanction of still higher opinions proved insufficient, indeed, 9 June 1836.
 ' to protect a law-agent from the consequences of professional error, 
 ' in the cases of Mathie, 17th May 1826, and Stevenson, 6th July
 ' 1827. But still the Lord Ordinary could not have perfectly sa- Frame, Son
 ' tisfied himself with a judgment resting merely on his own con- and Co. v.
 ' viction, that a great, and, in his view, an inconceivable blun- Campbell.
 ' der had been committed. He thinks it right to state, therefore, Note.
 ' that he has proceeded chiefly on a different view, a view very
 ' nearly corresponding with that on which Lord Lyndhurst appears
 ' to have placed his judgment, in affirming the interlocutor of this
 ' Court in the case of Stevenson, already referred to. He there
 ' said, that if the agent had been *necessarily constrained* to grapple
 ' with a nice and difficult point of law or practice, he might not have
 ' been answerable for the consequences ; but that the case was very
 ' different, when it appeared that he had a safe and plain course
 ' before him, which he chose to desert, in order to embark on a
 ' doubtful one ; and that, if he needlessly *raised* a nice question,
 ' when he might have avoided it, he must answer the consequence
 ' of resolving it wrong. Now, in this case, if the defender really was
 ' at a loss which of the two sections to proceed on, was it not open
 ' to him to proceed *upon both* ? If he actually believed that appren-
 ' tices (though not once mentioned) were, or might be included in
 ' the *third* section, and that it was only a repetition, in more com-
 ' prehensive terms, of the *first*, why not make sure of reaching the
 ' parties accused, by referring *to both conjunctly*, as merely explica-
 ' tory and supplementary of each other ? Or, if he was aware that
 ' both could not be intended for the same classes of persons, and
 ' was doubtful under *which* his parties were included, what was to
 ' hinder him from founding upon *both alternatively*, and seeking a
 ' conviction upon the same state of facts against them, as certainly
 ' comprehended under the one or the other description ? There is
 ' no doubt, it is humbly conceived, that a libel in either of these
 ' forms would have been perfectly relevant, and a conviction ob-
 ' tained, under either, liable to no objection. If the last or alter-
 ' native form was adopted, it would probably have been necessary
 ' for the Court to decide under which section the parties were to
 ' be held as arraigned ; and if they, with both before them, should
 ' have fallen into the alleged error of the defender, (which it is not
 ' easy to imagine,) it is no doubt possible that the consequences
 ' might have been the same to the pursuers. But the defender
 ' would, at all events, have been saved from responsibility, and been
 ' entitled to say, what he cannot now say, that in a matter of sup-
 ' posed difficulty, he had run upon no needless risks, but followed
 ' a course perfectly unexceptionable, and safe for all parties. Nay,

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‘ if this very plain statute had appeared to him absolutely inextricable and obscure in all its sections, there was still a plain and a safe way by which he might have escaped all possible embarrassment. It is settled by the special case, that he had no instructions to proceed upon that statute at all. His employment was quite general, ‘ to prepare petitions to the Justices against certain apprentices who had deserted their work, and otherwise misconducted themselves.’ Now, by the original acts of 1617 and 1661, as interpreted by immemorial usage, the Justices had undoubted power of enforcing all such contracts without the aid of any recent enactment; and the defender might have discharged himself of the task he had undertaken, without referring to the 4th of Geo. IV. at all. In this view, it appears to the Lord Ordinary that he stands very much in the situation of Stevenson in the question with Rowand; and that, even supposing that there could have been any material difficulty in fixing upon the proper section, it was a difficulty which the defender created by his own act, and met consequently at his own peril, there being a plain and safe course open to him, by which, without injury to any one, all peril might have been avoided. No man of common judgment, professional or unprofessional, can be listened to, who would say that, after reading the statute, he thought there was no sort of risk or difficulty in entirely passing over or neglecting the first section; or, if there was a plain or palpable difficulty, the defender must be answerable for the consequences of not taking a plain way to avoid it.’

Lord Ordinary's Interlocutor.

Thereafter, 10th March 1836, ‘ The Lord Ordinary having heard parties’ procurators, in terms of the appointment in his interlocutor of 27th February 1836, decerns against the defenders, 1st, For the sum of L.25 sterling, being the damages, and L.55, 17s., being the expenses found due, and paid by the pursuers to Archibald Hunter, in the principal action of damages at his instance against them, with the legal interest on these sums from the 18th October 1834, when the same were paid by the pursuers, till payment; and, 2d, For the sum of L.25 sterling, being the damages, and L.30 : 4 : 9, being the expenses found due, and paid by the pursuers to Robert Gilmour, in the principal action of damages at his instance against them, with the legal interest on these sums from the foresaid date, when the same were paid by the pursuers, till payment: Farther, finds the defender liable in the expenses incurred by the pursuers to their agents in defending the foresaid actions at the instance of the said Archibald Hunter and Robert Gilmour; appoints an account thereof to be given in; but, before

'answer, remits the same, when lodged, to the Auditor to tax, both
'as between agent and client and party and party, and to report
'the amounts in each view; reserving the pursuers' claim against
'the defender for the expenses on both sides in the proceedings
'before the Court of Justiciary and the Justices of the Peace, be-
'tween the pursuers and the said Archibald Hunter and Robert
'Gilmour, mentioned in the record and special case, and the de-
'fender's objections and defences against such claims: Finds the
'pursuers entitled to their expenses in the present conjoined ac-
'tions of relief.'

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inary's Inter-
locutor.

The defender *reclaimed*.

D. McNeill and P. Robertson.—The defender did not maintain that a wrong section of the act had not been founded on; but that, looking to the third section, which was libelled on, the error was not so gross as to infer damages. The act libelled on was an amendment of the 20. Geo. II. c. 19, in which both classes of offenders were mentioned indiscriminately. The cases relied on by the pursuers all proceed upon the supposition of the agent departing from the usual beaten track. See *Lyndhurst, (C.) in Stevenson v. Rowan*, 4. *W. & S.* 182, where the liability resulted from a departure from the established and beaten course. There could be no beaten path as to this new act. The case of *Grant* arose out of an error in doing diligence; *Stevenson's* from a plain departure from the ordinary mode of completing a title; *Megget's* case related to ordinary rules of professional practice. In *Godefroy*, in the Common Pleas, in 1830, 6. *Bingh.* 467-8, *Tyndal (C. J.)* stated, that, in 'points of new occurrence, or of nice or doubtful construction,' an agent might be exempted from liability.

Defender's
Pleas.

Dean of Faculty.—I do not feel it incumbent on me to support all the views expressed by the Lord Ordinary; but the result of the interlocutor is justified by the want of the usual professional caution and ordinary skill. This was an action for relief of expenses, in which the pursuers had been subjected, on account of an agent not having rightly gone about a professional duty which he had undertaken to perform, and which, it was to be presumed, he was competent to have performed in such a way that his employer should not be held liable in payment of expenses, through the illegality of the procedure adopted.

Pursuers'
Pleas.

Lord Justice-Clerk.—This may be a hard case, but I cannot find principles to warrant me in departing from the result of the Lord Ordinary's finding. It is not necessary for me to adopt the grounds

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stated in the note of the Lord Ordinary. I go on this, that although there has been no similar case under this statute, yet the same principle applies to all such cases, viz. that a practitioner in an inferior court is bound to warrant that ordinary degree of skill which is necessary to protect the interests of his employer. This an employer may rely on obtaining, although he may not look for unerring wisdom. Here the employment was accepted by the defender; and as to the course incumbent upon him, it is not necessary that the Court should point out what he ought to have done. He was authorised to submit complaints against these apprentices, and undertakes, without stating any difficulty about his competency for the duty, to do what was required. The employer was surely entitled to expect that this professional party, undertaking the duty, was possessed of knowledge sufficient to enable him to understand the right clause from the wrong one. There is an anxious provision in regard to apprentices in the first section of the act; yet the agent passes over it, and goes to the third section, on which he libels, though it relates to a different class of persons, and no mention is therein made of apprentices. A judgment was given by the Justices, and the party complained of was incarcerated. But on a suspension being brought, the Justiciary Court, without hesitation, found that the third section was inapplicable, and found the whole procedure null. The employers had to pay expenses and damages for these improper proceedings. Then comes this action of relief against the party who brought all this loss upon others. I look on this as a case where the pursuers were held liable on account of the proceedings erroneously adopted by the defender, the commission of a gross blunder, in short, which is admitted. With every respect for Mr Sheriff Campbell's opinion, I scarcely think it was his province to give it; but that opinion does not alter the case, for it was wrong. I can have no difficulty then in holding, that a professional man is bound to afford competent knowledge; and as there was here a gross blunder, the party is bound to answer for it. I have no objection to the words in the judgment of the Common Pleas in Godefroy; for here the agent acted rashly and precipitately. It was not a case where nice construction nor much light was necessary. All the requisite light might be got from reading the act. He would have been safe in libelling on the act generally, and he might afterwards, if necessary, have condescended on the particular section. But in what he did, I cannot hesitate in holding that he was wrong. I adopt the words of Lord Lyndhurst in Stevenson and Rowan, and hold that the defender departed from the ordinary beaten track of procedure.

Lord Glenlee.—I am of the same opinion.

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Lord Meadowbank.—My opinion is the same. Practitioners have a monopoly of practice in these Courts, and they are bound to possess a degree of knowledge, amounting to a warranty that the lieges, in employing them, may be protected against the consequences of ignorance in the conduct of the business intrusted to their care.

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Court.

The monopoly is given that practitioners may obtain indemnification for the expense of requisite study and preparation for discharging adequately their professional duties. And if they say they are competent, they must be liable for the consequences of advice given, which is plainly and practically erroneous, and which may prove pernicious to their clients. Here, when the party undertook the duty, he held out a guarantee that his employment would lead to no hazard or danger. If, on reading the act, he had been diffculted, he might have said so; but nothing of the kind was done. He proceeded periculo that the advice was sound. We have nothing to do with what he did not do, but with what he did do. Now, here there was extreme negligence; for, on the reading of the act, no one holding himself out to be a practitioner accustomed to the language of statutes, and versed in proceedings connected with acts of Parliament, could have doubted. Look to the marginal notes, and read the two sections. I must hold that he did read the act, and culpably disregarded it, by introducing into the complaint a section that ought to have been left out. I do not think that putting in both sections would have saved him; for, if he had still gone upon the wrong section, he would have been liable. My impression is, there was culpable, and apparently, one would be apt to think, wilful negligence.

Lord Medwyn.—A majority of the Court being of opinion that the interlocutor ought to be adhered to, it is unnecessary for me to express very fully my views, and the doubts which I have been led to entertain in regard to its soundness. The Lord Ordinary confesses that he has not gone upon the grounds on which the pursuers mainly relied, and the pursuers again now reject some of the rations adopted by the Lord Ordinary. It is admitted that the error must be very gross and palpable; and if I concurred with the Lord Ordinary in thinking that the error here was of that description, I would be for holding the defender liable. But I do not see that it is so. I think this case is to be considered in the same light as that relating to any other professional blunder: but then there must be crassa negligentia and culpa lata. The cases referred to, where liability attached, were cases of professional neglect in the execution of diligence, or preparation of deeds of conveyance, or the like, where there had been a long-established, well-understood

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practice, different from that observed in the instances complained of—a messenger departing from the common forms—a party neglecting to get an assignation to a debt, or the neglecting to get a base right confirmed, where there is a usual, well-established professional mode of going to work, are all plain enough cases for the application of the rule. But here I cannot discover the gross negligence. The act had not been long in existence. The first section only applies to certain classes of apprentices, not to all apprentices: it refers to the previous statutes, in which parish apprentices are the parties first expressed, and mainly contemplated. The blunder would have been more considerable if the section had applied to every class of apprentices; but it did not apply to the class complained of exclusively; at least none of the parties engaged before the Justices discovered that the wrong section had been founded on; nor was the error observed by the Justices, nor by their clerk, as assessor, nor by the Sheriff-substitute. Though it is more clear now, after the matter has been discussed in the Justiciary Court, it was not so at that time in that provincial court, where it is not held that there is *copia peritorum*. Is every blunder committed by an agent in the conduct of a suit to entitle the employer to indemnification? I cannot recognise any distinction betwixt a case of money lost from the occurrence of a professional blunder, and the paying of damages or expenses incurred from the same cause.

His Lordship then adverted to the circumstances in the case of Grant, and also of Alison, where an agent had adjudged the life-rent and not the lands; and that was not held to be such a departure from the usual and beaten tract as to infer liability. His Lordship added, I am not satisfied that there was in this instance such a plain and beaten path of professional conduct as an agent wishing to follow it could not mistake.

Judgment.

The Court adhered, and found additional expenses.

Lord Ordinary, Jeffrey. Act. Dean of Fac. (Hope,) Ivory. Alt. P. Robertson, M'Neill, Shaw, G. Moir. Campbell & M'Dowall, S. S. C. and C. F. Davidson, W. S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. CLIV.

9th June 1836.

FRAME, SON AND COMPANY

against

HART AND HODGE.

AGENT AND CLIENT.—REPARATION.—STAT. 4. GEO. IV. c. 34.

THIS was an action of relief against provincial writers, for a professional mistake similar to that referred to in the preceding case, (*Frame, Son and Co. v. Campbell*,) any slight difference betwixt the two cases being pointed out by the Lord Ordinary in the note attached to the interlocutor, by which his Lordship found the defenders liable in relief.

Nota.—‘ The grounds of this judgment are substantially the same as explained in a note to an interlocutor of this date, in the action by the same parties against James Campbell. The only difference between the cases is, that Campbell says he deliberately considered the statutes, and came to the conclusion on which he acted, after using all possible diligence to be right; while the present defenders say they did not deliberate at all; but, having been employed *after* Campbell’s petition had been received and acted upon, merely followed that precedent, and judged of its propriety by its success. Of the two, the Lord Ordinary rather thinks this last defence the worst. Even communis error, and a long course of local irregularity, has been found to afford no protection to one qui spernit peritiam artis. But here there had been nothing like a course of practice, or any series of precedents which had received the tacit sanction of the proper authorities. The defenders were in no way bound to submit their judgment to Campbell’s, and had no right to deprive their employers of the benefit of their own skill and sagacity, by leaning indolently on his example. If the blind will follow the blind, they must both lie in the same ditch.’

The defenders *reclaimed*; but, on the grounds stated in the preceding case, the Court *adhered*, with additional expenses.

Lord Ordinary and counsel same as in last case.
and *A. Nairne*, Agents. T. Clerk.

Campbell & M'Dowall, S. S. C.

R.

FIRST DIVISION.

No. CLV.

10th June 1836.

DAVID SMITH

*against*THE ROAD TRUSTEES OF THE COWAL DISTRICT OF
ARGYLESHIRE.

ROAD.—STAT. 56. GEO. III. c. 70.—*Circumstances in which the furnisher of certain plans and estimates was held to have no claim for the expense thereof against the Road Trustees of Argyleshire, in respect that his employment had not been in conformity with the provisions of the turnpike act of that county.*

Narrative.

THE Act of Parliament, 56. Geo. III. cap. 70, intituled, ‘ An Act for making and maintaining highways, roads, bridges and quays, and for regulating ferries in the shire of Argyle,’ divides that shire into districts, conferring certain powers on the trustees of the said districts, under various restrictions, of which the following is one: ‘ Provided always, that it shall not be lawful for the trustees of any of the said districts, or any person by their authority, to commence any new line of road, or any alteration of an old line, under the authority of this act, without the approbation of a general meeting of trustees; and that in every case where the expense shall exceed L.200, plans and estimates, verified on oath, by persons properly qualified, shall be submitted to the district and general meetings of trustees before an order shall be issued for executing the same, and the expense of which plans and estimates shall be paid from the district funds.’

At a meeting of the Road Trustees of the Cowal district, of the 29th March 1831, ‘ Mr John Lamond for Monzie and Dunoon, moved, that a sum shall be appropriated by the meeting, out of the sum applicable to the general line of road within the district, for making a new line of road from Locheck to Whistlefield. The meeting are of opinion, that they have no power to apply the general fund, or any part thereof, in the manner proposed; but they resolve to apply to the next general meeting of the road trustees, and to recommend to them the propriety and expediency of the proposed road being made, as being the most level and easiest line between the Clyde and Inverary, and the most direct communication from Bute, Dunoon and Kilmuir, to that place.’ Some of the district trustees, considering that plans and estimates

were necessary for carrying the resolution of the meeting into effect, but without the special authority of the meeting, employed the pursuer to make out the necessary plans and estimates. At a general meeting, of 30th April 1831, the report of the district of Cowal was presented; and the meeting having considered that part of the report regarding the proposed road, with the plans and estimates relative thereto, remitted the subject to a committee, with power to inquire into the utility of the proposed measure, and to report generally thereon to the adjourned meeting in October next. The report which was made out by this committee was as follows: 'The committee having taken into consideration the plans, estimates and reports this day laid before them by Mr Campbell at Duncholgin, the conveners of the committee are of opinion, that the proposed road will be of great benefit to the county at large, and more particularly to the district of Cowal, and recommended to the general meeting, that the district of Cowal should have the power of applying to the making of the said road any funds which they may be entitled to, whether district or general.' At a general meeting, held the 3d May 1832, the meeting approved of this report, but declared, 'that notwithstanding of this approval, neither the county nor the district of Cowal are to be held liable for the expense of the plans as to the line of road, ordered to be prepared without their authority.' In consequence of some disputes arising amongst the trustees, the road eventually was not made under the direction of the body of the trustees, but was carried through by private individuals, and by means of private contributions. The work, however, was executed on the above-mentioned plans and estimates furnished by the pursuer.

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—
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In these circumstances the pursuer raised the present action, founding on the clause of the Act of Parliament above quoted, and holding the whole of the Cowal district of trustees liable in payment of the plan and estimates, not only as trustees, but as individuals, jointly and severally, and also against their clerk, *pleading*,
1. The order given to the pursuer, by certain individuals of the district trustees, to prepare plans and estimates relative to the new line of road, was virtually, and in effect, the order of the whole body of those trustees, inasmuch as they had, at their previous meeting of the 29th March 1831, approved of the proposed new line, and resolved to recommend it to the general meeting, a step which, according to the provisions of the Act of Parliament, it would not have been competent for them to take, without the preparation of such plans and estimates. 2. Even if it could be held that the act of the individual trustees was not, in the circumstances, binding

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upon the whole body, they, by their subsequent conduct, recognised and substantially homologated the order which had been given in their name, and for their behoof, by allowing the plans and estimate, when submitted to the general meeting of which they were all members, to be used in connection with the resolution, and to form the subject of discussion there, and in the committee, without taking any objection on the ground that they had been prepared without their authority. 3. All the requisites of the act were complied with; and the plans and estimates having been entertained and acted upon by the general meeting, in connection with the report of the district trustees, the funds of the district were clearly rendered liable, in terms of the Act of Parliament, for payment of the pursuer's account. 4. The general meeting had no power, by any declaration of theirs, to qualify or affect the pursuer's right, or to free the district trustees from a liability which they had never incurred; and so far as the declaration, annexed to their deliverance of the 3d of May 1832, proceeded upon the allegation of the plans being unauthorised, it came too late, after they had remained more than a year under consideration. 5. That the road was ultimately made by private subscription, and not by the district trustees, or from the district funds, is quite immaterial, as the pursuer would have been entitled to payment of his account for professional labour, though his employers had never proceeded with the work at all. 6. At all events, if any doubt can possibly be raised as to the liability of the district fund, there can be none as to the liability of those trustees who individually contracted with the pursuer, and employed him in the survey; and he is therefore entitled to obtain payment from these parties of the expense of his plans and estimates, of which they have since availed themselves in completing the road in question.

Defenders'
Pleas.

The defenders *pleaded*—1. Mr Campbell having ceased to be clerk before the summons was executed, should not have been called as a defender. 2. The action being laid upon the Act of Parliament, 56. Geo. III. c. 70, it is incumbent on the pursuer to instruct that the charges pursued for have been incurred under that act, and in conformity with its provisions. 3. The pursuer having averred employment by the trustees as such, it is incumbent on him to instruct that employment. 4. The employment and operations of the pursuer not having been by authority of the trustees as such, or under the Act of Parliament, or in conformity with its provisions, he is not entitled to decree against the trustees as such, or against their clerk. 5. The conclusion against the defenders, as individuals, is not warranted by the narrative of the summons, but on the contrary is inconsistent therewith, and cannot be maintained under this

action. 6. The defenders not having employed the pursuer, are not individually liable for the sum sued for. 7. The pursuer cannot insist against the defenders on grounds of action not libelled in the summons.

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The pursuer subsequently gave in a minute abandoning the conclusion against the defenders as individuals, and restricting his account to L.43 : 12 : 11, but reserving all defences against those defenders who did not appear.

The Lord Ordinary pronounced the following interlocutor: 'The Lord Ordinary having heard parties' procurators upon the closed record, and whole process, repels the defences, and decerns, in terms of the conclusions of the libel, against the whole defenders, as road trustees of the Cowal district of Argyleshire, under the Act of Parliament libelled, and their clerk ex officio, and also against those defenders who have not lodged defences personally as individuals; finds expenses due, allows an account thereof to be given in, and remits to the Auditor to tax the same and to report.'

The trustees *reclaimed*.

Lord Balgray.—I conceive the trustees, being in the execution of a public duty, must be bound in terms of the statute, in order to be bound at all. But I find here that the act has not been complied with, and therefore I do not consider these defenders liable as trustees.

Opinion of
Court.

Lord Mackenzie.—I incline to the same opinion. I do not see how the pursuer can render the defenders liable as trustees for the plans ordered by private individuals, without the authority of the trustees of the district. The trustees of the district have no power under the act to order plans at the expense of the general fund; that is, to subject the fund, where no road has been made. The road was made at private expense. The plans were ordered by Mr Napier; and the plans he ordered, as a private person, were no doubt inspected at the general meeting, and a remit made to a committee; but on approving of the report, the general meeting protested against being liable for the cost. If, after the report of the committee, the road had been executed, there might have been some ground for holding the trustees liable, because it might have been reasonably argued that the plans had served their purpose; but this was not the case.

Lord President.—The plans may serve their purpose equally well, where they shew that the road should not be constructed; but I agree in thinking the expenses cannot come off the general fund.

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The Court altered the Lord Ordinary's interlocutor, in so far as it decerned against the defenders as road trustees, but gave no expenses.

Lord Ordinary, Fullerton.
M'Neill.
B. Clerk.

Act. Rutherford, Ivory.

Alexander Douglas, W. S. and MacLachlan & Ivory, W. S. Agents.

Alt. Dean of Fac. (Hops.)

C. R.

SECOND DIVISION.

No. CLVI.

10th June 1836.

DAVID BLAIR AND MANDATARY
against

THE MAGISTRATES AND TOWN-COUNCIL OF
DUNBAR.

TEINDS.—WARRANTICE.—*Circumstances in which it was found that teinds had not been duly disposed with the lands, and that a party purchaser, paying minister's stipend, was not entitled to relief, under a clause of absolute warrantice inserted in the disposition.*

BURGH-ROYAL.—(POWERS OF MAGISTRATES.)—*Circumstances in which an alleged conveyance of teinds by Magistrates of a burgh, there being no authority by the Town-Council, was found invalid.*

Narrative.

In 1800, the Magistrates and Town-Council of Dunbar, in order to pay off debts due by the burgh, resolved to sell part of their heritable property called the West Common, and appointed a committee for fixing the upset prices and arranging the articles of sale. The articles of roup bore to be, 'Articles and conditions of roup and sale of the several heritable subjects after mentioned, belonging to the town of Dunbar, which are to be exposed to sale;' and lot third was thus described: 'All and whole these lands called the West Common of Dunbar, consisting of fourteen acres or thereby, English measure, all as presently possessed by Alexander Sawers, tenant in Hallhill, bounded by the lands of Sir George Warrender upon the south and east, the lands of Westbarns, belonging to James Hamilton of Bangour upon the west, and the post-road leading from Dunbar to Haddington on the north parts, at the upset price of L.800.' Article 5. of the articles of roup declared, that upon the purchaser paying the price, the exposers were 'to grant

‘ and subscribe a formal and valid disposition of the said several sub- 10 June 1834.
 ‘ jects to the respective purchasers, and their heirs and successors,
 ‘ containing procuratories of resignation, precepts of sasine, clause Blair, &c. v.
 ‘ of absolute warrandice, assignation to the rents, maills and duties, Magistrates of
 ‘ and to the writs and evidents of the said subjects, with an obliga- Dunbar.
 ‘ tion on the said Magistrates to free and relieve the said subjects Narrative.
 ‘ of all debts and incumbrances affecting the same, and of all cess
 ‘ and other public burdens payable for the same at and preceding
 ‘ the term of Whitsunday then first, the purchasers being obliged
 ‘ to free and relieve the said subjects in all time thereafter of cess
 ‘ and other public burdens.’ The West Common was purchased
 by Thomas Mitchell. The sales made were afterwards duly re-
 ported to the Council; and they, by their minute, approved thereof,
 and authorised the Magistrates to grant dispositions to the pur-
 chasers, agreeably to the articles of roup. Thereafter, it was set
 forth in a minute of Council, ‘ that Mr Lawrie, writer in Dunbar,
 ‘ for Mr Thomas Mitchell, had written to the clerk, wishing im-
 ‘ mediately to pay the price of the West Common, upon the condi-
 ‘ tion mentioned in his letter, of which the tenor follows: ‘ Since
 “ I had the pleasure of seeing you in the forenoon, I have been
 “ with Mr Mitchell, who desires me to acquaint you, that he is
 “ now ready to pay the purchase-money of the West Common on
 “ receiving a disposition thereto, and discount at the rate of 5 per
 “ cent. till Whitsunday. Please communicate this to the Magis-
 “ trates and Council; and if they approve, I will draw out and
 “ send you a draft of the disposition.’ And the Magistrates and
 ‘ Council having considered the said letter, they agree to what
 ‘ is proposed therein.’ The narrative of the disposition in favour
 of Mitchell is in these terms: ‘ Know all men, by these presents,
 ‘ that we, &c. Provost, Bailies, and Town-Council of Dunbar, he-
 ‘ ritable proprietors of the lands after disposed, considering that,
 ‘ by articles of roup, &c. we, as specially empowered and au-
 ‘ thorised by minute of Council, of the date therein mentioned,
 ‘ having exposed to public sale sundry lands belonging to the
 ‘ burgh, and Thomas Mitchell being the only offerer for lot third
 ‘ of the said subjects, at the upset price of L.800 sterling, was
 ‘ preferred thereto at that price, payable at the term of Whitsun-
 ‘ day next, as the said articles of roup, and minutes of enactment
 ‘ and procedure, more fully bear: And seeing that the said Thomas
 ‘ Mitchell has instantly, at our desire, notwithstanding of the afore-
 ‘ said term of payment, paid to the treasurer of the said burgh
 ‘ L.800 sterling, which we are satisfied will be applied by him
 ‘ for the use and behoof of the community, whereof we hereby
 ‘ grant the receipt, and discharge the said Thomas Mitchell there-
 ‘ of for ever: Therefore we have sold, alienated and disposed, as

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‘ we, by these presents, for ourselves, and our successors in office, in terms of the said articles of roup, and as further specially empowered and authorised so to do by minute of Council, of date the day of March last, sell, alienate and dispone, to and in favour of the said Thomas Mitchell, and his heirs and assignees whomsoever, heritably and irredeemably, the said lot third of the foresaid subjects, being all and whole the lands called the West Common of Dunbar, consisting of fourteen acres or thereby, English measure.’ Then follow the boundaries, and the deed proceeds: ‘ All lying within the royalty and parish of Dunbar, constabulary of Haddington, and sheriffdom of Edinburgh; together with the teinds, parsonage and vicarage, of the said lands, the right and privilege of driving and using the sea-weed or ware coming ashore upon the sands within the liberties of said burgh, for the purpose of manuring the said lands allenarly, and for no other purpose whatsoever.’ The procuratory of resignation gave power for resigning the said lands, ‘ together with the teinds, parsonage and vicarage, thereof, the right and privilege of driving or using the sea-weed or ware as aforesaid for manure thereto, together with all other right, title and interest,’ which the Magistrates had thereto. The disposition also contained the usual clause of absolute warrandice and assignation to the writs and rents from and after crop 1800. Mitchell was shortly thereafter infest, more burgi.

The disposition in favour of Mitchell, prepared by his own agent, was disconform to the articles of roup, which it narrated in terms; in so far as neither the teinds nor the sea-weed were exposed to sale; and Mitchell paid no price therefor.

In 1811 a process of augmentation was brought, at the instance of the minister of the parish of Dunbar, against the heritors; and then, and for long previous thereto, it was assumed that the Magistrates of Dunbar had a right to the teinds of their lands. In 1823, Mitchell’s son-in-law, Mr Blair, agreed to relieve him of a certain cautionary obligation, upon condition his wife, Mrs Mitchell, would restrict to a certain extent an annuity in her favour over his heritable subjects, and that he would grant to Blair an absolute disposition to his heritage, subject to the liferent of the grantee. A deed of restriction was accordingly granted.

The disposition by Mitchell to Blair contains the following clause: ‘ Therefore, in implement of the said agreement, and in consideration of the money before mentioned, advanced by the said David Blair on my account, I have sold and disposed, as I hereby sell, alienate and dispone, from me, my heirs and successors, to and in favour of the said David Blair, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole’ the said lands,

together with the teinds, parsonage and vicarage, all as described in the disposition by the Magistrates and Council in favour of Mr Mitchell. But is hereby declared, and appointed to be inserted ~~in the instrument to follow hereon, that this disposition is granted with and under the reservation of my own liferent right of the whole subjects above described during all the days and years of my life.~~ Upon this disposition Blair was infeft in the said lands and teinds. Matters continued in this state until 1824. By this time a new process of augmentation, at the instance of the minister of the parish, had been brought; and part of the augmented stipend having been subsequently laid upon these lands, Mr Blair, the proprietor, thereupon made intimation to the Magistrates and Council, and claimed relief from them of the stipend, upon the allegation that their predecessors had conveyed the teinds to his father-in-law, Mr Mitchell. Prior to 1824 no additional stipend had been placed on the burgh for a period long past memory. In 1826, however, it was found that they had no right to their teinds, and hence part of the new augmentation was localled upon them and Mr Blair, who brought the present summons for relief or repayment of the stipend he has paid to the minister, and *pleaded*, 1. That he was entitled to the relief claimed, and his rights as singular successor and onerous assignee of Mitchell, to whom the defender's predecessors, by their disposition, conveyed the teinds, as well as the lands in question, under the obligation of absolute warrandice, are not liable to be affected by exceptions and pleas not appearing on the face of the records, or in the titles of his author. 2. Even in a question with the pursuer's author, Mitchell, there is no sufficient ground to relieve the defenders from the obligation and claim of relief libelled.

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The defenders, upon the foregoing state of the facts, *pleaded*—
1. That Mitchell, the pursuer's father-in-law, purchased only the lands of the West Common, as described in the articles of roup. He paid no price for any thing else; and the Magistrates and Council were under no obligation, and had no authority, to convey any other subject than that described in the articles of roup. 2. It was the purchaser's agent who either intentionally or per incuriam inserted in the disposition 'the teinds' of the said lands, without any price being paid therefor, and the same were conveyed accordingly; but the Magistrates did not become bound, and were not bound, to free and relieve the purchaser of any stipend or teind that might be placed on these lands. 3. The purchaser's agent satisfied himself as to the title of the Magistrates; and as there has been no eviction whatever of the subjects sold under the articles of roup, there

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can be no claim of relief against the defenders in respect of the said teinds. 4. The pursuer, as the successor and disponee of Mitchell, is in no better situation, in regard to this claim, than his author was. 5. The Magistrates and Council of 1800 had no authority and no right or title to convey 'the said teinds;' and if they conveyed what did not belong to the burgh, no obligation or warrandice of such conveyance can be transmitted against the defenders, who now form the magistracy, and who are mere trustees for behoof of the community.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having resumed consideration of the debate, with the closed record, productions for the parties, and whole process, finds, *1mo*, That it must be held that the Magistrates, who granted the disposition containing the clause of warrandice libelled in favour of the deceased Thomas Mitchell, (the author of the present pursuer,) on the 5th of April 1800, had no other warrant or authority to grant the said disposition than the acts or minutes of Council of the 23d of January and 24th of March respectively, in the said year 1800; and that it is admitted that neither of these acts or minutes contained any express warrant or mandate to convey *the teinds* of the lands thereby directed to be sold, or to bind the Council or community of the burgh in absolute warrandice for the teinds of the said lands: Finds, *2do*, That, upon a sound construction of the decisions in the cases of Scott and Muirhead, the Creditors of Tullibole, Lord Moray, and others, referred to by the pursuer, they cannot be held to import more than that it may be inferred from clear and unequivocal indications in a disposition of *lands*, that the disponent meant also to convey any right which might be in him to the *teinds* of the lands so conveyed, and could not be allowed, at an after period, to maintain that the said teinds, being actually vested in him at the time of the disposition, were reserved, and remained in him, merely because not expressly or separately conveyed; but that these decisions afford no authority for holding that persons who grant (or give mandate or commission to grant) a right to lands only, can be subjected in warrandice for the alleged eviction of the teinds of the said lands, when it turns out that they themselves had no right to such teinds, merely because it may be proved or admitted, that at the time of granting the conveyance to the lands, they believed that they had a right to the teinds also, and truly intended to convey such right to these teinds as they actually possessed; and therefore, and in respect that neither of the acts or minutes of Council, by which alone (or acts done in conformity to which)

' the defenders can be bound, contain any such clear indications of
 ' a purpose to grant the teinds as formed the grounds of decision in
 ' the cases referred to, and in respect that if the committee, acting
 ' under these acts or minutes of Council, had applied (as they ought
 ' to have done) to the said Council, when requested by Thomas
 ' Mitchell to include the teinds in his conveyance, the reasonable
 ' and legal presumption is, that the said Council would not have
 ' authorised them to grant such a conveyance, and to bind them in
 ' absolute warrandice to the disponent, but would either have looked
 ' into their own titles, and refused to convey the teinds to any ex-
 ' tent whatever, or would have merely assigned over such right to
 ' the said teinds as they themselves might be found to possess, and
 ' with warrandice from fact and deed only: Finds, that the defend-
 ' ers, as successors in office of the Magistrates and Council, who
 ' concurred in the acts and minutes of Council referred to, are not
 ' bound by the clause of warrandice libelled, or by the implied war-
 ' randice in the disposition onerously granted to the said Thomas
 ' Mitchell, in so far as relates to the teinds unwarrantably conveyed
 ' thereby to the said Thomas Mitchell, his heirs and successors;
 ' and therefore sustains the defences, assolizies the defenders from
 ' the whole conclusions of the action, and decerns: Finds the said
 ' defenders entitled to their expenses,' &c.

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Blair, &c.
 v. Magistrates
 of Dunbar.

Lord Ord-
 inary's Inter-
 locutor.

Note.—' Since the decision in the case of *Sellrig*, 11th June 1828, *Note*.
 ' (6 *Shaw*, 955,) it has been settled that *Magistrates* have no power
 ' to alienate any part of the burgh property, without the express
 ' authority of *the Council*; and as the acts of *Council* in this case
 ' authorise the sale of *the lands only*, the Lord Ordinary thinks the
 ' express conveyance of the *teinds* is entirely without warrant, un-
 ' less it can be shewn to have been necessarily implied from the
 ' terms in which the warrant to disponent the lands is conceived. But
 ' there are truly no terms, either in these acts, or in the articles of
 ' roup to which they refer, that can at all support such an implica-
 ' tion. In all the cases referred to, there were such expressions.
 ' The purchasers were either assigned into the benefit of current
 ' tacks, under which the tenants were expressly entitled to possess
 ' both stock and *teind*—or they were expressly burdened with *sti-*
 ' *pends*—or with future *augmentations*—or in some other way clearly
 ' designated as purchasers of the right to the teinds as well as to
 ' the lands. But there is not a word to this purpose in any instru-
 ' ment framed or adopted by the Council. Even if there had, the
 ' leading distinction pointed out in the interlocutor would be suffi-
 ' cient to prevent the application of these authorities. In all of
 ' them the disponents *had confessedly the right* to the teinds; and the
 ' only question was, whether there was not sufficient evidence, that

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Jacob Dixon senior, raised an action against the children of Jacob Dixon junior, to have it found and declared, that the residuary legacy conceived in favour of Jacob Dixon junior did lapse, and became void and null by his predecease, and did not transmit or accrue to his children and representatives; but that Jacob Dixon senior died intestate, quoad the succession of the free residue of his means and estate, and that the trustees were bound and entitled to make over such residue to the legal executors and nearest of kin of Jacob Dixon senior.

Pursuers'
Pleas.

The pursuers *pleaded*—1. The eldest son having predeceased his father, the testator, the legacy in his favour lapsed, and became void, and did not transmit or accrue to his children or representatives; nor is there any ground here for implying in their favour any conditional institution. 2. The testator having, by the lapse of the legacy, died intestate as to the residue of his estate, that residue, which, both in respect of the testator's directions to realise, by sale, the whole of his funds, and because the heritable property he left was exhausted by heritable debt, consists entirely of moveable succession, belongs to the pursuers and others, the next of kin, and must be accounted for to them by the trustees.

Defenders'
Pleas.

The defenders, the children of Jacob Dixon junior, resisted the action, and *pleaded*—1. The provisions in favour of the eldest son did not lapse by his predeceasing his father, but imply a conditional institution in favour of his children, and, consequently, the defenders are entitled to claim the said provisions; *Magistrates of Montrose v. Robertson*, 21st Nov. 1728; *Walker v. Walker*, 7th Dec. 1744; *Bailey v. Nelson*, 4th June 1822; *Wallace v. Wallace*, 28th January 1807; *Christie v. Paterson*, 5th July 1822; *Wood v. Aitchison*, 26th June 1789, *M.* 13,048.

The Lord Ordinary pronounced the following interlocutor and note:

Lord Ordinary's Interlocutor.

' The Lord Ordinary having resumed consideration of the debate, with the closed record and whole process, In respect that the question relates to the construction of a general family settlement by a father upon his children, by which it is manifest that he intended his whole succession to be regulated, and to leave no part of his property to the distribution of the law; and farther, in respect, that, by the said settlement, the eldest son is evidently the persona prædilecta, and that his share is not, like that of the other children, a definite sum or portion, in full satisfaction of all legal claims, but the whole residue of the estate, after paying the

‘portions of the other children, and even guaranteed, at the ex- 10 June 1886.
 ‘pense of those portions, to the extent of the minimum, greatly ex-
 ‘ceeding the maximum of what is thus provided to each of the
 ‘other children, finds, that the provision so made in favour of
 ‘Jacob Dixon, the younger, the testator’s said eldest son, did not
 ‘lapse or fall to the heirs ab intestato of the father, by the said
 ‘eldest son having predeceased his said father by a few hours; but
 ‘that the principle of the implied condition, *si sine liberis deces-*
 ‘serit, carries the whole right and benefit of the said provision to
 ‘the defenders in this action, the surviving children of the said Ja-
 ‘cob Dixon, the younger, as conditional institutes in the same, and
 ‘therefore sustains the defences, assoilzies the said defenders from
 ‘the whole conclusions of the action, and decerns; finds them en-
 ‘titled to expenses,’ &c.

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Lord Ordi-
nary’s Inter-
locutor.

‘*Note.*—‘Holding the *conditio si sine liberis* to depend on the Note.
 ‘presumpta voluntas of the testator, there probably have been few
 ‘cases where, on the whole matter, there were so strong reasons
 ‘for applying it as the present. The only circumstances which
 ‘could give a colour to the claim of the pursuers are, 1st, That
 ‘the father was aware, when he made his settlement, that his eld-
 ‘est son had children; and, 2d, That in providing for such of his
 ‘other children as had issue, he has expressly called the heirs of
 ‘their bodies as conditional institutes, but left his provision to the
 ‘eldest son individually, and without any such addition. In an or-
 ‘dinary case, these circumstances might be of moment; and it is
 ‘with a view to obviate their effect, that the Lord Ordinary has
 ‘brought into notice the other circumstances which are stated in
 ‘the body of his judgment; and taking them all together, as ele-
 ‘ments in the complex question as to the real or presumed will of
 ‘the testator, he thinks it cannot be reasonably doubted how that
 ‘question should be decided.

‘The existence of children at the date of the settlement is not
 ‘of much weight *per se*, and has often been disregarded in cases of
 ‘this kind. The variance of style in the provisions for the mar-
 ‘ried children, and for the eldest son, is no doubt much more ma-
 ‘terial, and in some cases has been held conclusive as to the pre-
 ‘sumed intention of the testator; and, even in the present case, it
 ‘would present great difficulties, if the eldest son had stood in the
 ‘settlement in the same line or rank with the other children, that
 ‘is, as a proper or special legatee for a definite sum of money. But
 ‘though this is their condition, his is fundamentally different. He
 ‘is not a legatee in the proper sense at all, but the general heir or
 ‘successor to the father’s whole estate, burdened only with the spe-
 ‘cial legacies to his brothers and sisters, or the heirs of their bodies,
 ‘and insured even against those encroaching on his inheritance be-

10 June 1836. 'yond a certain amount. It might be very natural, therefore, for
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 Note. ' the father to express his intention of continuing those special burdens on his general succession, in favour of the issue of his other children, while he considered no such intimation necessary as to the more comprehensive and final destination of that succession to his eldest son.

' It is impossible to read the settlement, with its codicils, without seeing that it was the testator's *enixa voluntas* not to die intestate with regard to any part of this property; and when the concluding words of the deed are attended to, along with the necessary effect of sustaining the claims of the pursuers, it is apprehended that, if effect is to be given to that will and intention, those claims must be rejected. The deed not only leaves the whole residue to the eldest son, but expressly provides, that the portions allotted to the children shall be in full of all legitim, executry, and all that they could ask or claim through his (the father's) death, or that of their mother; and farther declares, that if any of them shall in any way quarrel or object to the settlement they shall forfeit all right under it. Now, though this clause may appear in words to apply to the eldest son as well as the other children, it is manifest, that, in substance and effect, it can apply to them only, since the eldest son is made successor in *universum jus* of the father, and could never therefore be paid off or satisfied of his legal rights by the tender of any specific sum. The meaning of the clause, in short, is plainly to exclude and extinguish any claim on the part of the other children or next of kin, as heirs-at-law (in *mobilibus*) of the father. But it is impossible to give it this effect as against the eldest son, who, by the very terms of this deed, is made heir-at-law and universal successor to the father, under the burden only of their provisions, which are thus limited and conditioned for his sole and exclusive benefit. But the pursuers of this action are those other children; and the claim now insisted in by them is that, as heirs-at-law, they shall take beyond what they are limited to by the terms of the deed, and make an intestate succession, by denying that there is any ground for presuming that this was in any way contrary to the wish and intention of the testator.

' From what has now been said, it will be easily seen that, in the view the Lord Ordinary takes of the matter, the cases in which the *conditio si sine liberis* merely prevents a partial intestacy, (where the deceased has settled his whole property by deed,) and excludes only the heirs-at-law, to whom nothing is there provided in that character, are far more favourable cases for its application, than where its effect is to disappoint and exclude *nominatim substitutes*, who are preferred to such heirs-at-law, and expressly pointed out in the deed as next in the testator's favour to the

‘ parents of the children, who are, notwithstanding, allowed to exclude them; and the grounds of this opinion are thought to be too obvious to need explanation. It was not without some surprise, therefore, that the Lord Ordinary found the pursuers maintaining, at the debate, that the case which here occurs was the least favourable for the application of the condition in question; and that it was even inadmissible, except where it was introduced to disavow an express substitution.

‘ The argument seemed to be very much rested on the circumstance of the principle of extending a provision for a parent to his children, though not mentioned, being generally described as a condition; which, it was said, implied that there must be some ulterior destination to be affected by such condition; and that this was not the case, where, on the failure of the legatee named, the provision merely fell back into the general estate of the testator. In all this, however, it seems to the Lord Ordinary that the true reason and principle of the law is overlooked for a mere verbal subtilty. It is impossible to reflect for a moment on that principle, without seeing that the only question, in all such cases, is, whether there is sufficient ground for holding that the testator truly wished and intended that a provision made to an individual should, on his predecease, go to his surviving children, though not named in the bequest, rather than to that person (whoever he might be) to whom it must have gone if there had been no such children? There must always be some one, to whom, in that case, it would have gone; and whether that person was a nominatim substitute, or the next of kin of the testator, is plainly a matter of indifference, except as affording more or less ground for concluding as to the testator’s probable intention; and, in that view, it seems impossible to doubt that the interest of a nominatim substitute, who is named to the prejudice of the next of kin, must have been more tenderly regarded by the testator than his next of kin, who is excluded. If the children, therefore, are allowed to cut out the nominatim substitute, it would be strange if they should fail, as against the next of kin. Whether they are properly described as succeeding in either case, by virtue of an implied condition on the succession of those who must take, if they do not; or, whether this is less of the nature of a condition, where the person so taking claims only on the hæreditas jacens of the testator, are matters which do not seem at all to touch the plain principle upon which they do succeed, and resolve rather into criticism on the language used in law books in relation to this rule of law, than arguments as to the grounds of its application. If the heirs-at-law had been actually called, by a form of words importing a substitution, is it possible to suppose that this would have given the children of the prede-

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‘ ceasing eldest son a better right to exclude them, than if they had
‘ been passed by altogether, and never once named (in that character)
‘ in the settlement? And yet this is the argument of the pursuers.
‘ If the testator had said, ‘ And failing my said eldest son, I direct
‘ the provision hereby made for him to be divided equally among
‘ my next of kin,’ the pursuers admit that they would have been
‘ excluded by his surviving children. But they contend that the
‘ children have no claim in this case, because the next of kin are
‘ not called at all in the settlement; and that their taking any thing
‘ in that character is indeed anxiously precluded. To the Lord
‘ Ordinary it seems impossible to give any weight to such an argu-
‘ ment, of which he can find no trace in any former case on the sub-
‘ ject. On the contrary, it appears that effect was given to the
‘ principle, as against heirs-at-law, in one branch at least of the
‘ case of Wallace, 28th Jan. 1807, (*Morr. App. voce Clause*, No. 6,)
‘ and in the very recent case of Wilkie v. Jackson, which was
‘ decided last week by the First Division, adhering to an interlocu-
‘ tor of Lord Corehouse of 30th June 1835. That last case indeed
‘ presented both the grounds of difficulty on which the pursuers rely
‘ in the present, the children who prevailed having been in exis-
‘ tence at the date of the settlement, and the provisions to the other
‘ children, in the same deed, being taken expressly to these heirs,
‘ while those to their mother were only given to her individually.’

The pursuers *reclaimed*, and maintained generally, that the interlocutor was erroneous, and more especially that it could not be supported on the grounds stated in the last finding of the Lord Ordinary, and elaborated in the note by his Lordship, there being no room for the application of the *conditio si sine liberis decesserit* to the present case, unless by a perversion of that rule.

The *Dean of Faculty*, for the defenders, admitted that much of the reasoning in the note did not apply.

Opinion of
Court.

Lord Glenlee.—It is not a case for the application of the rule *si sine liberis*, &c. and was not so pleaded in the defences, but was put on a clearer ground. The first thing to be attended to is the nature of the deed, which is a general settlement disposing of the whole of the testator's property, and whereby he provided, more or less, for all his children, leaving no part of the property unbequeathed. Then, as to the rule of law applicable to such a case, I conceive it to be this, that if a father leaves certain provisions to each of his children, and one of those children dies, no matter whether before the father or not, the children of that child so deceasing just come into his place. And it proceeds upon this principle, that it is the duty of a father to provide for the children of a child just

as much as for the child himself. A father, by providing for his child, and not excluding his grandchildren, in effect makes a provision for these grandchildren, for the provision in course descends to them on their parents dying. It would be extraordinary then if a testator meant his grandchildren to succeed, and yet not mean that they should succeed in the event of his surviving his son, their father, whose share they would naturally have succeeded to without dispute had the son not predeceased the testator. As to the idea that any thing rests on the testator's knowledge of the existence of the children of the eldest son, I cannot listen to it. In all cases where a father, in making provision for the maintenance of his family, gives certain provisions to his children, the children of such as predecease come in their place. Unless this were the rule of law, what would be the meaning of the implied condition *si sine liberis decesserit*, which has been introduced with so little bearing on this case? True, this implied condition applies only where there is an express substitution; but then the condition, when it takes effect, destroys or extinguishes this substitution, and leaves the settlement just as if it had contained no such substitution. Now, where there is no such substitution, or where it is extinguished, there comes the question, whether the issue of the predeceasing child, called by such settlement, does not get the parent's share? There is to be seen a case, (not quoted,) *Fleming v. Trustees of Morton*, 6th June 1798, where a settlement by a sister was not held to call the issue of her sisters, and it was found that the legacy had lapsed, because an aunt is not bound, by the natural presumption of piety, to provide for nephews and nieces, as a father is for his children. The general rule is, that a testator stands differently in regard to his issue from what a stranger does, bequeathing to parties not standing in that relation to him. In regard to a legacy by a stranger, the rule is different from that which applies to the case of a father. In the former case, if the legatee predecease, all the conditions fly off. In the Roman law, the distinction applicable to a legacy from a father to his son, and a legacy by a stranger, was recognised; although I am not sure but that, in some cases, even where bequests were made by strangers, the rule was the same; but in general it was otherwise. And as to the *conditio si sine liberis*, it only applied where somebody else was appointed to take.

Lord Justice-Clerk.—Lord Glenlee has put the case on the right footing. As I rather think the implied condition *si sine liberis*, &c. does not apply here, part of the interlocutor had better be omitted.

Lord Meadowbank concurred.

Lord Medwyn.—This is not a case whose decision depends upon the maxim *si sine liberis*, &c. It was only in cases of substitution

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where such a condition was implied in the Roman law. But here there is no substitution: it is not a substitute who claims, but the heirs-at-law. Yet there is another maxim, flowing from the same principle, the *pietas paterna*, upon which the Lord Ordinary's interlocutor may be safely rested, by which a father, providing for his immediate descendent, is held to intend this provision to descend to his grandchild if his immediate issue predecease. And certainly it is much more easy to imply such a rule in the case where there has been no expression of ulterior will, but, on the contrary, that the heir-at-law is not to succeed those where a substitute has been called, after the failure of the only other person specially named. This is a settlement disposing of the whole property of the testator, shewing no intention to leave any part of it subject to the rules of intestate succession: the whole is divided among his children; and where any of these have failed, their children must be preferred. As we are unanimous, I need not go over the cases which bear on this point; but there are two cases to which I may refer, and in which my opinion is fully supported. I refer, first, to the case of *Wood v. Aitchison*, 26th June 1789, *F. C.* There, a testator had settled a certain sum upon himself and his wife in liferent, and to the children to be procreated, whom failing, on himself, his heirs and assignees, in fee. At the death of the father only one child was alive. Another had predeceased, leaving issue. These children claimed a half of the provision, and the Lord Ordinary preferred them. In a reclaiming petition (by Mr Alexander Wight) the law is thus pleaded: 'Although, in bonds of provision granted to children nominatim, and payable at the father's death, the right might transmit to the descendents of those who predeceased their father, the law was different where the provision was in favour of children nascituri. In that case the children had only a contingent or eventual right, depending on their surviving their father.' The report farther bears: 'The Court were of opinion, that, in all provisions of this sort, the issue of the children predeceasing the term of payment were entitled to that share which their parent could have claimed.' Then there is also the case of *Binning v. Binning*, 21st Jan. 1767, *F. C.*, which is an authority much to the same effect. I do not think it of any consequence in this case, that the grandchildren were alive at the date of the settlement, and yet have not been noticed in it. In truth, what is equivalent must occur in every such case; for, in testamentary settlements, the deed is never held to take effect till the death of the testator. In *Neilson v. Bailey*, 4th June 1822, *F. C.*, one of the daughters was married, and had children at the date of the deed: this circumstance is brought under the notice of the Court; but her children obtained

her share after a hearing in presence, on the ground that, when a provision is made by a parent for a child, there is no principle which can be supposed to limit the intention or restrict the provision to the child, and not extend it to the grandchild if the child predecease.

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Judgment.

The Lords pronounced the following interlocutor: 'The Lords having advised the case, and heard counsel for the parties, adhere to the interlocutor of the Lord Ordinary submitted to review, in so far as it finds that the provision made in favour of Jacob Dixon the younger, the testator's eldest son, did not lapse or fall to the heirs ab intestato of the father, by the said eldest son predeceasing his father; and assoilzie the defenders from the whole conclusions of the action, and find them entitled to expenses; find additional expenses due,' &c.

Lord Ordinary, *Jeffrey.* Act. *Rutherford, H. J. Robertson.* Alt. *Dean of Fac.*
(*Hope*), *J. S. More.* *Thomas Grahame, W. S. W. A. G. & R. Ellis, W. S.*
and *D. Fisher, Agents.* *F. Clerk.*

R.

SECOND DIVISION.

No. CLVIII.

11th June 1836.

MINISTER OF THE PARISH OF HARRIS *against* HIS CREDITORS.

CESSIO BONORUM.—*A minister of the Established Church, in obtaining the benefit of cessio, appointed to assign one-half of his stipend to his creditors.*

THE pursuer, a minister of the Established Church, fell into difficulties from heavy losses on a large farm taken by him. He had a wife and children. His stipend did not much exceed L.150. His glebe was said to be worth about L.30 a-year: this, of course, he did not admit. The creditors did not oppose his obtaining the benefit of this process, but claimed an assignation of part of his stipend.

The Court, after some discussion and consideration of the facts, ordained him to assign yearly one-half of his stipend, for the benefit of his present creditors.

Act. *Small Kair.* Ak. *A. McNeill.*

R.

SECOND DIVISION.

No. CLIX.

11th June 1836.

GEORGE GRANVILLE, DUKE OF SUTHERLAND,
against
 HUGH ROSS OF CROMARTY.

SALMON-FISHING.—*Found, that a clause, 'cum piscationibus,' in the titles of a proprietor, with an alleged immemorial practice, by himself and others, of fishing for salmon in an adjacent river with the rod, and occasionally with a hand-net, openly, and without molestation, and of appropriating salmon so caught to the use of himself and his friends, is not relevant and sufficient, (in competition with a proprietor having rights of salmon-fishings in the said river,) to establish a right of salmon-fishing by rod or hand-net.*

(Sequel of the cause, M'Kenzie v. Rose, 26th May 1830, F. C.)

Narrative.

THE Duke of Sutherland, as now in right of Murdo M'Kenzie of Ardross, the original pursuer, has, by his titles, a right to salmon-fishings in the river Shinn. The defender, Mr Rose, (now Ross of Cromarty,) is proprietor of the lands of Achany, situated on the Shinn, by titles containing this general clause, 'with the houses, yards, tofts, crofts and fishings, mosses, muirs, &c. parts, pendicles, and universal pertinents thereof, use and wont, pertaining or known to belong and pertain thereto.' The defender alleged that his authors had been in use to take salmon in the Shinn for forty years, so as to have acquired, in virtue of the general clause of 'fishing,' a right of salmon-fishing; and he contended that he had a right, at all events, to fish trout and other fish, exclusive of salmon, *ex adverso* of his own lands. M'Kenzie, the original pursuer, on the other hand, claimed the sole and exclusive right of fishing for salmon and other fish in the water of Shinn; and raised a declarator to have this found, and that Rose (Ross) had no right; and he also brought a suspension and interdict to have the latter prohibited from fishing. After some procedure, the Lord Ordinary, (12th Nov. 1829,) 'found the suspender and pursuer had produced 'a sufficient title to the property of the fishings of salmon and other fish in the river Shinn, including the linn thereof, generally, as in 'a question with the defender and respondent, who does not pretend 'any right to the said property generally, or any part thereof, but

‘pleads a right of the nature of a servitude thereon, viz. a special right of fishing for salmon, as well as trouts and other fish, by rod, spear and net, but not by net and coble, founded on a grant of lands adjoining, cum piscationibus et pertinentibus, with forty years’ possession of such special right; finds this possession wholly denied by the pursuer and suspender, and therefore remits the cause to the Jury Court.’

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Narrative.

The defender *reclaimed*, craving that the Court ‘would recall and alter the above interlocutor; to find that the titles of the pursuer cannot exclude the defender from killing fish other than salmon in the river Shinn, so far as his property extends along the said river; to recall the interdict to this extent, and find expenses.’ The Court, upon advising cases, pronounced this interlocutor, 26th May 1830: ‘The Lords, &c. recall the interlocutor reclaimed against, and find that the pursuer and suspender has produced a sufficient title to the property of the salmon-fishings in the river Shinn, including the linn thereof, generally, as in a question with the defender and respondent; finds, that the defender and respondent has right to fish trouts in the river Shinn, so far as his property extends along the said river, with trout rods, but not with net and coble, or in any way that may be prejudicial to the salmon-fishings belonging to the pursuer and suspender; recall the interdict to this extent, and, quoad ultra, remit the cause to the Lord Ordinary, reserving all claims to expenses of process for his Lordship’s determination, and decern.’

This judgment, while it sustained Ardross, the original pursuer’s title to the property of the salmon-fishings in the Shinn, was in so far unfavourable to him, that it found the defender entitled to a right of trout-fishing, though under certain qualifications. An appeal was entered to the House of Lords by Ardross, but the judgment was affirmed. The cause having returned to the Lord Ordinary, and the defender having intimated that he intended to retract the supposed abandonment of his right to a salmon-fishing with the rod, he was appointed to lodge a minute of his allegations in support of this special and limited right of salmon-fishing. The defender accordingly averred, that the proprietors of Achany were in the practice of fishing salmon by the rod, and that this practice was never for any considerable period discontinued, and existed down to the commencement of the present proceedings, in a greater or less degree; that they had fished with a hand or hanging net, but that this right was only exercised from time to time, though not so frequently as the right of rod-fishing. It was admitted that they never fished by net and coble, nor with the spear; and it was not averred that they received any rent for their rod-fishing, or that they sold salmon so caught, or ever enjoyed this right as a source

Defender’s
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of profit or emolument. The pursuer, however, denied that the defender's authors ever fished with a hand or hanging net; and although it was admitted that one of the former proprietors angled with the rod, it was expressly averred that this was done with the permission of the pursuer's authors.

Instead of whole facts being sent for trial by a jury, the point of law was raised upon the relevancy, whether the facts, as stated, were relevant to constitute a right of salmon-fishing. On hearing parties, the Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having heard parties' procurators, and considered the remit from the Second Division, minute for the defender, answers thereto, and whole process, finds, that the averments of the defender, as now explained by him, relative to the exercise of a right of salmon-fishing by himself or his authors, are not relevant to support his defences; therefore repels the defences in so far as respects the fishing of salmon; and in so far as respects the same, finds, decerns and declares, and prohibits and interdicts in terms of the libel: Finds no expenses due to either party.'

Note.—'The Lord Ordinary thinks the authorities, particularly the case of Forbes in Fountainhall, and the cases of Colquhoun and Chisholm, are substantially in point. In none of these could the decision rest on any other ground than an opinion held by the Court, that where there is not any express, special or limited title of salmon-fishing in another person, but a competition between two general unlimited titles of salmon-fishing, then the weaker general title cannot be supported to any extent at all by possession, even continuous for forty years of fishing, without objection, by the rod. And the averred accompaniment of an occasional (not said to be continuous) use of a net, whether a *hang-net*, which is illegal in any view, or a *hand-net*, which must mean some small kind of net, could not make the matter materially stronger. The averred circumstance, that the pursuer's authors fished always wholly by cruives, near the mouth of the river, would make the case weaker for the defender, as they had the less call to interfere with any trifling rod-fishing, or to watch any petty net-fishing in the river above the cruives.'

The defender *reclaimed*, craving the Court, either at once to sustain the defender's claim of a right to rod-fishing for salmon, or, before answer, remit to the Lord Ordinary to return to his former interlocutor, remitting the case to the Jury Roll for trial, as to the defender's possession of a fishing along the course of the river Shinn. Minutes of debate were ordered.

Pleaded for the pursuer—The defender's claim arises in competition with the pursuer's right, which is not only founded on an express grant from the Crown, cum salmonum piscationibus, but on a grant which comprehends the whole salmon-fishings in the river. Contrasted with such a right, the Court will receive, with great hesitation, any claim which is founded neither on a Crown grant, nor even on an express grant cum salmonum piscationibus. The question is, what acts of possession are sufficient to give to a general clause cum piscationibus the same force and effect with an express grant; or, in other words, what is sufficient to convert it from a right, which is in its own nature defective and ineffectual, into one valid and effectual, as a jus regale constituted by express grant from the Crown? It is not the mere enjoyment of angling for salmon as a pastime, nor the occasional use of fishing with rod by tolerance of the proprietor. The possession in such a case must be by net and coble, or by cruives, or by some other acknowledged mode of fishing. It must be of such a character as would lead to an immediate challenge if exercised, and would shew at once that it was not merely precarious or by tolerance, but was enjoyed as an exercise of an undoubted right. Neither is the defender entitled to the lesser right of angling for salmon, to which he has latterly limited his claim. Whether the Crown, or any other proprietor of salmon-fishings, could competently convey a limited right of rod-fishing, or whether, in the transmission of salmon-fishing, the acquirer could be burdened with a reservation of rod-fishing in favour of the adjacent heritors, it is immaterial to inquire. The pursuer does not pretend to say what effect might be given in a court of law to an express grant of salmon-fishing by rod. There is no authority recognising its legality. There can be little doubt it is a right which does not admit of being acquired by prescription, the acts of fishing by rod not serving to constitute the right, and consequently being only ascribable to tolerance or precarious possession. As the defender does not hold an express grant of fishing by rod, the privilege of angling for salmon having no definite effect in law as a substantive independent right, and being wholly unknown to conveyancers, the possession averred by the defender is nothing more than what might either have been permitted from a feeling of good neighbourhood, or surreptitiously taken in ignorance of the pursuer and his authors, but that it is in no way capable of sustaining so important an encroachment on the pursuer's salmon-fishing, or of creating a permanent burden over his property. It is only where the possession becomes of that absolute and exclusive nature, which is irreconcilable with any other supposition than an antecedent grant from the Crown, that the ordinary and limited clause, cum piscationibus, secures and

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11 June 1836. comprehends an effectual right of salmon-fishing. As to decisions: In *Forbes v. Udney*, 3d Dec. 1701, *Foiant, Dalrymple, M.* 7812, it was found insufficient to constitute a prescriptive right to a salmon-fishing, that a party had proved his possession of the fishing by angle, spear and wand, that it was accounted a part of his tenant's livelihood, and that the river fronting his ground was his property. In *Leith of Freefield v. Heritors of Don*, 16th Jan. 1773 *, (not reported,) it was found, that Leith had no title to insist in an action against the cruive proprietors for regulation of cruives; his rights being founded on a grant from a subject-superior, cum piscationibus salmonum, and an offer to prove possession by rod, spear and lister, but no offer to prove possession by net and coble. In *Colquhoun v. Smollett*, in 1779 †, (also unreported,) the same

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* *LEITH OF FREEFIELD against HERITORS of DON*, 16th January 1773.—*SALMON-FISHINGS*.—Certain questions as to the regulation of cruives occurred between Leith of Freefield and Heritors of cruive-fishings on the Don. Freefield, in an action at his instance, founded, as his title, on charters by the Mar Family, containing express grants, cum piscationibus salmonum super aqua de Don. The cruive heritors objected to this title as flowing from a subject-superior. But, in support of it, Freefield offered to prove possession by rod, spear and lister; but he did not offer to prove possession by net and coble, or that any rent had ever been paid to him. The Lord Ordinary, (Auchinleck,) at first pronounced this interlocutor: 'Repels the objections to the pursuer's title, and finds, as the pursuer has a right from Lord Braco, who has a grant from the Crown of a variety of baronies, whereof the pursuer's lands are a part, cum salmonum piscationibus, the same is a good title.' Upon advising mutual representations, his Lordship allowed a proof of facts and circumstances, before answer, as to the objection to the title.

The defenders *reclaimed*, on the ground, 'that, as the only possession which the pursuer or others are said to have had of any fishing is by rod, spear and lister, which is common to every heritor who has access to a river where any fishes can be caught, it is no such possession as can give a right of prescription.' The pursuer in answer admitted, that that was the sort of possession he wished to prove, and that 'these acts of possession were sufficiently strong to support a right properly constituted.'

The Court found, 16th January 1773, 'that Freefield has not produced a sufficient title to insist in the action, and remit to the Lord Ordinary to proceed accordingly.'

† *Mrs SMOLLETT of BONHILL against Sir JAMES COLQUHOUN of LUSS*.—*SALMON-FISHINGS*.—Sir James Colquhoun and his ancestors held an express grant from the Crown of the salmon-fishings in the Leven, from the place where that river issues out of Lochlomond, called the Balloch, down to the salt sea, where the tide flows. In virtue of this right, he and his predecessors had been in the constant possession of salmon-fishings within these bounds. The lands of Bonhill, belonging to Mrs Smollett, are situated upon one of the banks of the Leven, within the bounds above specified, which indeed comprehend the whole course of the Leven. These lands were held by the Family of Smollett of the Crown, and the proprietors were infest in the lands of Bonhill and others, with houses and woods, *fishings*, parts, pendicles, &c. The proprietors of Bonhill had been

principles were recognised. It was held, that a possession of fish- 11 June 1836.
 ing salmon only by the rod was of so inferior a kind, that it could not constitute a right of salmon-fishing, and that it did not entitle the Family of Smollett, who had only a grant from the Crown of lands cum piscationibus, to interfere with Sir James Colquhoun's grant from the Crown of the salmon-fishings in the Leven. In *Chisholm v. Fraser*, 17th June 1801, *F. C. M. App. Salmon-Fishing*, No. 1, which was an action for regulating cruives, Chisholm's title, founded on a clause cum piscationibus, with possession of fishing salmon by rod and spear only, without ever having sold the salmon or let the right, was found insufficient.

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in the constant use to fish salmon by the rod, ex adverso of their own lands, and had even kept a servant for the purpose of killing salmon and it appeared that they occasionally had used a salmon net.

Sir James Colquhoun, however, some time prior to 1779, conceived that they were encroaching upon his right of salmon-fishing, and interrupted them. Mrs Smollett thereupon brought a declarator, concluding that she had an undoubted right to a salmon-fishing, and other fishings on Lochlomond, and also on the Leven, ex adverso of her own lands, in virtue of her infestment and immemorial possession; and also concluding, that Sir James should be prohibited from interrupting her in the said right of fishing, and to remove certain poles and stobs of wood, and nets thereon, placed by him at the mouth of Lochlomond, and to leave the passage from the said loch free and open in all time to come. In the course of the proof which was allowed, the Family of Smollett proved that they had been in use to keep a servant for supplying them with salmon, and that they had a salmon net, with which some of the witnesses had seen salmon caught, although it did not distinctly appear from the proof whether it was a proper salmon net or not. It was proved that they had been in the use to fish salmon themselves by the rod, and to employ their servants to do so. It appeared from the proof that rod-fishing was a more advantageous mode of catching salmon than in almost any other river, owing to the Leven being very rapid, inasmuch that Sir James Colquhoun and his tacksman had been in use to let the liberty of fishing with a single rod for L.5 or L.6 sterling per annum, and the liberty of fishing with a double rod at a much higher rate. The Lord Ordinary, (Auchinleck,) 12th Dec. 1778, found, that 'the pursuer, Mrs Smollett, has a grant of her lands cum piscationibus, which, with continued uninterrupted possession for forty years, would give her a good right to a salmon-fishing by prescription, but finds the proof brought by her being chiefly by the rod, which is a fishing of a meaner kind, which, when persons living in a good neighbourhood are permitted to use, does not constitute a right of salmon-fishing, but may well be ascribed to the indulgence of good neighbourhood, and besides, even this meaner kind was not continued, and therefore she cannot compete with the defender, who stands infest cum salmonum piscationibus, which is a proper and legal right, and therefore finds the defender has the exclusive right to the salmon-fishings within the bounds libelled.' Mrs Smollett reclaimed, and *pleaded*, alternatively, that in respect of the foresaid possession, she had either a general right of salmon-fishing, or at least a special right of fishing with rod and spear, according to the state of possession previously enjoyed by her authors. The Court, upon advising petition and answers, adhered to the Lord Ordinary's interlocutor.

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The defender *pleaded*—That the following conclusions were deducible from the settled principles and decisions applicable to this question : 1. That a right of taking salmon by the rod or hand-net is not inter regalia, but is a right competent to every proprietor, who, without trespass, has access to the river and its banks, subject, perhaps, to such modification as may prevent it from abuse, or from substantially interfering with the higher right of fishing appropriated to the Crown; *Bell's Princ.* § 671 and 1100; Leslie, 29th June 1593, *M.* 14,249; Gairlies, 30th July 1605, *M. ibid.* 2. At least a right of taking salmon by the rod is a right capable of being acquired either by express grant, or by a clause cum piscationibus, followed by prescriptive possession; and that the possession of rod-fishing, though not a means of acquiring a higher fishing, or a right to interfere with cruive-fishing, is yet a good ground for constituting and maintaining this particular kind of privilege to the extent to which it has actually been possessed. 3. None of the cases referred to by the Lord Ordinary and pursuers support the pursuers' view, but, on the contrary, are perfectly consistent with the views above mentioned. 4. At all events, in a question of this kind, much will depend upon the exact nature and character of the possession proved, either as implying a mere tolerance, or as asserting a positive right; and the question of law ought to be reserved for consideration, along with, or after an investigation into the facts.

As to the authorities relied on by the pursuers in Udney's case, the question at issue between the parties was only a mutual claim to exclusive cruive-fishing. A possession by rod and spear was pleaded as sufficient to constitute a right of the highest kind, though clearly it was not sufficient; but nothing was argued or determined as to the point, whether a possession by rod and spear was not sufficient to constitute a right of fishing by rod and spear. In Smollett's case, the action was laid so as to establish, not a limited privilege of rod-fishing, but a full right of salmon-fishing in its utmost extent. The pursuer injured her claim by pushing it too far. The poles and stobs complained of by Mrs Smollett might be sanctioned by the Court without any intention to let Sir James Colquhoun invade her limited right of rod-fishing, which is perhaps not entitled to equal protection with a higher right of fishing.

At the advising, the following opinions were delivered :

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Court.

Lord Medwyn.—Although the Court has already sustained the right of the pursuer's author to the property of the fishings of salmon in the river Shinn, it may be worth while to remind your Lordships, with a view to a statement of the defender in this case, that in the title of the pursuer's author in 1720, it is expressly denomi-

nated a coble-fishing, cum lie corfehouse, (hut for fishers,) cum privilegiis, casualitatibus et proficuis earundem quibuscunque, in the most ample terms of such a grant, thus apparently recognising only a coble-fishing as a subject of property, and by no means importing that the river could not be fished by net and coble; whereas the defender has nothing but the term *fishings* in the general enumeration of the pertinents of the lands conveyed, in a title which does not flow from the Crown, but from a subject-superior, who had no grant of salmon-fishing in the river in his titles, and never attempted to interfere with the right of the pursuer's authors under their express grant.

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The rule of law as to salmon-fishing is thus laid down by Craig, i. 16. 38: 'Salmonum piscatio apud nos inter regalia numeratur, neque cuiquam hodie concessa videtur, nisi specialis ejus in concessione mentio fiat.' He adds, 'Antiquitus autem sub nomine piscationis comprehendebatur etiam apud nos, quoties perpetua et ultra hominum memoriam possessio accesserat.' The same doctrine is laid down at lib. ii. d. 8. § 15. He there discusses the question, whether the words cum piscationibus in a charter of a barony will carry a right of salmon-fishing, and seems to prefer the opinion that it does not, but says, 'Novi sane plerosque viros nobiles ex hac generalis clausula (*cum piscationibus*) etiam salmonum piscationem præscripsisse, et propriam fecisse; a quibus eas auferre durum esset, quod a jure communi non abhorret.' The terms in which Stair lays down the law on this subject may almost be reckoned a translation of these passages: 'Salmon-fishing is also *inter regalia*, and therefore passeth not ordinarily as pertinent, and ought to be expressed in the infeftment; yet, in some cases, salmon-fishing hath been found constituted without special expression, but only by the common clause *cum piscationibus* and long possession;' Stair, ii. 3. 69. The instances referred to are chiefly in the case of a barony, or when the term cum piscariis (the fishing-station) is used, which, in ancient conveyancing, imported a higher right than the other. But I do not mean to dispute that the Court have latterly held, particularly since the case of Lord Stormont, Aug. 1773, that such a title, even in a charter from a subject-superior, is sufficient to prescribe a right of salmon-fishing by constant and immemorial possession; and I only refer to the above authorities to shew that it is a deviation from the rule of law, admitted from the feelings mentioned by Craig, that it would be hard to deprive them of what they had so long enjoyed by the acquiescence of all mankind, yet to be admitted only when the possession is complete, and of the full right of fishing salmon in the usual mode, i. e. by net and coble. Such an ample and public exercise of the right, if uninterrupted

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and continuous for forty years, may well imply that the *piscationes* conveyed were intended to include salmon-fishing; while it would be quite otherwise if the fishing was merely for amusement or sport by the rod or spear, and not continuous or uninterrupted by an occasional exercise of this limited use, which it might be reckoned unneighbourly to interrupt, which it is admitted is not capable of becoming a source of patrimonial profit, more especially when this pretended right is insisted in against the direct grantee of salmon-fishing from the Crown. This seems to have been the view of the Court in the cases referred to by the Lord Ordinary, which, I think, amply support his view of this case.

The old case of Gairlies shews that the possession, to preserve a right of salmon-fishing, must be at least a fishing by coble. In *Forbes v. Udney*, Fountainhall reports it to have been found by the Court, that fishing by angle, spear and wand, was not a sufficient possession for salmon-fishing; and accordingly it is abridged by Lord Kames in the Dictionary, as laying down that proposition, *voce Prescription*. And although Dalrymple's report does not bear expressly that this was so found, it bears nothing to the contrary. In fact, it was not his object to report this point; for it will be observed that the case is reported under the title *Jus tertii*, and embraces two points only, illustrative of that doctrine. Hence, on examining the two reports, it will be found that they are not contradictory. Dalrymple notices the first two points in Fountainhall, the latter with a slight variation, that it was *jus tertii* also, 'Udney having no interest to allege prescription of the obligation of his author, unless he could allege prescription of his author's right non utendo;' and that he could not allege this is the point reported by Fountainhall. Dalrymple having reported these points, gives no information as to the fate of the case, as he was not reporting it with a view to the law of salmon-fishing; but he shews that Udney's plea on his possession was not sustained, thus confirming Fountainhall; for he says, 'The probation of possession does neither constitute a right by prescription, nor takes off the right of either party non utendo; so that the point of right depends upon the respective production;' which agrees pretty much with Fountainhall's account, who joins to the more ancient right the more pregnant possession, as also influencing the Court to prefer Forbes, and assoilzie from Udney's declarator, although he actually was infest within the boundary of the other's fishings cum salmonum piscationibus ex adverso of his lands; the Court holding that the title cum piscariis was applicable to all kinds of fishings, and with the symbols of sasine, boats, cruives and nets, was applicable only to salmon-fishing. The point which the

Court had no occasion to inquire into was, whether anterior possession was to be presumed. 11 June 1836.

The next case is that of Smollet, and a more direct case upon this point cannot be figured.

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The defender finds fault with Mrs Smollet in this case for not confining herself to claim the inferior right which she exercised; that she injured her claim by pushing it too far. But I do not see what other claim she could make than she did. She claims, in general terms, a right of salmon-fishing; and she claims it according as she possessed it, on the ground of prescription, by the rod. The ingenuity of her advisers had not devised a claim of a more limited kind; and the interlocutor of the Lord Ordinary and the Court shews what would have been the fate of a claim limited to a fishing by the rod merely.

A few years previous to this the same question had occurred, in an attempt by Leith of Freefield to regulate the cruive-fishings on the Don.

The grounds of the finding in that case are more fully explained by the Lord Ordinary, when he comes to apply it. 1st, That the pursuer's titles, which bear a grant of salmon-fishings, are derived from subjects who have no right to make such grants, unless they have themselves a right from the Crown: this ratio, I admit, would not be sufficient now if there had been the proper kind of possession; and, 2d, That he does not offer to prove that he and his authors have immemorially, or from any period, possessed the salmon-fishing. In short, that his title was no higher than a grant cum piscationibus, and that the possession condescended on by rod, spear or lister, was not the possession of a salmon-fishing such as would constitute such a right by prescription.

The next case to be noticed is *Chisholm v. Fraser*, 17th June 1801, where it was found that 'an infestment cum piscationibus, followed by forty years' possession of killing salmon with the rod and spear, was not a sufficient title to insist in an action for regulating the cruive-fishings of an inferior heritor,'—just repeating the judgment which had been given in Freefield's case, on the simple ground, that a fishing by rod and spear was not the mode of exercising this right contemplated by law, and that it was only by the public and effectual exercise of it by net and coble, calling upon any one having interest to interrupt and put it down, that forty years' possession will constitute a right by prescription. If Chisholm could have established such a right, his title to regulate the cruive-fishings in the river was unquestionable.

It is a just remark in the case for the Duke of Sutherland, that there is no notice in our writers on the law of Scotland, nor any

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It may not be useless to observe, that the symbols by which sasine of a salmon-fishing is given are net and coble, indicating clearly that that is the mode in which it is to be exercised. It would have been much easier to convey this right by delivering to the disponent a fishing-rod, or spear, or lister, if that mode had been recognised as the mode of using or acquiring this right.

At the same time, in some of the pleadings in the above cases, it is sometimes assumed, as if the right of fishing salmon with the rod *ex adverso* of a proprietor's lands was a pertinent of property requiring no express grant. None of our law authorities lay down any such doctrine, with the exception of our latest writer, (*Bell's Princ.*) But I cannot assent to any such doctrine. There was at one time an inclination in our courts to limit the privilege of salmon-fishings, being *inter regalia*, to those within sea-mark, or where the sea ebbs and flows, or where the fishing is with net and coble, or trail-net; in all which cases an express disposition was necessary, otherwise that it passes under the clause *cum piscationibus*; Leslie, 29th June 1593; *Ld. of Gairlies*, 30th July 1605, and 6th Mar. 1606; *Dict. v. Salmon-Fishing*. But this distinction seems to have been adopted, in order to protect the rights of those heritors who had immemorially enjoyed this privilege, till, as expressed by Craig, it would have been *durum* to have taken it away; and it probably led to the establishing of it as law, that such a title, with a proper sort of possession, was sufficient to prescribe a right to salmon-fishing, though *regale*. But since that doctrine has been established in our law, salmon-fishing has been reckoned *inter regalia*, wherever exercised; and no such right is recognised as a common law right of fishing with the rod *ex adverso* of a proprietor's lands. It seems impossible to allege this after the case of *Smollett*. Something, no doubt, is said in the argument for Lovat to this effect, in his petition to the Court; but no such idea is to be found in the additional petition allowed by the Court, in order to notice the cases which had been suggested from the Bench, no doubt by the great lawyer then at the head of the Court, (Sir Ilay Campbell,) and which is much more carefully drawn than the original petition, which had not noticed any of these cases, or the important argument deducible from them, against such a view of the law; and in the answers for Chisholm, whose interest it would have been to fortify and enlarge his rights as much as he could, it is expressly said, 'The respondent does not know that there is any authority for this doctrine; on the contrary, he has always understood that the right to kill salmon in whatever way, whether with the rod and spear, net and coble, or cruives, (according as the channel of the river

'will admit,) requires some original title, and does not belong to every proprietor, as a mere accessory, or as a part and pertinent of his lands. All our lawyers have laid it down in general and comprehensive terms, that the right of killing salmon is a jus regale, without distinguishing whether that right is exercised by the rod, the spear, net or coble, or by cruives;' and I think that statement of the law is correct. I am therefore of opinion that the interlocutor of the Lord Ordinary is well founded, and ought to be adhered to.

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Court.

Lord Justice-Clerk.—I have no doubt as to the propriety of adhering, and I rest my opinion upon the authorities referred to. No sort of right of salmon-fishing is carried by those titles of the defender, and the alleged possession. It must be held to be mere tolerance on the part of those possessing the higher and undoubted right of salmon-fishing. What would we say to the doctrine, that every proprietor on a river, having the words cum piscationibus in his charter, without any prescriptive possession of the right of salmon-fishing, were to arrogate the right, upon the mere averment of having enjoyed the inferior mode of catching salmon for the use of himself and his family? This would be to place entirely at the discretion of such proprietors the rights of others. Accordingly, no such state of things prevails; the permission to angle being generally obtained by paying a certain sum to those having right to give it. I take for granted here, that there has been the exercise of a right of rod-fishing; but then there is a stream of authorities which go to establish that this is not sufficient to constitute a right of salmon-fishing. The great object in Smollett's case was to declare the limited right of fishing, as may be seen from the interlocutor of the Lord Auchinleck.

Lord Glenlee concurred.

Lord Meadowbank was not present.

The Court adhered, with expenses.

Judgment.

Lord Ordinary, *Mackenzie*. Act, *Rutherford, A. Anderson*. Alt. *Dean of Fac.*
(*Hope, Neaves*. Wm. *Mackenzie*, W. S. and *Sang & Adam*, S. S. C. Agents.
F. Clerk.

R.

No. CLX.

FIRST DIVISION.

11th June 1836.

SIR JAMES GRANT SUTTIE against GEORGE GORDON AND OTHERS.

TACK.—This was a special case, where the Court refused to lay upon the tenant the expense of a sequestration taken out by a landlord, *currente termino*, in se-

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Suttie v. Gordon and Others.

Lord Ordinary, *Corchouse.*

Act. *Keay, Whigham.*

Alt. *Forsyth, A. McNeill.*

J. & A. Smith, W.S. and William Allan, S.S.C. Agents.

D. Clerk.

C. R.

FIRST DIVISION.

No. CLXI.

14th June 1836.

THE MAGISTRATES OF EDINBURGH *against* ALEXANDER SCOT.

REGALIA. — (HARBOUR.) — **DECLARATOR.** — **INTERDICT.** — *In an action of declarator, at the instance of certain pursuers who had obtained from the Crown a grant of port and harbour, with the privileges attendant thereon, including that of levying harbour, shore, and other dues within the precincts assigned in the grant; where, in defence, it was pleaded, inter alia, that the defender's lands were not within the limits of the grant to the pursuers; that, besides, the pursuers had lost, by disuse, any right they might have had to levy dues opposite to the lands of the defender; and, further, that the defender had acquired a prescriptive right to land goods for his own use; — circumstances in which it was found that the pursuers were entitled to a decree declaratory of their rights, in terms of the grants in their favour; and the Court granted interdict against the defender, prohibiting him from erecting a harbour, pier or dock, or other building, so as to interrupt, interfere with, or encroach on the rights vested in the pursuers.*

Narrative. By several royal charters, and, amongst others, charters granted by King Robert Bruce, dated 28th May 1329, by King James II, dated in November 1454, and by King James III, in November 1482, there were conveyed and granted in favour of the corporation of the city of Edinburgh, various rights and privileges, including the port of Leith, roadstead thereof, and the customs and dues of vessels, goods, &c. entering the same.

King James IV, by a charter dated in March 1510, granted to the predecessors of the pursuers, and their successors, 'totum por-

‘tum nostrum novum nuncupat. le New Havin, cum bondis ejusdem 14 June 1836.
 ‘per nos in maris litore nuper factum et constructum, inter capel-
 ‘lam Sancti Nicolai ex parte boreali ville de Leith, et terras de
 ‘Werdy Brow, cum omnibus predicti portus pecuniis, viz. havin
 ‘silver et proficuis ejusdem, sibi et portui suo de Leith annexandis
 ‘et applicandis, cum communi et libero passagio eundo ad prefatum
 ‘novum portum et redeundo ab eodem omni tempore et per omnes
 ‘vias omniaque passagia, que ducunt ad eundem portum—Cum li-
 ‘bertate et spatio ad edificandum et prolongandum munitionem,
 ‘viz. le pere et bulwerk, ejusdem portus; ac mercancias et bona
 ‘sua in navibus, apud dictum portum, oneranda et exoneranda super
 ‘terram locandi et ponendi; anchorasque et funes in litore figendi,
 ‘a fluxu maris ejusdem portus usque ad frontem anteriorem domo-
 ‘rum de le South Raw, viz. que ex parte australi transitus ville
 ‘dicti novi portus edificantur; et sicut se ante sinum ejusdem in
 ‘longum extendunt. Ac cum omnibus aliis privilegiis dicti novi
 ‘portus ac simili modo et adeo libere, in omnibus et per omnia
 ‘sicut ipsi de portu suo de Leith et libertati ejusdem liberius in-
 ‘feodantur et eundem possident.’ Sasine thereafter followed in
 May 1511.

The Magis-
 trates of Edin-
 burgh v. Scot.
 Narrative.

King James VI, by charter dated in March 1603, commonly called the Golden Charter, confirmed various prior grants, and, among others, the above-mentioned grant of the port of Newhaven, and granted of new to the town of Edinburgh the ports of Leith and Newhaven in the following terms: ‘Et non solum totum et inte-
 ‘grum predictum portum, estuarium et receptaculum, vulgo the
 ‘poirt, hevin and herbrie de Leith et fundum ejusdem ac radam
 ‘et stationem de Leith et pertinen.’ &c. ‘Ac cum omnibus
 ‘commoditatibus, asiamentis, privilegiis et immunitatibus ad pre-
 ‘missa spectan. et pertinen. Et in specie, omnia et singula privi-
 ‘legia, custumas, et alia prout ad longum in vulgari sequitur,
 ‘viz. and in speciall, all and haill the privileges, custumes, hevyn
 ‘silver, anchoragiis, doksilver, goldyn penneis, schoir silver, ex-
 ‘actionis, rentis, dewties, and casualiteis of the said poirt and
 ‘hevyn of Leyth, raid thereof, and toun of Leith, and of the New-
 ‘hevin, according to the tabill heir following,’ &c. ‘sed etiam totum
 ‘et integrum antedictum novum portum nuncupatum the hevin
 ‘and harbrie of Newhevin, ac stationem et radam ejusdem, cum
 ‘terris cuniculariis vulgo lie lynkis, domibus, edificiis, terris et
 ‘bondis et suis pertinentiis jacen. super littus maris ex australi
 ‘latere aque de Forth, a capella Sancti Nicholai ex boreali latere
 ‘ville de Leyth, usque ad terras nuncupatas Weirdbrow, et in
 ‘longitudine ad arabilas terras sicuti dicti prepositus, ballivi
 ‘et consules, eorumque predecessores easdem habent seu juste pos-

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‘sidere poterint,’ ‘cum omnibus et integris privilegiis, portuum pecu-
niis vulgo lie hevin silver, schoir silver, anchoragiis et lie doksilver,
golden pennies, impositionibus, custumis, taxationibus, exactioni-
bus, redditibus, censibus, firmis, devoriis et ejusdem casualitatibus,
ipsis eorumque portu antedicto de Leith, annexandis et applicandis;
ac cum communi et libero passagio eundi et redeundi, ad et ab
dicto nostro burgo de Edinburgh, ad prefatum novum portum, et
ad predictas terras cunicularias et bondas earundem, per omnes
vias, plateas, tramites, semitas et passagia ad eundem ducen. pe-
dibus et equis, vulgo on futt and horse, ac cum eorum curribus et
vehiculis, bonis et mercimoniis que contigerint onerari seu exo-
nerari apud predictum novum portum vulgo lie Newhevin vehere
et transportare, ad et ab eodem competentis latitudinis et longitu-
dinis ad hoc necessarii, cum libertate et spatio edificandi et am-
plificandi piram et propugnaculum, vulgo the peir and bulwark
ejusdem portus, ac mercantias et bona sua in navibus, cymbis seu
aliis vasis, apud dictum portum oneranda et exoneranda, super
terram locandi et ponendi, anchorasque rudentes, funes et ligami-
na, in maris litore et lie schoir, a fluxu maris antedicti portus et
terrarum cuniculariarum, usque ad frontem anteriorem domorum
de lie Southraw, que ex parte australi transitus ville de Newhevin
edificantur, et sicut si ante et ad sinum ejusdem in longum exten-
dunt figendi; Ac cum omnibus aliis privilegiis antedicti novi portus,
ac simili modo et adeo libere in omnibus et per omnia, sicut ipsi
de portu suo de Leyth, custumis, libertatibus et pertinentiis ejus-
dem superius recitatis liberius infeodantur, et eundem possident
seu possidere poterint.’

The charter also contained a clause of union, uniting, annexing
and incorporating, ‘ad et cum dicto nostro burgo de Edinburgh,
statu, privilegiis et libertatibus predictis eidem concessis, omnes
et singulas predictas moras communes, maresias, lacus, ripas, ter-
ras, portus vulgo lie poirtis and hevynis de Leyth et Newhevin,
radas, stationes, propugnacula, vulgo lie poirtis and hevynis de
Leyth et Newhevin, radas, stationes, propugnacula, vulgo raidis,
peiris, schoirris, bulwarkis, bondas, vias, semitas, plateas, passagia,
cum plenis et liberis jurisdictionibus; in unum liberum burgum
regale, tenementum et tenandriam.’

By a charter dated in October 1636, King Charles the First, con-
firmed prior grants, and of new granted to the burgh of Edinburgh,
‘totas et integras dict. villam et terras de Newhevin et bondas
ejusdem, inter St Nicholas Chapell et Wairdiebrow, cum portu,
estuarii, receptaculo et rada ejusdem, lie raid, cum lie Linkis,
domibus, edificiis, terris, bondis et pertinen. ejusmodi, cum uni-

'versis privilegiis, libertatibus, et custumis eorundem, lie hevin 14 June 1836
'silver, schoir silver,' &c.

The property of Trinity, belonging to the defender, is situated to the west of the port or village of Newhaven. The lands of Trinity formerly belonged to the kirk-session of South Leith; and in a charter, dated 16th March 1614, granted by King James, they are thus described: 'And two acres of the said lands, lying betwixt the lands of old belonging to our predecessors, on the east; the laird of Inverleith's land on the west, ascending to the Craighead and waterdrop of the same on the south, and descending to the flood mark on the northern side.'

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In the subsequent titles they are described as 'All and whole that piece of ground of the lands of Trinity Main, formerly called Bellshaugh, and part of the field called Bogside, immediately south of the same, and now called Christian Bank, &c. bounded by the King's highway leading from Newhaven to Cramond on the north, &c. all lying in parish of North Leith and sheriffdom of Edinburgh.'

The pursuers, finding that the defender had applied to Parliament for leave to erect a harbour opposite to his lands of Trinity, raised this action to have it declared, (1.) That the pursuers have good and undoubted right to exact and levy harbour, shore, and other dues on all vessels and goods of every description, loaded and unloaded, from or upon the shore of the Firth of Forth, between St Nicolas' Chapel and Wardiebrow aforesaid, or at least from or upon any part of the said shore opposite or adjacent to the property at Trinity or Trinity Bay, belonging to the said Alexander Scot, as fully, freely, and to the same extent as they are, in virtue of the foresaid royal charters, entitled to do at the port of Leith. (2.) That the shore adjoining the said property of the said Alexander Scot forms part of the links conveyed by the foresaid royal charters, and belongs exclusively to the community of Edinburgh. (3.) That the said Alexander Scot has no right of free port or of harbour, or any privilege or right whatever connected with the sea shore within the bounds above mentioned. (4.) That the property of the said Alexander Scot does not extend to, and is not bounded by the sea or sea shore, and he has no right to use and occupy the said shore adjoining his said lands for any purposes whatever, whether of landing goods, making piers, or similar purposes. (5.) That neither the said Alexander Scot, nor any one deriving right of, from, or through him, have right to erect, build, or establish a harbour, pier, or dock, or to load or unload goods belonging to themselves, or for their own use, of any description, from or upon his said property at Trinity or Trinity Bay, without the consent

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of the pursuers, and without payment of the shore, harbour, and other dues exigible by the pursuers in virtue of the foresaid royal charters, and no right whatever to land or receive the goods of others thereon, except under the grant of free port belonging to the pursuers, and as authorised by them, and subject to the payment and conditions of their right of dock and harbour. (6.) That any attempt by the said Alexander Scot, or those deriving right from him, to use the sea shore adjoining to the said lands of Trinity as a free port or harbour, or to land goods thereon, is inconsistent with, and an evasion of the rights, privileges and duties vested in and belonging to the pursuers and the community of Edinburgh, and with the public right of port and harbour established at Leith and Newhaven, whether the said shore adjoining to the said lands of Trinity is within the bounds within which the dues belonging to the pursuers can be levied or not. The summons concludes, that the defender, and all others acquiring right from him, should be interdicted and prohibited from erecting a harbour, pier or dock, so as to interfere with, or encroach on the rights vested in the pursuers.

Pursuers' Pleas.

The pursuers *pleaded*—1. That they are entitled, in virtue of their charters, and the possession following thereon, to exact and levy harbour, shore and other dues, as libelled, upon all vessels resorting to, and upon all goods loaded and unloaded within any part of the district between St Nicolas' Chapel and Wardiebrae, including that part thereof lying opposite or to the north of Trinity. 2. The shore opposite to, or to the northward of the defender's lands of Trinity, belongs to the pursuers, in respect the same is the site of what formerly formed the links, which were conveyed to, and possessed by their predecessors as their property. 3. The defender has no right or title, either by grant, by prescription, or otherwise, to a port or harbour to the northward of his lands, or within any part of the foresaid district, or to levy dues upon vessels resorting to the same, or upon goods loaded or unloaded there, or to appropriate or occupy any part of the same shore, for making piers or any similar purposes. 4. The defender cannot have the privilege of so occupying or appropriating the said shore, in virtue of his right to the lands of Trinity, in respect not only that these titles do not include any such privilege, but likewise, that his lands are not bounded by the sea, and that the public road, and also the site of the links belonging to the pursuers, are interposed between the sea and his lands: And, 5. *Separatim*, The defender is not entitled to use the said shore as a free port or harbour belonging to himself, whether or not the said shore be within the bounds within which the dues belonging to the pursuers are leviable;—in respect that a grant of a port and harbour, within the bounds included in a former

grant to a different party, or in the immediate vicinity thereof, is inept; and that, in the present case, the use of the shore by the defender, for the purpose of trade, of loading and unloading vessels, and shipping and landing commodities, would, in the circumstances, be an evasion and an unlawful infringement of the rights, privileges and dues belonging to the pursuers, and the right of public port and harbour established at Leith and Newhaven.

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The defender *pleaded*—1. The pursuers have no legal title to support the conclusions of the present action. They never had any right or title to the ground libelled on, which was followed with possession; and, even if they had, it has been long ago lost by dereliction, and by the effect of the negative prescription. 2. The defender, both from his various titles, and from the state of the possession enjoyed by him and his predecessors for more than forty years, has the sole right to claim, appropriate, and inclose the shore-ground in dispute. 3. The lands of Trinity, and the ground *ex adverso* of it, are not included within either the ports or harbours of Leith and Newhaven, and never formed any part of these ports or harbours; and consequently the pursuers are not entitled to levy dues or any duties upon any goods or vessels loading or unloading upon these lands. 4. Even if the pursuers could shew that they were entitled to levy any dues at the defender's lands, as comprehended within the port of Newhaven, in virtue of the charters libelled,—the right to levy the dues therein specified has been lost by dereliction and non-usage, and could not prevent the defender from erecting piers on the shore for the accommodation of himself and his tenants, and others who may frequent the same by his permission; at all events, even in this view, the pursuers could not claim any other or higher dues than those which are granted by the Golden Charter.

Defender's Pleas.

Cases were ordered by the Lord Ordinary, and the cause was reported to the Court.

The pursuers *maintained*—That they have a right of free port from between St Nicholas' Chapel to Wardiebrow, and that the lands of Trinity were included within these boundaries: that the links which were granted to them extended to the north of Trinity, and lay between it and the sea; and that they have exercised the rights of possession both of the harbour and of the links, in so far as these have extended beyond the lands of Trinity to the west of Newhaven.

Argument for Pursuers.

That according to the authority of Hargreave's Tracts, p. 46, the grantees of a right of port are entitled to levy dues in the whole of the district specified in the grant: That this right has been exercised by the pursuers; for, in the *first* place, in all the acts of

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Argument for Pursuers.

Parliament for levying dues for erecting the docks at Leith, the Legislature expressly confirmed the right of the pursuers to levy the dues of the port of Newhaven as well as of Leith, according to the table therein referred to. 2. In the statutes also regarding the Fife and Mid-Lothian ferries, the Legislature has confirmed the rights of the pursuers, as owners of the port of Newhaven. 3. Accordingly, the same shore-dues, &c. which are leviable at the port of Leith, have always been levied at whatever parts of the districts between St Nicholas' Chapel and Wardiebrow vessels have been accustomed to land, and goods have been shipped or unshipped. In particular, the fact is admitted, that such dues have been levied upon all vessels which have resorted to the stone pier at the village of Newhaven, including even the passage-boats upon the Fife and Mid-Lothian ferries, and also upon all goods landed thereat, including the very materials of which the pier was constructed. Besides, when a temporary pier was erected at a place situated due north of the lands of Trinity, for shipping and unshipping goods carried by a London steam-boat, the shore-dues were levied upon all such goods; and, above all, when the owners of steam-boats resorting to the chain pier, which has been erected also to the north of the lands of Trinity, attempted to withhold payment of the shore-dues, the pursuers effectually vindicated their right in the Court of Admiralty, and in this Court, by decrees against them, finding expressly, that that pier was within the bounds of the port of Newhaven, and on that ground decerning the owners of these vessels to pay the accustomed shore-dues to the pursuers: And, 4. The right of the pursuers, as owners of the right of port along the whole of this district, was expressly recognised, both when the chain pier was erected, and when the bulwark was built, by which the road trustees have protected the public road along the shore, and by their permission to perform these operations as a matter of favour, having been expressly applied for, and obtained before the operations were commenced: That even, assuming that the pursuers had lost by prescription their rights to levy dues at a particular part of the port, the right of port would still remain, which implies a power to prevent the defender's appropriating ground included in the bounds of the port for the purpose of erecting a rival harbour, because a grant of a branch of the regalia implies that it shall not be frustrated by any similar grant to another person; *Hargreave's Tracts*, p. 60; *Tarbet v. Boyle*, 22d Dec. 1731; *Campbell v. Campbell*, 18th Jan. 1815; *Trustees of Kirkcaldy Ferry*, 18th Dec. 1821, *S. & D.* It has been held in the following decisions regarding markets, that a second grant in the neighbourhood of the first is inept; *Falconers*, 24th June 1642, *Mor.* 4146; *Farquharson*, 24th Dec. 1679, *Mor.* 4147; *Magistrates of Stirling*, 7th Feb. 1706, *Mor.* 4148.

The defender *maintained*—That from time immemorial the port or harbour of Newhaven has been known, and may be identified; and that it never extended beyond what is known by the Southern Row of Newhaven: That no dues upon goods or any thing else were ever levied by the pursuers upon the lands of Trinity, or the grounds to the westward of Newhaven, except in one or two modern instances mentioned in the papers: That so far as memory exists, the lands of Trinity have been actually bounded by the sea upon the north; and that every right that was competent to a proprietor on the sea shore has, from time immemorial, been exercised by himself and his predecessors.

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Argument for the Defender.

It is not disputed that the lands of Trinity are not expressly comprehended in the grants of the pursuers; and the right of port to which they are entitled is evidently limited to what has been known from time immemorial as the port and harbour of Newhaven. The boundaries alluded to so often by the pursuers are those of certain territorial property, which may at one time have been granted to the Magistrates, but the greater part of which has been long ago destroyed. These boundaries have no connection with any right of free port, no such right having been granted by any of the charters referred to; and such right is not to be considered as conveyed, unless there is a special grant, as in the case of *Agnew v. The Magistrates of Stranraer*, 27th Nov. 1822, *S. & D.*, and *Christie v. Landale*, 16th May 1828. The defender has averred, that no duties or exactions under any of the grants were ever levied to the westward of Newhaven, or at the lands of Trinity, and contends, in point of law, that if the question, as to the interpretation of the grant, be doubtful, that doubt is removed by prescription, and that the pursuers have lost whatever right they might have originally possessed by the effect of the negative prescription, on the principles established in the following cases; *Miller v. Storrrie*, June 15. 1757, *Mor.* 10,738; *Earl of Aboyne v. Magistrates of Edinburgh*, 10th March 1775, *Mor.* 1972; *Cowan v. Magistrates of Edinburgh*, Feb. 22. 1828. If any doubt therefore exists, as to whether the lands of Trinity were comprehended within the bounds over which the right of levying dues claimed by the pursuers extend, the fact, that no dues ever had been claimed from these lands, is submitted to be conclusive of the question. As to the cases of the *Tug steam-boat* and *Morning Star*, founded on by the pursuers, the defender not being a party to them, they cannot affect the present question. Further, the lands of the defender have been bounded by the sea for upwards of forty years; and, insofar as part and pertinent, he has exercised every right and possession upon the sea shore, which a proprietor, bounded by the sea, is entitled to exercise, without challenge or interruption;—he has

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Argument for the Defender.

permitted the feuars of the respondents to use the beach at Trinity, prevented boats or drifted vessels being removed without his consent, imported articles of consumption, taken sea-ware, stones and gravel from the beach, and prevented all others from taking such uses of the sea shore, erected bath-houses, and let the shore for bathing machines :—whereas no acts of possession are proved by the pursuers. Besides, by a contract entered into with the road trustees, the defender obtained right to the old road which now forms part of the bed of the sea or beach, with power to construct bathing machines or houses there, or whatever else he might think proper ; and in 1820 he gave a charter of part of the shore ground to a company for the erection of the chain pier. The pursuers have therefore lost, by the negative prescription, any right to the shore they might have had ; and the defender has acquired, as part and pertinent of the lands of Trinity, the rights which exist in a proprietor who is bounded by the sea ; *Erskine*, ii. 6. 17 ; *Bell, Prin.* sect. 43 ; *Campbell v. Brown*, Nov. 18. 1813 ; *Bouden v. Crawford*, Nov. 13. 1813. The English authorities cited by the pursuers can have no effect in the Scotch court. The argument, that even were there a regular grant of harbour from the Crown in favour of the defender, he would not be entitled to use it, because it might be supposed to interfere with the rights previously granted in favour of the pursuers, of the ports of Newhaven and Leith, derives no support from the authorities quoted, because they apply entirely to the case where a charter has been granted by the Crown within the precincts of the former port ; whereas, in the first place, the pursuers have not established that the lands of Trinity are within the precincts of the port of Newhaven ; and even if they were, there is no attempt to give the defender a charter with a right of free port.

At advising,

Opinion of Court.

Lord Balgray.—I have no difficulty on the general principle which should rule this case. There is no competition of rights as to the harbour. Ports and harbours are *res publicæ*, and are vested in the King as trustee for the public ; and he has the sole power to grant this right to a subject, and to authorise him to levy dues. Indeed it is impossible to suppose a grant of that nature without it is accompanied by the rights which naturally belong to it, and which are to be exercised within the limits of the grant. The right of harbour is not confined to a particular spot, but has generally certain precincts assigned to it. The law, as I have now stated it, is clearly laid down by *Craig*. In the case before us there is a distinct grant to the Magistrates of Edinburgh of the right of a port and harbour from St Nicholas' Chapel to Wardie-brow. Now,

every man having a grant is entitled to have a declarator of his rights in terms of that grant, and of the privileges attending it. I am therefore of opinion that the pursuers should obtain a decree, in terms of the charters in their favour, granting them a privilege of port and harbour, and the rights attendant thereon of erecting piers and levying dues, within the precincts assigned. Should the lands of Trinity be within these bounds, then I think the pursuers are further entitled to an interdict to protect their rights. If the lands of the defender lie beyond the limits of their grant, then the Magistrates should not interfere. But I am clearly of opinion that they are entitled to decree in terms of their grant from King James, and further than that I do not go.

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Opinion of Court.

Lord Mackenzie.—I am of the same opinion, because I am satisfied that the Magistrates have conveyed to them, by their titles, a right of free port at the least, from St Nicholas' Chapel on the east, to Wardiebrow on the west. It is stated, no doubt, on this record, that the lands of Trinity are beyond the boundaries of Wardiebrow; and a proof on that point is demanded. This would have been relevant if the defender had averred that Wardiebrow was at some place specified, different from that maintained by the pursuers, so that it was impossible the lands of Trinity could be included within these limits, and a proof might have been allowed. But I do not find any such averment as would entitle him to such a proof. Trinity is admitted to be to the east of Wardie, and hence is within the limits of the grant. The defender denies, it is true, that Trinity is within the bounds of the port of Newhaven; but that is because he does not admit that these extend beyond the town of Newhaven itself. We cannot then, in my opinion, allow a proof, because there is no statement which raises a proper point for an issue. I must therefore hold, that the limits within which the pursuers have a right of free port extend, at least, to Trinity; and such being the case, the pursuers are entitled to decree in terms of the first conclusion. The defender has two arguments against such a finding; first, that as the pursuers have not levied dues on the portion of the coast opposite Trinity, they have therefore, pro tanto, lost their privileges by disuse. But this plea is not available. It would have been a good defence to shew that others had, by usage, obtained for themselves a right to those privileges; but it does not follow that the pursuers have lost their rights at the place in question, by not levying dues there, if they have been in the practice of doing so at other parts of the precincts assigned, such as at Leith and Newhaven. In the next place, the defender alleges that he has been in the custom of landing goods there for his own use; but this is not conclusive, because he might, as a special favour, be permitted to do this for his own use. Besides, this privilege would be only a

14 June 1836. servitude on the right of free port, which would require to be rested on a title; but we have no evidence that his lands reach the shore. I am therefore clearly for granting decree in terms of the first conclusion; but, in respect to the terms of some of the others, I have considerable difficulty. It is admitted that the land adjoining the defender's property has been washed away by the sea: how then can we find in terms of the second conclusion? Though the property may remain in the original proprietor after it has been covered by the sea, as, for example, where a valuable mine is in that situation, still his rights cannot be of the same absolute and exclusive nature as before. They cannot extend a *cœlo ad centrum*, because he could not prevent ships sailing over it, and he must therefore have a mixed right. Meantime, we cannot declare in terms of the second conclusion, as it is not proved that the shore adjoining the defender's lands formed part of the links conveyed to the pursuer; and the defender does not produce the least evidence to shew that the lands were granted as lands on the shore at all, or with any special right, or with any pertinents as such. Then there is the conclusion, as to the defender having no connection with the sea shore. It would be going far to say that he has none, if the sea in fact washes up to his lands. All we can find is, that he has not a right of free port. With regard to the conclusion, that the property of the defender does not extend to, and is not bounded by the sea shore, we cannot find that, for it is a fact which is not to be known from the titles, which is not admitted by the defender, and scarcely averred by the pursuers. The defender is entitled to land within the precincts of the grant, without the consent of the pursuers, but not without paying dues. The sixth conclusion is hypothetical, and ought not to be entertained by us, if the view I take of the first is to be adopted. In short, it appears to me that what we are warranted in finding, is, in substance, that the pursuers have a grant of free port within the limits mentioned, and that the defender has not shown a sufficient title to do any thing in prejudice of that grant.

Lord President.—I concur in opinion with your Lordships. There can be no doubt the right of free port is *inter regalia*. It is held by the Crown in trust for the public, and the Crown alone has the power to grant a right of harbour. A grant of harbour, in the general case, would be useless, unless precincts were added; for where there is an accessible beach, any one might erect another harbour close by. Therefore, in all the grants of this kind which I have seen, precincts have been added to prevent the encroachments of hoters. Now, here, the town of Edinburgh has a right to a free harbour from St Nicholas' Chapel to Wardiebrew. Scot, the defender, has produced no title; and it is not averred that Trinity forms

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Opinion of Court.

a part of Wardie, or that Wardiebrow could form part of the lands of Trinity. There can be no doubt that the town has the sole right of harbour within these precincts, and that Wardie is to the west of Trinity. In these circumstances I consider the Magistrates entitled to decree, in terms of the first conclusion. In regard to the other conclusions, I agree with Lord Mackenzie, that we cannot find *expressly* in terms of all of them.

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Opinion of Court.

Lord Gillies was absent.

Dean of Faculty, for the pursuers, intimated that he would modify the conclusions of their declarator, so as to meet the views of the Court. And a minute having been given in to that effect, the Court pronounced the following judgment :

‘ The Lords having advised this cause, and the cases for both parties, and heard counsel, find and declare, *1mo*, That the pursuers have good right to erect and levy harbour and shore-dues, and other dues, on all vessels and goods loaded and unloaded, from and upon the shore of the Frith of Forth between St Nicolas’ Chapel and Wardiebrow, or at least from and upon any part of the said shore opposite or adjacent to the property at Trinity or Trinity Bay belonging to the said Alexander Scot, as freely and to the same extent, and as fully as, by virtue of their royal charters, they were entitled to do at the port of Leith: *2do*, That the said Alexander Scot has no right of free port or harbour within the bounds above mentioned: *3tio*, That the said Alexander Scot has no right to use and occupy the shore adjoining his own lands for making piers or similar purposes: *4to*, That neither the said Alexander Scot, nor any one deriving right from or through him, have right to make harbour, pier or dock, or to load or unload goods belonging to themselves, or for their own use, of any description, from or upon the said property at Trinity, or Trinity Bay, without payment of the shore, harbour or other dues exigible by the pursuers, in virtue of the foresaid royal charters, and no right whatever to land or receive goods of others thereon, except under the grant of free port belonging to the pursuers, and as authorised by them, and subject to the payment and conditions of their right of dock and harbour: Reserve consideration of the remaining conclusions of declarator: Interdict and prohibit the defender from erecting, building or establishing a harbour, pier or dock, or other building, so as to interrupt, interfere with, or encroach on the said rights vested in the community of Edinburgh, or the pursuers representing them as aforesaid, and decern.’

Lord Ordinary, *Fullerton*.

Act. *Dean of Fac. (Hope,) Marshall.*

Alt. Sol.-

Gen. (Cunninghame,) Keay.

Graham & Anderson, W. S. and Alexander Scot,

W. S. Agents.

S. Clerk.

FIRST DIVISION.

No. CLXII.

16th June 1836.

JOHN ANDERSON
against
 THE BANK OF SCOTLAND.

PROCESS.—TITLE TO PURSUE.—REDUCTION.—*The title of a second son, as heir of his father, on his elder brother's death, to pursue a reduction of a settlement of heritage, made by his father to his prejudice, in favour of his said eldest brother,—to which it was objected, that the interest of the pursuer to insist in the action was excluded by other deeds of his father, executed prior to the settlement in question, under which he had a pecuniary interest, but was prevented from taking up the succession as heir of his father,—sustained.*

PROCESS.—JURY.—*Circumstances in which a cause was remitted to the Jury Roll, before answer as to certain pleas in law which raised the merits of the cause.*

Narrative.

ROBERT ANDERSON inherited from his father the lands of Stroquhan, Skinford and others, and purchased those of Gordonston, Chapell, and Lochanhead. On the 8th December 1820 he executed two deeds of settlement, by the first of which he conveyed the lands of Chappell, Kenmuir, and Drumshanlag, in trust, to James Anderson, his eldest son, for behoof of the pursuer, John Anderson, under the burden, 1st, of certain heritable bonds, and of L.1000 to each of his other children. By the second deed he conveyed the lands of Skinford, Stroquhan and others, in favour of his eldest son, James Anderson, under the burden, 1st, of all his debts; and, 2dly, of an annuity of L.100 to Mrs Anderson, in the event of her surviving him. The deed also contained a conveyance of all his moveables, with a certain provision in favour of the widow. By a disposition and deed of settlement, dated 13th July 1825, Mr Anderson disposed, to and in favour of his eldest son, James, his whole heritable and moveable property, directing him, (1.) to pay his, the granter's, debts; (2.) to pay L.4200 to the younger children, viz. L.330 to each of John, (the pursuer,) William, and Thomas, and the balance to the rest of the children in certain proportions, under burden of the widow's liferent. The deed contained a revocation of former settlements, and a declaration that it should take immediate effect, the grantee being bound to account, during

his father's life, for the annual produce of the reversion, under deduction of the expenses of management. James Anderson was immediately infeft thereon; and having embarked in commercial speculations, he, for the purpose of meeting engagements, granted, in 1825, two bonds and dispositions in security, one for L.10,000, and the other for L.2500, over certain portions of the estate. In 1827 James Anderson farther granted an absolute disposition to the Bank of Scotland, of the whole lands and estate conveyed to him by his father. By a separate letter this deed was declared to be, as between the parties, a disposition in trust, until payment of the debt due to the bank, which ultimately amounted to about L.15,000. The eldest son, James, died on 8th November 1828, surviving his father about a month. The bank subsequently paid off most of the prior heritable creditors, and obtained right to the securities.

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The pursuer, who was the second son, and had been abroad at the date of his father's settlement, in 1825, soon after his return brought this action of reduction of it, and of the various deeds following thereon, *pleading*, 1. The deed of settlement under reduction not having been subscribed by the alleged granter before witnesses, nor his subscription acknowledged in presence of the alleged instrumentary witnesses, the said deed is null and void. 2. The alleged granter being incapable of understanding the same, and not being of sound and disposing mind, the said deed is null and void. 3. The alleged granter being of weak mind, and the deed not having been fairly explained to him, nor fully understood, but impetrated by fraud and circumvention, the said deed is reducible. 4. The deed being to the lesion of the granter, and advantage having been taken of his imbecility by circumvention, the deed is reducible. 5. The said disposition, even if it should be found to be the true and genuine deed of the alleged granter, being insufficient to warrant the securities granted by James Anderson under pretence thereof, the said securities are reducible on that head. 6. The reference in the instrument of sasine to the conditions under which the deed was granted was sufficient to put the defenders on their guard, and they are thereby barred from pleading ignorance of the terms of the foresaid deed, or bona fides, in taking security for the debts of James Anderson. 7. The defenders are also barred, *personali exceptione*, from founding on these securities, without reference to the title of James Anderson under the foresaid disposition, in respect that the same was known to their agents. *Lastly*, The defenders are bound to account for the rents to the pursuer's predecessor, and the pursuer is entitled to be reponed against the deeds under challenge cum omni causa.

The bank *pleaded*—(1.) Even if the deed under challenge were liable to reduction, the title and interest of the pursuer, as the eldest survi-

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viving son and heir of his father, to insist in this action, are excluded by the deeds founded on by the pursuer in article fifth of the condescendence, (being the deeds first above mentioned,) and which his father executed in 1820, and which were only recovered under the diligence of the Court, after the pursuer's original condescendence had been lodged. (2.) In consequence of the pursuer having acted upon, and accepted of the provisions made in his favour by his father's disposition and settlement, and of his other repeated acts of homologation, he is barred from pursuing the present action of reduction. (3.) As the respondents are confessedly onerous disponees, the fraud alleged to have been practised by Mr James Anderson is not pleadable against them. And with reference to the alternative conclusions of the summons, which proceeds on the supposition that the deed under challenge is the true and genuine deed of Mr Anderson, the respondents maintain, (4.) That the disposition being in its form and nature an irrevocable conveyance to James Anderson, the eldest son of the granter, his heirs, disponees and assignees whatsoever, heritably and irredeemably, and infestment having been expedited in his favour, and duly registered, he had full power and right to grant the securities over the estates which were executed by him, and to convey the estates themselves onerously to the respondents; and consequently the deeds are not reducible on the alleged ground of want of power in the granter. (5.) The form of expression by which James Anderson is taken bound and obliged to account to his father for the annual produce of the reversion of the estate, after payment of his debts, is not such as to render the claim of accounting at Mr Anderson's instance, or at the instance of the pursuer, as now representing him, a real burden on the estate; and therefore, being merely a personal claim, and none of the other provisions being declared real on the conveyance, they are not transmissible against, or preferable to the claims of the respondents, under the disposition in their favour; *Stair*, ii. 3. 53; *Ersk.* ii. 3. 49; *Bank.* i. 519; *Bell*, 5th edit. i. 686; *Martin v. Paterson*, 22d June 1808; *App. to Morr. voce Personal and Real*, No. 5; *McIntyre v. Masterton*, 3d Feb. 1824; *Johnston v. Ramsay*, 20th May 1824; *Braidwood v. Braidwood*, 26th Nov. 1835. (6.) The respondents transacted with Mr James Anderson on the faith of the public register, and in the bona fide belief that, as appeared from the registers, he was undoubted and unfettered proprietor of the estates; and therefore they are not barred, personali exceptione, or otherwise, from maintaining any of their pleas in defence against this action: And, (7.) The deed of settlement under challenge was neither null nor void, nor liable to reduction on the grounds, or any of them, alleged by the pursuer, as having been impetrated from

Mr Anderson by fraud and circumvention on the part of his eldest son, Mr James Anderson, or any one else. 16 June 1836.

‘ The Lord Ordinary (3d March 1836) having considered the closed record and productions, and heard the pursuer, and the Bank of Scotland, the only defenders appearing thereon, repels the defences of want of title or interest; and, quoad ultra, before further answer, and particularly before answer as to the plea of the defenders, that the grounds of reduction, even if well founded, could not operate in law against them who maintain themselves to be bona fide onerous creditors, remits the cause to the Jury Roll, reserving all questions of expenses.’

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Lord Ordinary's Interlocutor.

Note.—‘ The Lord Ordinary has disposed of the pleas, that the pursuer has no title or interest, because they go to exclude all further discussion. But the defenders, mistaking the meaning of what was done in the case of Braidwood, (26th November 1835,) maintain that other legal questions, which raise the merits of the case, should be disposed of before any trial of the facts. The Lord Ordinary is not of this opinion. Wherever it is possible that a trial may be requisite, if the law of a case be settled in a particular way, he thinks that the facts, especially if they may supersede the legal discussion, should be ascertained first; partly because evidence may perish, partly because the legal point is generally affected by the circumstances, and partly because no court ought to determine legal points unnecessarily. But independently of this, one of the grounds of reduction here is, that there is a defect in the execution of the deed; that is, that there is no deed at all. Yet, in this situation, it is proposed to go on ascertaining what the legal effect of the deed is. The defenders' plea, founded on their being onerous creditors, is not raised if there be no deed. The defenders also maintained that the whole case was disposed of by homologation. A verdict finding homologation may possibly render it unnecessary to proceed further with the trial. But though it may sometimes be, it is rarely the province of the Court to decide this fact; especially when, as here, even the party pleading it has no one, or no two clear writings to prove it, but only infers it from a variety of documents and circumstances, when the opposite party has further proof to adduce.’

Note.

The defender *reclaimed*. At advising, *Keay*, for the defender, *pleaded*, that the pursuer was not entitled to insist as heir-at-law of his father, although his elder brother had died without issue; because the father had previously, in 1820, executed deeds in trust to the elder, which, if the deed in question was reduced, would prevent the pursuer taking up the succession as heir of his father, though certainly he had some pecuniary interest under these deeds of 1820: That, in the next place, fraud was not a relevant ground of the re-

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duction against the bank, who were bona fide onerous creditors, and not cognisant of it. It was therefore necessary first of all to have a decision on two preliminary points, viz. whether the title of the pursuer is not excluded by the disposition 1820,—and whether or not the disposition to the eldest son was of such a nature as to put the bank in mala fide to take the securities which they held: That, so far as related to the form of proceeding, the case of Braidwood fully bore out what was now demanded. There the summons of reduction rested on two grounds; *first*, That the deed had been revoked; and, *second*, on the head of fraud. And when the question came to be discussed, whether or not this case was to be sent to a jury, it was argued that there was no subject for an issue, if it were held in law that the deed was revoked. Upon which the Court took up that point, and on finding the deed not revoked, sent the case to a jury to discuss the question of fraud. The defenders are further entitled to a decision upon the point, whether the pursuer can come against them, bona fide onerous holders of these securities, there being no statement against them as to any knowledge of the fraud of the heir; it being an established principle, that the fraud of the author does not affect a bona fide successor.

Pursuer's
Pleas.

Dean of Faculty and Robertson, for the pursuer, *pleaded*—The question which is properly before the Court, at this stage, is, whether the pursuer is excluded by want of interest. The deed which is challenged is a revocable mortis causa deed in favour of the eldest son, under which the bank claim as his assignees. Now, the title of the pursuer is irrealisable; because, if he sets aside this deed, he brings into existence the deed of 1820, which, it is admitted, is more favourable to him than the present; and, in the next place, if he gets rid of the deed in question, he may then, if he think proper, challenge the deed of 1820. In fact, this case is just similar to that of Lord Fife, decided in the House of Lords, 17th July 1823, *Shaw's Appeal Cases*, i. 498; for the pursuer is the heir of line, who challenges the last deed of his author made to his prejudice. It is impossible for the pursuer to make up his title under the first, till the last has been revoked; and if he chooses to hold under the first, the Court has no power to interfere: Therefore the title is unexceptionable, and sufficient interest has been qualified. Next, as to the decision on the point of law: it is a settled point, that the Court shall not decide the law, unless it is absolutely necessary to the investigation of the facts. So it was laid down in the case of Lady Ramsay, 20th August 1833, and in other cases. The first ground of reduction here, is to set aside the old man's deed; and this comes before the reduction of the securities. Now, the bank are interested only as to the securities; and they surely cannot prevent the pursuer from proceeding to try the first point, by demanding a decision on questions of law, which are not necessary to the investi-

gation of the facts. They may be perfectly right in their objection; but the proper time for trying it is, when they come to settle an issue, when it will be determined whether there is a relevant case laid against them.

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The Court adhered, reserving the question as to additional expenses.

Lord Ordinary, Cockburn,
and Whigham.
S. Clerk.

Act. Deem of Fac. (Hope,) D. M'Neill. Alt. Keay
James Hope, W.S. and Davidsons & Syme, W.S. Agents.

C. R.

SECOND DIVISION.

No. CLXIII.

16th June 1836.

TRUSTEES OF THE LATE ALEXANDER FORSYTH, S.S.C.

against

GEORGE LEARMONTH,

ET E CONTRA.

IMPLIED CONTRACT.—SUPERIOR AND VASSAL.—PRESUMPTION.

—Circumstances in which, in an action of declarator by the representatives of the proprietor of a certain area of ground, against a party who had built upon and possessed the same for a considerable period, it was found,—that the portions of the ground so built upon were held in feu, and that although no written contract had passed between the parties, there were data sufficient to enable the Court to compel the defender to enter into a regular feu-contract.

THE late Alexander Forsyth was proprietor of a piece of ground in the neighbourhood of Edinburgh, which he proposed to feu in the form of a crescent, to be called Claremont Crescent, and he employed an architect for that purpose. Thereafter, Mr Learmonth, a builder in Edinburgh, was employed by Forsyth to build the first house in said crescent, as a residence for himself; and he was also employed to build another for a client of Forsyth. Learmonth subsequently built six houses on the said area, one of which having been sold to a Mr Blackwood, a regular feu-contract was entered into between Forsyth and Blackwood, with consent of Learmonth. The other houses remained undisposed of, but they were let to different tenants. The present action was raised by Forsyth's trustees, on the allegation that the houses had been built

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by Learmonth, on the understanding that a regular feu-contract should be entered into when the same were sold, on the same terms as Blackwood's, and that the defender had drawn the rents of the same; and in respect the defender had declined to acknowledge the said agreement, or that the building areas had been so feued by him, it should therefore be found that the defender was bound to enter into a regular feu-contract, and that he was liable to the pursuers for arrears, &c. The defender met the action by denying the agreement, and alleging that he built the houses in his professional capacity, on the employment of Forsyth; that the rents were drawn on account of Forsyth, and, in so far as unpaid to Forsyth, he was entitled to impute them towards payment of his charges and advances as a builder. Learmonth also raised a counter action of debt against the pursuers, and the actions were conjoined.

Lord Ordinary's
Interlocutor.

The Lord Ordinary found, '1mo, That it is sufficiently established by the documents in process, and the admitted facts and circumstances of the case, that the defender, Learmonth, was not employed by the late Alexander Forsyth to build any of the five houses in Claremont Crescent now in dispute, but that the whole of the said houses were built by the said defender on his own account, and at his own risk and responsibility, on an understanding that he was ultimately to feu from the said Alexander Forsyth the areas on which they were severally erected; and therefore, if it should be found impracticable to adjust the terms of such a feu-contract as the parties might be mutually compelled to enter into, the legal consequence would be, that the property of the said houses would accresce to the pursuers, the trustees of the said Alexander Forsyth, as owners of the soil on which they are erected, subject only to a claim, on the part of the said defender, for such part of the expenses of building them as he can shew to have been laid out for their benefit, or for the present marketable value of the said houses, deducting a reasonable feu-duty for the areas on which they are built; but finds, 2do, That the written evidence in process, and the judicial admissions of the defender, are sufficient to instruct not only that there was a feu-contract and agreement between the parties, by which he was bound to become the feuar of the several areas in question generally, but that it was also contracted and agreed, that the terms and conditions of the said feus should be the same as are expressed in the feu-contract between the said Alexander Forsyth and John Blackwood, dated in June 1825, to which feu-contract the said defender Learmonth was himself a subscribing party, the house thereby conveyed to the said Blackwood being immediately contiguous to one of those now

' in dispute, and having been built by the said defender confessedly
 ' on his own account, on one of Forsyth's areas, under such a ge-
 ' neral contract and agreement to become the feuar of such area,
 ' as the pursuers contend (and have proved) to have existed as to
 ' the adjoining areas now in dispute ; and therefore, and in respect
 ' that the pursuers do not insist upon any other terms and condi-
 ' tions being inserted in the feu-contract or contracts, into which
 ' they now call on the defender to enter, than such as are contained
 ' in such feu-contracts with Blackwood, finds, that the said defender
 ' is bound to enter into such contract or contracts, in terms of the
 ' first conclusions of the pursuer's summons of December 1833 ;
 ' and, before answer as to the other conclusions of that summons,
 ' and the other matters in dispute between the parties in this con-
 ' joined process, appoints the cause to be enrolled, that they may
 ' state in what way they propose those to be discussed consistently
 ' with the preceding findings.'

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 nary's Inter-
 locutor.

The grounds of this interlocutor will sufficiently appear from the following note, appended thereto :

Note.—' The Lord Ordinary has no doubt as to the leading point
 ' of the first finding of this interlocutor, though the grounds of it
 ' are unavoidably involved in such details as could not be explained
 ' in the compass of a note. He has nearly as little doubt as to the
 ' concluding—or what may perhaps be called, the hypothetical part
 ' of that finding. Indeed, if the defender should appear to have
 ' been in mala fide in denying the existence of any agreement to
 ' feu the areas in question, his right to claim meliorations, which is
 ' rather an equitable than a legal right, might perhaps be still far-
 ' ther restricted.

' It is on the second finding that the chief difficulty arises.
 ' Though there may be complete evidence of an agreement to feu
 ' generally, and though possession may have followed, and most
 ' important operations have been carried on, on the faith of such
 ' agreement, still, if there be no sufficient evidence of the parti-
 ' cular terms and conditions on which the feu was to be granted,
 ' it might be impossible, notwithstanding any rei interventus, to
 ' give specific implement, or to decern the defender to enter into a
 ' feu-contract, the most essential provision of which must be fixed
 ' arbitrarily, or by mere conjecture. And certainly there is not,
 ' in this case, any proof or admission, either as to the amount of
 ' the feu-duty, or the entries of heirs or singular successors, which
 ' can be said to be *expressly*, or in precise terms, referable to the
 ' particular fens now in question. It is not without hesitation,
 ' therefore, that the Lord Ordinary has found, that a decree for
 ' executing such particular contracts may be issued ; and it is with
 ' a view to the chance of this part of his judgment being altered,

16 June 1836. ' that he has thought it right to express, in the concluding part of
 ' the first finding, what he apprehends must be the alternative. At
 ' the same time, he is humbly of opinion, that there is evidence
 ' enough to fix on the defender the terms to which he assented (in
 ' circumstances precisely parallel, and with exactly the same inte-
 ' rest to resist them) in the contract with Blackwood.

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' His admissions on the record are in this view extremely mate-
 ' rial. The pursuers aver, in their summons, that the whole areas
 ' in Claremont Crescent were divided into two classes; those in the
 ' curved part to be feued at the rate of 15s. per foot of front, and
 ' those at the ends at the rate of 14s.; and that the defender was
 ' employed to lay out the grounds accordingly. Now, not only is
 ' no part of this statement *denied* in the defences, but it seems ex-
 ' pressly *admitted* in the following passage: ' Having procured
 ' building plans from Mr Burn, architect, Mr Forsyth employed
 ' the defender to lay out the grounds in terms thereof, as a place
 ' or crescent, *dividing the stances into two different classes*, of which
 ' the one was intended to bear a somewhat higher rate of feu-duty
 ' than the other; and Mr Forsyth caused *corresponding advertise-
 ' ments to be published*, for the feuing of this ground.' This was in
 ' 1820; and it is distinctly admitted, that almost immediately after,
 ' the defender did, without any formal contract or writing of any
 ' kind, agree to become the feuar of *one stance* or area, on which
 ' he was to build a house on his own account, and only to require
 ' a contract, or formal title to the ground, when he should either
 ' let or dispose of it to a purchaser. This house he accordingly
 ' sold to Mr Blackwood in June 1825, by which time all the other
 ' five houses, now in dispute, had been also built by the defender
 ' on adjoining areas, and, as the pursuers aver, on precisely the
 ' same agreement and understanding with that for which alone he
 ' has been fortunate enough to find a purchaser. When the bar-
 ' gain was concluded with Blackwood, the defender applied to For-
 ' syth for a feu; and the feu-contract, of which the material parts
 ' are excerpted at page 2 of the printed Appendix, was accordingly
 ' executed.

' In this instrument, to which the defender is a party, it is set
 ' forth, that ' the said George Learmonth *having agreed to feu* from
 ' the said Alexander Forsyth the area, &c. *at the yearly feu-duty*,
 ' *and under the conditions after mentioned*, and having since erected
 ' a dwelling-house,' &c. and then, after narrating, that he had sold
 ' the house so erected to Blackwood, and that they had *both* applied
 ' to Forsyth for a conveyance, therefore he grants the feu-right, on
 ' condition of the vassal *paying a feu-duty at the rate of 15s. a foot*
 ' *of front*, and doubling the same at the entry of every heir or sin-
 ' gular successor, &c. Now this is a writing, *under the defender's*

‘hand, proving, that at the very time he was building the five houses in dispute, he was also building a sixth house, in consequence of a mere verbal agreement to feu the area, at the precise rate mentioned in the summons; and that he only applied for a proper written title in implement of such agreement, when he had found a purchaser for the building. In the defences, all this is substantially admitted, though an awkward attempt is made to give it a colour quite inconsistent with the recital of the deed, to which he has set his hand; and yet containing an admission perhaps still more fatal to his present plea. ‘The terms,’ he is pleased to say, (Defences, p. 3,) ‘on which he was to become the feuar of this subject were never precisely fixed, but were left to be adjusted conformably to the terms on which Mr Forsyth might be able to feu the remainder of his ground.’ Now, the contract with Blackwood distinctly states, that he had originally agreed to feu on the terms there mentioned, and had afterwards built the house. But if the agreement was to feu on such terms as were granted to other feuars, it is admitted, that all the houses feued in the crescent are at the rates thus fixed for Blackwood’s, and originally specified in the advertisements. The defender likewise states in his defences, that he had no interest to object to the rate of feu-duty adopted on this occasion, as that was to be paid by Blackwood; and was a matter entirely between him and Forsyth. But this is an obvious fallacy, since the more Blackwood had to pay Forsyth as feu-duty, the less he could afford to pay the defender as price; and the defender had therefore exactly the same interest to beat down the feu-duty below 15s. as to that house, as to any of those now in question. But he admits, in the feu-contract of 1825; that 15s. was what had been fixed and settled, when he agreed, in 1821, to build as a feuar in that quarter.

‘If it be clear, therefore, that there was such a general agreement to feu, as to the five houses now in dispute, as existed at the same time as to the sixth house, since sold to Blackwood, the particular terms on which the contracts in implement of that agreement should be drawn out would seem to be legitimately ascertained by reference to that contract.

‘But there is one other document also under the defender’s hand, which seems to complete the necessary evidence. On the 2d October 1832, Mr Adam writes to the defender on the part of Mr Forsyth, requiring him to send (printed Appendix, pp. 54, 55,) ‘a note of the feus payable for your different houses, and the dates of your building the several houses, in order to my making out an account betwixt you and Mr Forsyth.’ And in answer to this distinct requisition, the defender, without any repudiation of the character of feuar, or any hint that the terms still remain to be

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settled before any account could be made out, transmits a holograph note, which is printed at p. 56 of the Appendix, in which he merely sets down *the number of feet of front* in each of the houses, with a notice of the terms during which they had been respectively occupied. Now this not only proves that he acknowledged them all to be held on an agreement to feu, but that the terms of feuing had also been agreed on, since nothing more is held necessary to make up his account with the superior, than a statement of the number of feet in front, and the periods during which the houses had been finished or occupied. But if it is thus clear that a *fixed rate* of feu-duty had been settled between the parties, what else could it possibly be than that fixed on for all such houses before the building began, and that expressly set forth in the regular contract as to one of them but a few years before?

The sum of the case, in short, is this: After the defender had been employed to lay out the ground for houses at 15s. or at 14s. a foot of front, he begins and proceeds at the same time with the building of *six* houses of the same class, upon a verbal agreement and engagement to complete a feu-contract when he can get them off his hands. After they are all finished, one of them is sold; and in the feu-contract then extended as to that house, the original verbal or general agreement is distinctly set forth under the hand of this defender, and the terms fixed in exact conformity with the original scheme and proposal. None of the others are yet sold; but a settlement of accounts is now necessary; and holding that the general agreement was the same for the whole six, the question is, Whether the terms deliberately adopted for that one should not be held as necessarily applicable to all the rest, and to be the terms on which the parties should now be ordained to consummate their original agreement? The Lord Ordinary is satisfied that there is sufficient evidence to support such a decree.

With regard to the remaining branches of the cause, it is plain that there must be a report by an accountant before there can be any final decree; and that the value of the houses at Claremont Crescent, and the extent of the deductions from the contract price upon the house at Dunach, on account of defective execution, and of the additions thereto for *extra* work, must be the subject of at least two Jury trials, if the parties shall not agree to have them adjusted by the report of persons of skill in such matters, mutually chosen.'

The defender *reclaimed*.

Lord Justice-Clerk.—I am thoroughly satisfied that the Lord Ordinary has given the just and true construction to this matter. It is

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a case in which parole evidence is out of the question. It must be ascertained by writing, and the correspondence between the parties. I am satisfied, taking the whole of the correspondence together, not only with regard to the individual house, which is the only one in which a purchase has been made, but likewise as to the others, that there is sufficient evidence to shew the nature of the contract under which Learmonth has possessed these houses. I am clear, although there was no written agreement between Forsyth and Learmonth, that Learmonth was in a situation in which he could have compelled Forsyth to have granted him a regular feu-contract. The correspondence shows distinctly that Learmonth was quite aware of the terms on which he held these different feus. I admit there are equivocal expressions in some of the letters; but the parties were intimately connected, and nothing is more natural than to suppose that a great deal of intercourse passed between them, which would sufficiently explain this. I do not think these expressions are of any consequence, when I look to the whole body of the correspondence. There is no way of reconciling the whole of it, but by presuming that Learmonth was the proprietor of the whole of these feus.

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Lord Glenlee.—I am of the same opinion. This party is not entitled to claim any thing on the footing of his being a mere contractor. That there was a building contract between these parties is not a thing to be presumed. It is said Forsyth was always interfering. There is not a vestige of any thing of that sort. It is the oddest of all things, that parties should enter into a building contract, without agreeing upon a specific price. Learmonth says that the price was to be fixed according to the estimate of tradesmen. This is certainly an out of the way kind of bargain; but, at any rate, why did not Learmonth get the houses estimated after they were finished? I have no doubt of the first finding. With respect to the second, the Lord Ordinary says matters are somewhat different; but, on considering the note, I am clear he has come to a right conclusion. If this man were to say, I built without any express understanding of any kind, the process would be a very short one; because then he must just walk out, reserving any claim which he might have for building on another man's property; but I do not think Mr Learmonth is quite so desperate as that. *Esto* the precise terms of the feu-contract do not appear, there are data sufficient to determine that matter. I think it is stated on the part of Learmonth himself, that the rents per foot were advertised publicly before there was any building at all. Then we must presume that the feu-duty must be conform to those advertisements. As to the only other matter, the entry of heirs, that is matter of common form, and we must presume the common form must be adopted. I have therefore no doubt the interlocutor is well founded on the second ground also.

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Court.

Lord Meadowbank.—I am of the same opinion. It is incomprehensible—it is next to impossible—that so long a correspondence could have taken place without something occurring, in the course of it, to shew that the parties stood in a different situation from what the general complexion of the property bears. But that is not the case. There may be doubtful expressions: that is the utmost. The general scope of the correspondence is the thing that proves that Learmonth considered himself proprietor.

Lord Medwyn.—I concur. There are three circumstances which lead me to this conclusion: First, It is scarcely possible to suppose any person would enter into an engagement as a builder without a contract as to the price. It is stated that an estimate of the price was to be made by two men in the trade; but the work is finished in 1823, the discussion goes down to 1833, and during the whole of this time this estimate is never given in. Second, The letter of 2d October 1832 states the houses as your houses. Then would have been the time for Learmonth to say, The houses are not my houses, but yours. Third, From the whole of this correspondence I cannot discover a single letter in which this person states himself to be not a feuar, but a contractor, at least during the life of Forsyth.

Judgment.

The Court unanimously adhered.

Lord Ordinary, *Jeffrey.*Act. *Rutherford, Ivory.*Alt. *Keay, H. Pyper.**James Adam, S.S.C. and Richard Cowan, W.S. Agents.**T. Clerk.*

R.

SECOND DIVISION.

No. CLXIV.

16th June 1836.

PATRICK TENNENT AND OTHERS, (TENNENT'S TRUSTEES,)
against
JAMES McDONALD AND OTHERS.

TACK.—IRRITANCY.—BANKRUPT.—CLAUSE.—*Circumstances in which it was found, upon construing a clause in a tack, that the lease must be held to have been forfeited by the bankruptcy of the tenants. (2.) That the landlord had, in due time, and in sufficient form, declared his option that the tenants should remove from the subjects. (3.) That the effect of the bankruptcy, by sequestration of the parties to the lease, to produce a forfeiture of the lease, was not prevented or removed by the circumstance of the bankrupts having settled with their creditors by a contract for a composition.*

ARBITRATION.—*Opinion of Lord Ordinary not dissented from; that 16 June 1836;*
an arbiter, named under a mutual tack, having subsequently become
the partner in business of one of the contracting parties, who was
also cautioner for a composition payable by the rest, was disqualified
from acting, in respect of his actual or contingent interest in the issue,

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THE late Robert Tennent let, by tack, to John M'Donald and his sons, James, William and Alexander M'Donald, all dyers, secluding assignees, legal and conventional, four acres of ground, for nineteen years, after Martinmas 1821, 'for the purpose of establishing 'a dye-work, and carrying on the operations connected therewith.' By the tack it was declared, 'that in the event of the bankruptcy 'of the party or parties carrying on the said dye-work, by sequestration, or in the event of the conveyance of their estate for the 'behoof of creditors, this lease shall, in the option of the proprietor and his successors, be held and construed to be ipso facto 'thereby forfeited, and the said proprietor shall be entitled to remove the said tenants within six months thereafter, without the 'necessity of any declarator or process of law.' Also, 'that on the 'termination of this lease in any manner of way, it shall be in the 'option of the proprietor to pay the value of the works to be erected 'as aforesaid, according to the valuation of men mutually chosen, 'or to allow the tenants to remove the materials of their buildings, 'they being always bound to do so within the space of two months 'from the said termination.' At the close of the lease there is this clause: 'In the event of any difference of opinion as to the 'meaning of any part of the foregoing stipulations, they hereby 'agree to submit and refer all questions and differences arising 'in relation thereto to the final decision of Mr Hugh Mackay.'

Dye-works were established, and business carried on by the tacksmen, under the firm of John M'Donald and Sons. James M'Donald left the company about 1825, and engaged in business with other persons; in 1830 he entered into partnership, as dyer, with Hugh Mackay, the arbiter above named. The company of John M'Donald and Sons continued, with some changes in its partners, carrying on business at the said dye-work, and at their warehouse in Glasgow. They were sequestrated in October 1832. James M'Donald was not included in or touched by the sequestration, either as a partner of John M'Donald and Sons, or as an individual, and continued solvent.

In April 1833, within six months after the sequestration, Mr Tennent addressed a letter to each of the members of the bankrupt firm, in these terms: 'SIR, I hereby intimate to you, that I mean to 'resume possession, at Whitsunday first, of the subjects let to you 'and to Messrs James, William and Alexander M'Donald, as de-

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'scribed in a lease granted to you,' &c.; 'and this I mean to do 'in virtue of the clause in the lease,' &c. Answers were returned to this letter, in substance stating, that as James M'Donald was still solvent, the irritancy had not been incurred. The creditors of the bankrupt firm were settled with by composition-contract.

Mr Robert Tennent died in 1826. Mr Hugh Tennent, his son, purchased the subjects, in 1827, from his father's trustees, of whom he himself was one, though the feudal title remained in the trustees; the pursuers, his trustees, having been infeft in 1834. Mr Mackay, the arbiter, continued a partner of James M'Donald, who was a cautioner under the composition-contract. Robert Tennent's trustees raised an action of declarator and removing, founding on the clause of the lease.

Defenders'
Pleas.

The defences relied on were, 1. (Preliminary,) That the pursuers, not being the real proprietors, had no title to pursue. 2. They were bound to refer all disputes arising out of the lease. 3. (On the merits,) James M'Donald being solvent, there could be no irritancy. 4. As the clause merely conferred an option on the landlord to have the lease forfeited, and did not declare it to be forfeited by the new act of bankruptcy, but only if the landlord exercised his option within a limited period, it was necessary for the pursuers to have libelled that they did exercise that power, and gave due notice thereof to the respondents, which they have not done. 5. The defenders, though at one time insolvent, were restored to a legal solvency before this action was brought, and the forfeiture has been thereby purged.

Pursuers'
Pleas.

The pursuers *pleaded*—1. That the objection, that they were not infeft till after the summons was called, is inapplicable to a case of this description, where the most important conclusions of the action are of a declaratory nature, independently altogether of the conclusions for removing, and where the conclusion for removing of itself is not rested either upon a warning given upon the act 1555, or the A. S. 1756, but on a clause in the lease, declaring that it shall be forfeited on the bankruptcy of the tenants. 2. An arbiter becomes disqualified by a supervening interest not contemplated at the period when the submission was entered into; *M'Kensie v. Clerk*, 19th Dec. 1828. Besides, the clause of arbitration applied not to a legal question of forfeiture of the lease, like the present. 3. The lease was forfeited by the bankruptcy of the tenants. 4. The option competent to the landlord was exercised tempestive.

The Lord Ordinary pronounced the following interlocutor and note:

‘ The Lord Ordinary having considered the closed record, and 16 June 1836.
 ‘ heard parties’ procurators thereon, and made avisandum, repels
 ‘ the preliminary defences : Finds, that in consequence of the bank- Tennent’s
 ‘ ruptcy, by sequestration, of John M’Donald, William M’Donald, Trustees v.
 ‘ and Alexander M’Donald, and of the company of John M’Donald M’Donald
 ‘ and Sons, who are admitted to have been the parties carrying on and Others.
 ‘ the dye-work in question under the lease libelled on, the said Lord Ord-
 ‘ lease must be held and construed to have been ipso facto thereby nary’s Inter-
 ‘ forfeited, in terms of the express clause to that effect in the deed locutor.
 ‘ of lease : Finds, that in so far as it might be necessary that an
 ‘ option should be declared on the part of the landlord, such option
 ‘ was in due time and in sufficient form declared : Finds, that the
 ‘ effect of the bankruptcy, by sequestration of the parties to the lease
 ‘ carrying on the dye-work, was not prevented by the solvency of
 ‘ James M’Donald, one of the parties to the lease, in respect that
 ‘ it is admitted that he had long before retired from the company of
 ‘ John M’Donald and Sons, and from the whole business of the
 ‘ dye-work as carried on at the date of the sequestration : Finds,
 ‘ that the effect of such bankruptcy, by sequestration, to produce a
 ‘ forfeiture of the lease, is not prevented or removed by the circum-
 ‘ stance of the defenders having settled with their creditors by a
 ‘ contract for a composition ; and finds, that the pursuers are not
 ‘ in any way barred from insisting in this action by such composition-
 ‘ contract : Therefore repels the defences, and decerns and declares
 ‘ in terms of the declaratory conclusion of the summons : Finds;
 ‘ that the pursuers are entitled to a decree of removing against the
 ‘ defenders : But, before further answer, appoints the cause to be
 ‘ enrolled, in order that the term of removal may be determined in
 ‘ the present circumstances of the case ; reserves all questions with
 ‘ regard to the value of the works or buildings erected by the de-
 ‘ fenders, and the appurtenances thereof, and as to the mode of
 ‘ settlement with the pursuers in reference thereto ; finds expenses
 ‘ due.’

Note.—‘ 1. This being a declarator, the Lord Ordinary has no Note.
 ‘ doubt that the trustees were in titulo to insist in it, though they
 ‘ had not been infest till after it was in Court ; and that, being in-
 ‘ fest, they are entitled to obtain a decree of removing, as conse-
 ‘ quent on the declarator. This case is essentially different from
 ‘ an ordinary summons of removing, which must either be good at
 ‘ the time when it is brought into Court, or can take no effect at all.
 ‘ 2. The Lord Ordinary is of opinion that the clause of arbitration
 ‘ cannot apply to a question like this, more especially when a de-
 ‘ clarator is rendered necessary. But he also thinks, that the arbi-
 ‘ ter named having subsequently become the partner in business of

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‘ one of the defenders, who is also cautioner for the composition of
‘ the rest, is disqualified from acting, seeing that he has or may
‘ have a material interest in the issue.

‘ 3. On the merits, the Lord Ordinary is of opinion that the sti-
‘ pulation in the contract is a fair and just stipulation, to which it
‘ is the duty of the Court to give fair effect. The lease was granted
‘ for the establishment of a dye-work; and when it was once esta-
‘ blished, the landlord had a manifest interest, not only for security
‘ of his rent, but for the continuance of the work of that description,
‘ that he should have solvent tenants in actual possession and carry-
‘ ing it on. The value of the ground and premises might be en-
‘ tirely changed by their ceasing to carry on the dye-work; and a
‘ company and its partners in a state of bankruptcy could neither
‘ afford security for the rent, nor give the landlord any confidence
‘ in the continuance of the work. Therefore the landlord stipula-
‘ ted, as he had a right to do, that the lease should come to an end,
‘ not by the bankruptcy of all the individual tenants, but by the
‘ *sequestration of the parties carrying on the dye-work*, or their execu-
‘ ting a trust-deed. The event took place; and the Lord Ordinary
‘ is of opinion that the continued solvency of James M'Donald,
‘ who had ceased to have any concern with the dye-work, and was
‘ engaged in a rival work, could not prevent the consequence ex-
‘ pressly stipulated.

‘ The lease provides, that the forfeiture shall take place in the
‘ *option* of the *proprietor*. The Lord Ordinary doubts very much
‘ whether, strictly, there is any limit to that option, except simply
‘ what the law would give, that it must be taken in reasonable time,
‘ the subsequent clause being rather, in his opinion, a stipulation
‘ for regulating the power of *removing* without necessity of decla-
‘ rator. But, taking it on the construction of the defenders, he is
‘ of opinion that Mr Hugh Tennent's letter of the 18th April 1833,
‘ which is admitted to have been within six months from the date
‘ of the sequestration, and at which time the sequestration was *still*
‘ *subsisting*, was a sufficient declaration of the option. By a deed
‘ of agreement produced, it is shewn that, in January 1827, the whole
‘ subjects in question had been sold by Mr Tennent's trustees to
‘ Mr Hugh Tennent. There is no doubt of the power of the trus-
‘ tees to make such a sale; and it is no concern of the defenders whe-
‘ ther they were right in doing so or not. Mr Hugh Tennent had
‘ not indeed obtained a feudal conveyance, but he held the obliga-
‘ tion of the trustees to grant such a conveyance; and he was in pos-
‘ session, by receiving the rents, and otherwise managing the pro-
‘ perty, and had received and discharged the rents of these defenders.
‘ He was also himself one of the trustees; and therefore, having

‘ the beneficial title and interest, the Lord Ordinary can see no
 ‘ cause to doubt that he had a right to exercise the option, and that
 ‘ he did so sufficiently for himself and the trustees, so far as it was
 ‘ necessary, by writing the letter, no particular form being prescribed
 ‘ by the lease.

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‘ The defenders having refused to remove, a declarator became
 ‘ necessary. But the lease declares that the tenant may be re-
 ‘ moved *without* declarator. It is impossible, therefore, to main-
 ‘ tain that the defenders refusing to remove according to their con-
 ‘ tract, declarator shall not be competent, because the six months
 ‘ have expired before the declaratory action is raised. It appears
 ‘ to the Lord Ordinary, that if sufficient notice was given of the
 ‘ intention to proceed on the forfeiture and resume possession, and
 ‘ if the parties were bound by the contract to give obedience to the
 ‘ demand *without* declarator, declarator could not be prevented by
 ‘ the lapse of the six months.

‘ The Lord Ordinary is further of opinion, that the settlement by
 ‘ composition-contract could not in any view purge the irritancy,
 ‘ so far as this *condition* can with any propriety be called an *irri-*
 ‘ *tancy*. The event which Mr Tennent provided against took place,
 ‘ the complete bankruptcy of *the parties carrying on the dye-work*.
 ‘ Is that event at all altered or removed by the fact, that their cre-
 ‘ ditors, finding that they could not get payment of their debts,
 ‘ agreed to discharge them on payment of a composition of 6s. 6d.
 ‘ in the pound? The Lord Ordinary is of opinion that it is not;
 ‘ and he thinks that the opinion expressed by Lord Corehouse, in
 ‘ the case of *Hall v. Grant*, May 19. 1831, and which he thinks
 ‘ was confirmed substantially by the judgment of the Court, is per-
 ‘ fectly well founded. It comes to this, that instead of persons per-
 ‘ fectly solvent and in good credit, the landlord, after expressly pro-
 ‘ viding against it, must put up with tenants who have been seques-
 ‘ trated, who have paid less than a third of their debts, and who
 ‘ must be presumed to be without any capital whatever.

‘ The defenders urge that the composition-contract was settled on
 ‘ the footing that the lease was to subsist. As far as the Lord Or-
 ‘ dinary can judge, there is no correctness in this statement. It
 ‘ is clear that the clause of the lease was fully in the view of the
 ‘ factor and trustee, and put before the creditors; and the Lord Or-
 ‘ dinary can find no trace of any *valuation* being put upon the *lease*.
 ‘ How the buildings, &c. were to be valued is another matter.
 ‘ But surely the *defenders*, knowing the terms of the lease, and ha-
 ‘ ving Mr Tennent's letter in their possession, cannot be allowed to
 ‘ state that *they* were at all misled by him, or *could* settle their com-
 ‘ position on any legal assumption that the forfeiture had not taken
 ‘ place. If they did so, it must have been on the faith of some of

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' the reasoning now employed by them, which the Lord Ordinary thinks erroneous. But none of the pursuers were parties to that transaction.

' The term of removing, and any question as to the value of the buildings, must be otherwise discussed, if this interlocutor shall become final.'

Opinion of
Court.

The defenders *reclaimed*.

Lord Medwyn.—I have no doubt that this interlocutor is well founded. As if to obviate the main defence which has been urged, the clause founded on by the pursuer is so expressed, as to apply to the parties carrying on the dye-work being sequestrated; so that although one of the Tennents be solvent, who is liable for the rent, this will not prevent the operation of this express condition of the lease, as he had entirely withdrawn from the concern, which became insolvent. I think we are misled by looking upon such a clause as an irritancy, and attempting to apply the doctrine of purgation to it. When a feu-right was a unilateral deed, and even after it became bilateral—and the same observation applies to a lease—and when the law implies a forfeiture of the right of two years' feu-duty, or rent fell into arrear, this was properly an irritancy,—a legal irritancy. But when it came to be stipulated, that this was to take place on an arrear of one year, or not till three years, or upon any other event, such as bankruptcy, though it was natural to call this a conventional irritancy, I think it was just a simple condition in the contract,—a break at the option of the landlord on a particular event, similar to, and, as in the present case, an addition to the three breaks at specified periods, at the option of either party, or such a provision as was introduced into the Ardnamurchan leases, (*Sup. v. 570.*) In this view, I think the condition has occurred, which gives the landlord a right to terminate this lease; and that his letter, within six months, was sufficient notification of his intention to avail himself of his option, duly followed up by the process; and that it is of no consequence that the bankrupts were discharged before the action was raised. In *Gordon v. Copland*, a discharge did not prevent decree of removing being pronounced two days afterwards. Such a circumstance, at whatever time it take place, cannot do away the effect of the condition having actually occurred, nor deprive the landlord of a privilege stipulated for, and consented to, in a certain event.

The other Judges *concurred*.

Judgment.

The Court unanimously *adhered*, with additional expenses.

Lord Ordinary, *Moncreiff*. Act. *M'Neill and Shaw*. Alt. *Rutherford, Penny*.
George Lyon, W. S. and *Fisher & Duncan*, S.S.C. Agents. T. Clerk.

R.

FIRST DIVISION.

No. CLXV.

18th June 1836.

HUGH BRODIE

against

ALEXANDER THOMSON AND JAMES SMITH.

PROCESS.—CITATION.—STAT. 6. GEO. IV. c. 48.—REDUCTION.—

An error in the name of the complainer, occurring in the copy-citation to answer a complaint under the Small Debt Act, which did not appear to create any real doubt as to who the complainer was,—held not to be a sufficient ground for an action of reduction and damages, at the instance of the defender in the complaint, who had allowed decree to be given in absence, upon which he was incarcerated.

IN December 1834, a complaint, under the Small Debt Act, was made to the Justices of the Peace for the shire of Edinburgh, in name of 'Alexander Thomson,' 'collector of poor's-money for the 'city of Edinburgh,' against Hugh Brodie, for non-payment of L.1, 3s., being the arrears of poor's-rates due by him; and a warrant, in terms of the schedule annexed to the act, was granted by the clerk of the peace to summon the said defender, 'to answer at 'the instance of the said complainer.' A copy of the complaint and warrant, with a citation, all on the same paper, was delivered personally to Brodie, by James Smith, constable. The citation, for which there was no form prescribed by the act, charged Brodie to appear, 'to answer at the instance of the above-designed Alexander 'Brodie, complainer,' instead of Alexander Thomson, in whose name the complaint was lodged. This mistake, however, did not appear on the face of the execution, which was quite correct. Brodie allowed decree to pass in absence, (15th December,) and did not avail himself of the statutory privilege of obtaining a rehearing, although a copy of the decree was served on him in ordinary form, along with a charge to pay in six days, under pain of poinding and imprisonment. Nearly six months having elapsed from the date of the decree, and after the constable, Smith, had called, and again threatened to execute the decree, on which occasion it was averred by Smith, that Brodie declared he did not resist payment on account of any informality in the proceedings, Brodie was at last apprehended and carried to jail, (16th May 1835); but on his name

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having been entered on the jail books, he paid the debt and was discharged.

In July 1836, Brodie brought the present action of reduction of the decree and other writs, and of damages, for wrongous imprisonment, against Thomson, and Smith the constable. This action was founded on the mistake in the citation, the pursuer pleading irregularity of the execution, of the decree, and of all that followed thereon, inasmuch as he was not served with any complaint at the instance of Alexander Brodie, and never was cited to answer to that at the instance of Alexander Thomson.

The defenders founded on the 6. Geo. IV. c. 48, (§ 6, 7, and 8,) regarding the opening up of decrees in absence, and rehearing of causes; and (§ 14,) which, inter alia, enacts, that the decrees of the Justices, in cases competent, shall not 'be set aside or altered in 'an action of reduction in the Court of Session, on any other ground 'except that of malice and oppression on the part of the Justices.'

The Lord Ordinary pronounced an interlocutor, repelling the defence of incompetency, adding the following note:

Note.

Note.—'The Lord Ordinary holds the action to be competent, 'notwithstanding the finality of the Justices' decree, by the 6. 'Geo. IV. c. 48, because the pursuer was never brought legally 'before the Justices. The act prescribes the form of citing a party, 'and even common law requires that a defender shall be told at 'whose instance he is to appear. But here a blunder vitiated the 'citation in this respect, so that the defender was never put under 'the operation of the statute. A much slighter objection has been 'repeatedly found to exclude the statutory finality, particularly in 'the analogous jurisdiction of the Sheriff small debt court.'

The defenders *reclaimed*. At advising,

Defenders'
Pleas.

McNeill, for the reclaimers.—There is no particular form of citation annexed to the act, so that this is not the case of an omission of some statutory form, as happened in the cases on another statute. The question here is not, whether this objection would have been sustained if pleaded before the Justices, but whether it can be competently entertained in this Court, when the power of review is excluded on all grounds but those of malice and oppression; and it must be remembered that the pursuer had abstained from coming forward on two occasions to plead it; first, when cited; and, next, when charged.

Pursuer's
Plea.

Dean of Faculty, for pursuer.—The argument of the defenders applies to the case where parties have been fairly in Court, for the

exclusion of the review by the statute applies only to the proceedings in Court. But here, if the objection is a good one, the pursuer never was in Court at all. It is admitted that a citation is necessary; and it cannot be said that there is any thing in the act to cover the blunder which has been made, or to prevent this Court from judging of the validity of this, just as of any other citation.

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Lord President.—The statute, although it does not prescribe the form of the citation, yet as it requires some citation, we must imply that it means a regular one. If the argument for the pursuer is sound, it would apply with equal force to an error in the name of the defender, which would lead to serious results. I am of opinion, that the more summary the procedure, the more strictly should the forms be attended to, and am therefore inclined to adhere to the Lord Ordinary's interlocutor.

Opinion of
Court.

Lord Gillies.—I have some difficulty in this case. There is no schedule of the citation annexed to the statute. Therefore, in my opinion, a paper containing a repetition of the warrant, with two lines, stating the delivery of the complaint, would be enough. Here there is certainly an error in the name of the complainer; but I don't think that sufficient in the present instance; for there could be no mistake as to who the complainer was. I therefore differ from the Lord Ordinary.

Lord Mackenzie.—It is evident that there must be a citation; and this one, in my opinion, is quite sufficient. The constable had nothing to do to add the name of the complainer; but I cannot see that there is the least doubt as to who the complainer is. It is an important question, whether, on an error of this nature, we shall reduce this decree. The execution is not quarrelled: that and the warrant are correct; and the pursuer, after allowing decree to go in absence, brings the present action against these defenders, pleading an error in the citation known only to himself. How can this quadrate with the spirit of a statute for the cheap and summary decision of causes? There could be here no real doubt in the mind of the pursuer as to who the complainer was; but he purposely hung back, in order to take advantage of the mistake. This the statute cannot countenance. He ought to have appeared at first, and to have stated his ground of doubt. I do not think the law, as laid down in the other cases, applies. Certainly the law of citation, as settled in the Court of Session, cannot rule in this case, as it is by express statute that the names and designation of parties are there required; and even in the face of the statute, they are sometimes dispensed with.

Lord Balgray concurred with Lord Mackenzie.

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The *Court* accordingly altered the judgment of the Lord Ordinary, and assoilzied, with expenses.

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Smith.

—
Judgment.

Lord Ordinary, *Cockburn*. Act. *Dean of Fac. (Hope,)* *Maitland*. Alt. *M'Neil*,
Inglis. *John Cullen*, W.S. *H. Inglis*, W.S. and *John Ross*, S.S.C. Agents.
S. Clerk.

C. R.

FIRST DIVISION.

No. CLXVI.

18th June 1836.

JOHN SHERRIFF

against

JAMES SHERRIFF'S TRUSTEES.

PROCESS.—PROOF.—WITNESS.—IN this case two legatees under a trust-deed and settlement, who had been called as defenders, along with the trustees, in an action of reduction of the said settlement, at the instance of the heir of conquest of the maker, claimed to be assoilzied, with a view of being witnesses at the trial in the case, in respect that their legacies were paid, and they had discharged their interest in the settlement, and that the trustees renounced all claim of repetition. The point being verbally reported by the Lord Ordinary,

The *Court* were of opinion that the interest of the legatees to uphold the deed was discharged, and directed the Lord Ordinary to assoilzie them from the action of reduction.

Act. *Ivory*, *Moncreiff*. Alt. *Rutherford*, *Walker*. *J. Knox*, S.S.C. and *Walker*,
Richardson & Melville, W.S. Agents. *D.* Clerk.

C. R.

FIRST DIVISION.

No. CLXVII.

23d June 1836.

WILLIAM ISLES
against
 JOHN GILL. -

BILL OF EXCHANGE.—STAMP.—*The following document, ‘SIR, Pay the bearer the sum of £.40 sterling, and charge the same against my account of wright work for your house,’—held to require a bill stamp, in order to have effect as a legal obligation.*

REID employed Duncan to build a house, and Duncan, in the course of the operations, in order to pay Gill for materials furnished by him for the work, addressed the following document to Reid, written on unstamped paper: ‘*Dundee, Nov. 16. 1831. SIR, Pay the bearer the sum of L.40 sterling, and charge the same against my account of wright work for your house. (Signed) WILLIAM DUNCAN.*’ This document was also signed by Mr Reid. Narrative.

The point in dispute was, whether this document was a valid obligation without a stamp.

It was argued on one side, founding on the case of Lawrie v. Perry Ogilvie, 6th Feb. 1810, *F. C.*, that this was a valid obligation without a stamp, in respect that it was, in effect, exactly similar to an indorsement of part of an account in favour of the bearer, which enabled the debtor to strike out L.40 from the account due by him.

On the other side it was contended, that the document was not valid without a bill stamp, and that the case of Lawrie was no authority, as that was an indorsement on the back of an open account; and the document in question here, was an order to pay a sum of money, in the form of a bill or draft in favour of the bearer, and, as such, was regularly accepted by the payee.

Lord President.—Suppose the document had finished with the words, ‘and charge against my account,’ that would have been a bill, and I do not see that the additional words alter its nature. Opinion of Court.

Lord Bulgray.—I am clearly of the same opinion. It is an order to pay a sum of money, and must have a stamp.

The other Judges concurred, and the Court pronounced judgment, finding, ‘that the document, 16th November 1831, being

23 June 1836. 'unstamped, is incapable, under the stamp acts, of founding any
 Isles v. Gill. 'action or competition in this case.'

Judgment.

Lord Ordinary, *Cochburn.*
Robertson, Patterson.
 and *John Christie*, S.S.C. Agents.

Act. *Keay, Pyper.*
James D. Lawrie, S.S.C.
D. Clerk.

Alt. *Dean of Fac. (Hope),*
James Stuart, S.S.C.

C. R.

No. CLXVIII.

SECOND DIVISION.

23d June 1836.

ALEXANDER BLACKADDER AND OTHERS (CAIRNS' TRUSTEES) *against* WILLIAM
 AND DAVID BROWN.

BILL OF EXCHANGE.—NEGOTIATION.—DILIGENCE.—Circumstantial case depending upon the construction put on certain correspondence, where the Court (altering the interlocutor of the Lord Ordinary) found the defender, William Brown, a writer, liable in payment of a bill, for money alleged to have been borrowed for a client from Cairns, in respect, (1.) That Brown so acted as to lead Cairns to rely on him; and, (2.) Of culpable negligence in not enforcing payment from Thomson, the alleged borrower, in as much as he neglected to do diligence in recovering the contents of the bill for many months after the bill had, at his own request, been put into his hands for that purpose, and having, in the interim, allowed Thomson to become insolvent without taking any step.

PRESCRIPTION, (SEXENNIAL).—Defence of prescription sustained, (adhering to the Lord Ordinary's interlocutor,) in regard to another bill in the same cause. (See Papers.)

Lord Ordinary, *Jeffrey.*
W.S. and A. & J. Paterson, S.S.C. Agents.

Act. *Keay, Ferrier.*
S.S.C. Agents.

Alt. *Russell.*
F. Clerk.

J. & W. Ferrier,

R.

SECOND DIVISION.

No. CLXIX.

24th June 1836.

WILLIAM BERRY AND OTHERS

against

SIR ROBERT HENDERSON'S TRUSTEES.

CLAUSE. — INTEREST. — IMPLIED CONTRACT. — CONJUNCT FEE
 AND LIFERENT.—*A postnuptial contract of marriage, to which the
 father of the wife was a party, bearing, in consideration of counter
 obligations on the husband, payable at his death, that the father
 should make payment to the spouses in conjunct liferent, and their*

children in fee, of a sum of £.20,000, but with a declaration that the sum so 'devised' should be liable to be affected by him, by provisions to the children, to be payable at the first term after his death, and failing which, at such term subsequent to his death as the spouses should appoint; the contract further declaring, that in case he should destine a certain estate, at any time during his life, to the value of at least £.20,000, or any other heritable estate of that value belonging to him, to be estimated as at the first term after his death, the same should be held as implement of the obligation incumbent on him in regard to the sum of £.20,000, payable on the death of himself and the survivor of the spouses—found, that interest was due on the principal sum only from the date of his death.

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Trustees.

By postnuptial contract, dated in February 1826, entered into by William Berry and Mrs Isabella Henderson or Berry, his spouse, daughter of Sir Robert Henderson, with the special advice and consent of her father, Mr Berry, 'in consideration,' inter alia, 'of the counter obligations on Sir Robert Henderson,' bound himself to make payment, at a term after his death, of L.20,000 sterling, to the heirs-male of his body of the marriage, and other heirs therein mentioned, under certain burdens and conditions; 'for which causes, Sir Robert Henderson binds and obliges himself, and his heirs, executors and successors whomsoever, to make payment of the sum of L.20,000 sterling to William Berry and Mrs Isabella Henderson or Berry, in conjunct liferent allenary, and to the survivor of them in liferent, for his or her liferent use allenary, and to the heirs-male of the body of Mrs Isabella Henderson or Berry of this present marriage, and to the heirs whatsoever of their bodies;' (then followed a substitution of heirs); 'whom all failing, to the nearest heirs and assignees of him, the said Sir Robert Henderson, in fee;' 'but under the provisions, &c. after expressed; declaring, that although the said sum of L.20,000 is hereby devised to and in favour of the said William Berry, or Mrs Isabella Henderson or Berry, in conjunct liferent, it shall be in their power, by any joint deed to be executed by them, to burden and affect the foresaid sum of L.20,000, hereby settled by the said Sir Robert Henderson, as aforesaid, with such provisions to the children of this marriage other than the heir succeeding to the said sum of L.20,000, hereby settled by the said Sir Robert Henderson, as the said William Berry and Mrs Isabella Henderson or Berry may think proper; and, on failure of such deed,—(follow certain provisions for the children)—'the said provisions to younger children to be payable at the first term of Whitsunday or Martinmas that shall ensue after the death of the said Sir Ro-

Narrative.

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‘bert Henderson, and of the survivor of their father and mother,
‘or at such other term or terms subsequent to the decease of the
‘said Sir Robert Henderson, as the said William Berry and Mrs
‘Isabella Henderson or Berry shall fix and appoint by a joint writ-
‘ing under their hands, with interest,’ &c.

There was also a declaration, ‘That in case Sir Robert Hender-
‘son shall, at any time during his life, settle and destine the estate
‘of Straiton, or any part thereof, to the extent in clear value of at
‘least L.20,000, or any other heritable estate belonging to him to
‘that extent, to be estimated as at the first term of Whitsunday or
‘Martinmas after his death, in favour of the said William Berry
‘and Mrs Isabella Henderson or Berry, in conjunct liferent, and
‘to the survivor of them in liferent, and to and in favour of the
‘same series of heirs, and on the terms and conditions relative to
‘the obligation before mentioned, the same shall be held as full im-
‘plement of the obligation incumbent on him and his foresaids in
‘regard to the said sum of L.20,000 hereby settled by him; and
‘further, it is hereby provided and declared, that in case the said
‘Robert Henderson shall settle and destine his said lands of Strai-
‘ton, or any other heritable estate belonging to him, in manner
‘foresaid, the said William Berry and Mrs Isabella Henderson or
‘Berry, or the survivor of them, shall have power to grant a lease
‘or leases of the said lands or estate,’ as therein menticned.

It was intended at the time, by the parties, to make the provi-
sions in favour of Mrs Berry equal to what Sir Robert Henderson
had bestowed on his younger daughter, Mrs Lindsay, to whom,
and her children, he had, in her marriage-contract, destined a sum
of L.20,000, payable at his death. In implement of Sir Robert
Henderson's obligation in the contract between Mr and Mrs Berry,
he, on 14th February 1832, executed a disposition and conveyance
of two heritable debts, contained in bonds, of L.10,000 each. This
disposition, after narrating the postnuptial contract before referred
to, so far as regards Sir Robert's obligation, also narrates, ‘that
‘I have resolved to implement the obligation undertaken by me
‘in the said contract of marriage, in regard to the said sum of
‘L.20,000 sterling, by settling and securing the two sums after
‘mentioned, of L.10,000 each, and securities created therefor, in
‘favour of the persons after named or referred to, having the im-
‘mediate or eventual and reversionary interest in or to the life-
‘rent and fee respectively of the said sum of L.20,000, as stipulated
‘to be paid by me, under and by virtue and in terms of my said
‘obligation contained in the said contract of marriage: Therefore
‘I have given, granted and disponed,’ &c.

The conveyance is to Mr and Mrs Berry in liferent allenary,

and the heirs-male of their marriage; whom failing, to the other heirs in fee, in the same terms as his obligation in the marriage-contract. It provided and declared, that the sums, and the subject before disposed in security thereof, should be held to be taken and accepted of by them, for their several and respective rights foresaid, as in full of all claim competent to them against him or his heirs, by virtue of the obligation in the contract of marriage. Sir Robert also reserved power to revoke this deed. Accordingly, it was not delivered during his life, but kept along with his settlement and other papers, and given to Mr Berry after his death. Sir Robert died in August 1833, leaving a settlement of his whole property in favour of trustees.

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Upon Sir Robert's death, Mr Berry consented to accept the conveyance to the heritable bonds, and drew the first year's interest after Sir Robert's death. He also signed a discharge of Sir Robert's obligation, which, however, was never delivered. Several children were born of the marriage between Mr and Mrs Berry. Mr Berry subsequently rejected the conveyance of the bonds, and betook himself to Sir Robert's obligation in the marriage-contract. He further alleged, that interest was due to him out of Sir Robert Henderson's estate, from the date of the contract of marriage in 1826.

Thereafter Mr and Mrs Berry raised this action for themselves, and as administrators-in-law for their children, concluding that the defenders, as trustees of Sir Robert Henderson, 'should be decerned to make payment to the pursuers of the foresaid sum of L.20,000 sterling, with the interest thereof from and since the said 17th day of February 1826, and in time coming during the not payment, deducting a sum of L.400 paid to account of interest;'—in support of which claim they *pleaded*—That by the legal import and effect of Sir Robert Henderson's obligation in the marriage-contract, and by his understanding of its effect, interest was due to them from its date, seeing he did not adopt the alternative of conveying to them and their children the heritable estate contemplated in that deed: That an assignment of the two debts, especially under the terms in which the securities had been taken, was not legal implement of Sir Robert Henderson's obligation in favour of the pursuers, 'to destine the estate of Straiton, or any part thereof, to the extent, in clear value, of at least L.20,000, or any other heritable estate belonging to him to that extent, to be estimated,' &c., the pursuers having 'power to grant a lease or leases of the said lands or estate for nineteen years, without stipulating for any grassum,' &c.: That as the proposed discharge of Sir Robert Henderson's obligation was never delivered, and the pursuers never, by any legal homologation, ratified Sir Robert Henderson's trust-

Pursuers'
Pleas.

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deed of settlement, or finally agreed to depart from their rights under their marriage-contract, they were entitled to decree in terms of the libel; *Ersk.* b. iii. tit. 2, § 4, 43 and 45; Munro, 13th Feb. 1810, *F. C.*; Cameron, &c. 18th Dec. 1810, *F. C.*; Duke of Gordon, 16th Nov. 1821, *S. and D.* i. 150; Clarks, 15th May 1823, *S. and B.*

Defenders'
Pleas.

The defenders *pleaded*—That, under the terms of the contract, the provision of L.20,000 made by Sir Robert Henderson, which was entirely gratuitous on his part, was not payable until after his decease, nor did interest begin to run upon it until that event took place: That this view, which was agreeable to the legal import of the terms used, accorded with the understanding of all concerned as to the granter's intention, as indicated by circumstances set forth in the record: That even assuming the pursuers' interpretation, that interest would have been exigible from the date of the contract, if Sir Robert had failed to adopt the alternative which he reserved to himself, of conveying to the pursuers and their children an heritable estate to the amount of the money provision, there would have been no room for the pursuers' claim of interest previous to Sir Robert's death, as, in point of fact, he adopted that alternative, by conveying to them the bonds and heritable securities above mentioned: That the conveyance of these bonds and heritable securities, which amounted to the full value of L.20,000, as at the first term of Whitsunday or Martinmas after Sir Robert's death, amounted to full legal implement of the obligation incumbent on him under the contract, and the pursuers had no right to repudiate it, or to demand implement of the obligation in any other form. At all events, the pursuers having agreed to accept of the conveyance of those securities, and having, after Sir Robert's death, drawn the interest of the heritable debts conveyed to them, they could not now resort to Sir Robert's personal obligation under the marriage-contract.

A minute was given in by the defenders, stating, that by article nine of their statement of facts they had made an offer, which was now judicially repeated, viz. That they would, out of Sir Robert's funds and estate, make good to the pursuers, as at the first term after Sir Robert's death, the principal sum of L.20,000 sterling, and that in terms of the marriage-contract, for the respective interests of the pursuers, Mr and Mrs Berry, in liferent, and their children in fee, reserving specially for the consideration of the Lord Ordinary, (1.) The question raised by the pursuers as to the interest from the date of the contract; and, (2.) Whether Mr Berry was of himself entitled to receive and discharge the said pro-

vision, or whether the defenders, or some other party, were not bound to see the same invested for behoof of Mr Berry's children, in fee. And to this minute was subjoined an *additional plea*, That, under the circumstances of the case, the pursuer, Mr Berry, was not entitled of himself to receive and discharge the sum settled by Sir Robert Henderson in the pursuers' contract of marriage, but it was the duty of the defenders, as Sir Robert Henderson's trustees, to see that the sum was invested in such a way as to secure the rights of the children interested in the fee under the marriage-contract.

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Defenders'
Pleas.

' The Lord Ordinary (19th March 1836) having resumed consideration of the debate, with the closed record, minute, and additional plea in law since given in by the defenders, and whole process, finds, *Imo*, That in consequence of the said minute and relative offer in Article 9. of the defenders' statement of facts on the record, it is no longer necessary to determine whether the late Sir Robert Henderson's conveyance of the two heritable bonds, in the proceedings mentioned, could be considered as due implement of the second or alternative undertaking in the postnuptial marriage-contract libelled, to settle on the pursuers an heritable estate of the value of not less than L.20,000, and that the pursuers are now entitled to implement of the said contract, under the first or primary obligation therein contained, actually to pay over to them the said sum of L.20,000 in money; but finds, *2do*, That according to the just construction, and true and legal meaning and import of the said postnuptial contract, the said pursuers are only entitled to interest on the said principal sum of L.20,000 from the first term after the death of the said Sir Robert Henderson, till payment, and not from the date of the postnuptial contract itself; and before answer as to the right of the pursuer, William Berry, of himself to receive and discharge the said principal sum of L.20,000, or any part thereof, either as liferenter thereof, or as administrator-in-law for his minor children, finds, That it is proper that a tutor or curator ad litem be appointed for those children, to whom those proceedings may be intimated; and directs the cause to be enrolled, that parties may state what has been done, or is proposed to be done, in implement of this order.'

Lord Ordinary's
Interlocutor.

Note.—' It is needless to go through the grounds on which the Lord Ordinary rests his construction of the postnuptial contract, as to the only point seriously contested. They will naturally occur to any one who reads it through with attention. He may only mention generally, that he relies chiefly on these four considerations: 1st, The exact and anxious parity, and indeed identity,

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24 June 1836. *quoad cetera*, of the provisions as to the L.20,000 settled by Mr Berry, in this deed, which is expressly declared to be payable only at his death, and the other, or corresponding L.20,000, (now in question,) settled by Sir Robert Henderson; 2d, On the general style and structure of the whole clauses touching this last sum of L.20,000, throughout the whole of which it is described, not as a sum presently assigned or made over *inter vivos*, but as a sum *devised* and *settled* on the pursuers and their children; 3d, On the special provision, (of itself decisive of the whole case,) that in the event of both the spouses predeceasing Sir Robert Henderson, the said L.20,000, the fee of which is provided, *ab initio*, to the children, shall not be payable to them till the first term after Sir Robert's death; and, 4th, On the alternative provision referred to in the interlocutor, that Sir Robert might implement and discharge himself of the substantive obligation as to this L.20,000, by settling and destining, at *any time of his life*, an heritable estate of equal value, in lieu, and as an equivalent, for the money provision. It was admitted that, under *this* mode of liquidating his obligation, the pursuers must have taken the settled estate *as at Sir Robert's death*, without any retrospect. But it is plain that all parties regarded these two provisions as *equivalent*; though, if the money provision had been to bear interest from the date of the deed, and Sir Robert had lived twenty years after, the one would have been at least treble the value of the other. It is needless, in these circumstances, to look into the proofs so largely dwelt on at the debate, of the understanding and intention of the parties, the admissibility of which, in a question of mere construction, is always very questionable. Fortunately, however, they are here all in favour of the construction which has been adopted. The most remarkable are the pursuers' repeated admissions on the record, that the object of all parties in the postnuptial contract, was to make Mrs Berry's provision equal to that of her younger sister, Mrs Lindsay; taken along with the other admitted fact, that the L.20,000 provided to Mrs Lindsay and her children is *expressly* declared to be payable only at Sir Robert's death. The pursuer, Mr Berry's written and deliberate consent to accept of the two heritable bonds, with interest only from Sir Robert's death, as full satisfaction of his claims under the marriage-contract, and his actual signature of a regular discharge upon that footing, might also be urged as a bar to his present pleas; for though he withheld delivery of this discharge, and afterwards raised the present action, this was *solely* on the ground that the defenders demurred to making over these bonds to him *absolutely*, and without taking some security for the right of fee in his children. But though

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‘ this might justify him in bringing to issue the question now raised 24 June 1836.
 ‘ in the defender’s additional plea in law, and in relation to which
 ‘ the Lord Ordinary has directed a tutor ad litem to be sisted for
 ‘ the children, it could never entitle him to revive the claim of in- 
 ‘ terest from the date of the deed, which was substantially aban- Berry and
 ‘ doned by the unchallenged part of the arrangement. There was Others v.
 ‘ some discussion about a *pencil note* of Sir Robert’s, which, whether Henderson’s
 ‘ holograph or probative or not, is obviously of no consequence what- Trustees.
 ‘ ever. If it proves Sir Robert’s opinion, as a lawyer, of the effect
 ‘ of the *omission* of any term of payment of the L.20,000, it proves
 ‘ still more clearly, that he regarded that omission as purely casual,
 ‘ and against the true intention of the parties.’

Note.

The pursuers *reclaimed*.

Lord Glenlee.—I have no sort of doubt about adhering. If it Opinion of
Court.
 had been intended that interest should be payable, as contended
 for, it should have been so stated in the contract. As no regular
 term of payment is expressed, no interest is due till the death of
 Sir Robert. I can only say, that so far as I have seen, Sir Robert
 was to pay nothing during his life.

Lord Medwyn.—I am entirely of the same opinion with Lord
 Glenlee. If it be competent to refer to subsequent writings to
 ascertain the meaning of a doubtful agreement, it surely must be
 equally competent to refer to the subsequent conduct of the parties.
 No claim is made during Sir Robert’s life by the husband: nay,
 the wife applies to her father for a small sum, by way of separate
 allowance to a child, independent of her husband—not likely either
 to have been claimed or granted, if all the time the father was liable
 to pay the interest of L.20,000. There is no stipulation as to in-
 terest during Sir Robert’s life; and I was inclined to think that the
 whole operation of the contract was only to take effect at his death,
 founding chiefly on the third and fourth reasons stated in the note
 of the Lord Ordinary. Suppose that a bill for L.20,000 had been
 granted by Sir Robert, and no term of payment was specified, in-
 terest would not run on the bill till demand.

The other Judges had no difficulty, and concurred.

The Court unanimously *adhered*.

Judgment.

Lord Ordinary, <i>Jeffrey</i> .	Act. <i>Dean of Fac. (Hope), Forsyth.</i>	Alt. <i>Sol.-Gen.</i>
(<i>Cunninghame</i> ,) <i>Monteith.</i>	<i>James Adam</i> , S.S.C. and <i>Gibson-Craigs</i> , <i>Wardlaw</i>	
& <i>Dalziel</i> , W.S. Agents.	<i>T. Clerk.</i>	

R.

FIRST DIVISION.

No. CLXX.

25th June 1836.

SIR JOHN H. DALRYMPLE AND OTHERS
against
 CHARLES RANKEN.

PROCESS.—CURATOR BONIS.—TRUST.—IN this case, the existence of a trustee was not held a bar to granting the prayer of a petition for the appointment of a curator bonis, with the usual powers, to a person in a state of mental incapacity, although it was alleged that the trust embraced every interest and property which otherwise would have fallen under the management of the curator bonis.

Act. *Dean of Fac. (Hope,) Rutherford, Mailland.* Alt. *Keay, H. J. Robertson.*
Aeneas Macbean, W.S. and Mackenzie & Innes, W.S. Agents. D. Clerk.
 C. R.

FIRST DIVISION.

No. CLXXI.

25th June 1836.

DR JAMES ANDERSON
against
 HIS CREDITORS.

CESSIO.—Held that a party who obtains the benefit of the process of cessio, on condition of granting a disposition in common form, is bound, if required, to grant a special conveyance of heritage.

Act. *Keay.* Alt. *M'Neill.* S. Clerk.

C. R.

SECOND DIVISION.

No. CLXXII.

28th June 1836.

JOHN MATTHEW AND OTHERS, (MOON'S TRUSTEES,)
against
WALTER CARMICHAEL AND OTHERS.

HUSBAND AND WIFE.—MARRIAGE-CONTRACT.—CLAUSE.—*In a postnuptial contract of marriage, by which certain provisions were made in favour of the wife, who conveyed to the husband all the property of which she might be possessed, and renounced her legal rights in consideration thereof,—found, in the circumstances of the case, that although one of these provisions was declared payable from the funds conveyed by the wife, this expression was not taxative, but demonstrative, and the provision was due without reference to the amount of the wife's estate.*

AGREEMENT.—DISCHARGE.—CONSTRUCTION. — *Circumstances in which an agreement to execute a full discharge of all claims was limited to those claims specially under the notice of the parties at the time.*

By trust-disposition, in August 1814, Adam Moon conveyed his Narrative.
whole property, heritable and moveable, of which he should be possessed at the time of his death. In 1816, Moon and his wife, Mrs Ann Carmichael, by a postnuptial contract of marriage, after providing to her an annuity payable from his lands, ‘ he became bound
‘ to pay to Ann Carmichael, in case she survive him, the sum of
‘ L.200 sterling, and that at the first term of Whitsunday or Martinmas after his decease, with a fifth part more of penalty, and annualrent of the said sum from and after the term of payment during the not payment.’ After conveying the household furniture, &c. the deed bore : ‘ Which respective provisions, made and conceived in favours of the said Ann Carmichael, and the farther provision
‘ in the event after mentioned, shall be, and the said Ann Carmichael, with consent foressaid, has accepted, and hereby accepts
‘ of the same, in full satisfaction to her of all terce of lands, half or third of moveables, and every thing else which she can claim or demand from the said Adam Moon, or his representatives, or out
‘ of his estate or effects, in case she shall happen to survive him, or which her executors or nearest of kin can claim or demand from
‘ the said Adam Moon, or from his estate, or the goods in commu-

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—
Narrative.

nion, in case he survive her: For which causes, Ann Carmichael, under the declaration after mentioned, hereby assigns and disposes, and makes over to Adam Moon, his heirs, &c. all debts and sums of money, goods and other effects, belonging to her, or to which she shall happen to succeed during the subsistence of the marriage; surrogating and substituting him and his foresaids in her full right and place of the premises; but declaring always, as it is hereby specially provided and declared betwixt the parties, that in the event of there being no child or children procreated of their marriage, or alive at the dissolution thereof, then Ann Carmichael shall be entitled to the farther sum of L.200 sterling from the sums of money hereby conveyed by her to Adam Moon; which farther sum of L.200, in the event foresaid, Adam Moon hereby binds and obliges him, and his foresaids, to content and pay to Ann Carmichael, his spouse, whether she survive or predecease him, or to her heirs, executors or assignees, and that at the first term of Whitsunday or Martinmas after his death, with a fifth part more, &c.; declaring farther, that in the event of Ann Carmichael predeceasing Adam Moon, it shall be in her power, by a writing under her hand, at any time in her life, and even on deathbed, to settle and dispose upon the said sum of L.200 in any way, and to whom she pleases.'

Mrs Moon survived her husband eleven years, but no children were procreated of the marriage. During that time she received from Moon's trustees payment of her annuity, and of the interest of the first sum of L.200; but she made no claim for the farther sum of L.200. On her death, at a meeting of Moon's trustees and legatees, on 30th March 1830, at which her next in kin attended, the following proceedings took place, relative to their claims in her right: The minute bears, 'That Messrs Carmichael, as representatives of the late Mrs Moon, claimed a legacy of L.200, together with certain sums of taxes and annuity, alleged to be due under the contract of marriage and deeds of settlement of the late Mr and Mrs Moon; and after very full discussion, the other individuals composing the meeting unanimously agreed to offer L.200 in full of all these claims; and after consideration, the Messrs Carmichael stated that they would accept of L.210 sterling; and this proposition having been ultimately and unanimously agreed to by the meeting, the Messrs Carmichael hereby become bound to grant a full and valid discharge of all claims, at the instance of Mr Moon's executors, on payment of said sum of L.210 sterling, with interest from this date; and Mr Duncan, as agent for the trustees and the parties interested, was directed to settle the same from the trust-funds accordingly.'

The Carmichaels having declined to execute a full discharge, the trustees brought an action of multiplepoinding before the Sheriff; and the Carmichaels raised an ordinary action against the trustees, concluding for payment of the sum of L.200, with the legal interest from Mr Moon's death, over and above the before-mentioned sum of L.210. The Sheriff having decided in favour of the Carmichaels, the trustees brought an advocacy, in which they contended, 1. That the respondents were bound, in terms of the minute subscribed by them, 'to grant a full and valid discharge of all claims at the instance of Mrs Moon's executors, on payment of the said sum of L.210, with interest' from the date of the minute, and were consequently barred from claiming the additional sum of L.200; and, 2. Supposing they had not come under the special obligation referred to, they were not entitled to claim from the funds of Mr Moon a sum of L.200, which was declared to be payable out of his wife's money, with which he had, and could have had no intromission, seeing she had none.

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The Lord Ordinary repelled the reasons of advocacy, and remitted the cause simpliciter to the Sheriff, adding the subjoined note, in which the respondents' pleas are fully stated:

Note.—'It is very clear that there is nothing in the minute of the meeting of the trustees and the relations of Mrs. Moon which can constitute a discharge, or agreement to discharge the legacy here claimed. It evidently relates only to *one* legacy of L.200, and the arrears of the annuity, taxes, and other such minor matters. The very utmost that can be made of it, therefore, is an argumentative inference of understanding in regard to the construction of the settlement. But no such understanding, however clear, could be of any avail, to deprive the respondents and claimants of their legal rights, even though it were certain that they were fully aware of the facts at the time. Parties like these cannot be tied down to a legal construction of clauses in a technical deed, which may have been pressed on them authoritatively; and the same is to be said of Mrs Moon's having abstained from making the claim, even if it were clear that she did not make it: She had probably but a very loose idea on the subject. The real question therefore is, what is the legal construction of the material clause, taken in connection with the rest of the deed? The Lord Ordinary will not say that the question does not admit of argument, because, in reading the entire deed, he has been struck by the particular *place* in which the clause is introduced, *after the conveyance of the debts, goods, &c. by the wife*, which may give a certain colourable probability to the idea, that the parties were

Lord Ordinary's Note.

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' thinking of effects derived from her. But even though this were
 ' assumed, it would be far from settling the question in favour of
 ' the advocates; for, 1st, Is it clear that the clause, so taken,
 ' ought not also to be held as probatio probata, as laying down by
 ' agreement, as a *fact* not to be redargued, that the wife *had* brought
 ' effects, at least equal in value to L.200? The respondents state
 ' in the record, (condescendence, answer to art. 3,) that she ac-
 ' tually had effects to the amount of L.300; but it rather appears
 ' that the clause, if it could be limited in the way maintained by
 ' the advocates, must be held to assume it as a fact, admitted by
 ' and known to both parties, that there were such effects sufficient
 ' to answer the provision of L.200; but, 2d, This appears to be
 ' far too limited a construction. The wife expressly, *in respect of*
 ' *this provision*, as well as the rest, renounces her legal rights, both in
 ' the event of her surviving her husband, and in that of *his* surviving
 ' *her*. Yet the second provision is the only one by which any part
 ' of the goods in communion comes to her representatives in the
 ' latter case; and the Lord Ordinary thinks, that on the statements
 ' in the record, and the facts appearing from the deeds, it must be
 ' taken, that, at the date of the contract, the husband held large
 ' funds, to a legal share of which the wife must have been entitled,
 ' if this *postnuptial* contract had not been voluntarily executed by
 ' her. It was therefore a very onerous contract on her part, in
 ' construing which, every presumption ought to be given against
 ' the inference of any of the provisions made by the husband being
 ' dependent, as a *condition*, on its being proved that he had derived
 ' funds from the wife to that amount. The provision is, indeed,
 ' so far conditional, that it would not have had effect if there had
 ' been children; but otherwise, the Lord Ordinary is clearly of
 ' opinion that there is no condition; and the *principle* by which he
 ' thinks that the case is at once resolved, is, that the words, '*from*
 ' '*the sums of money hereby conveyed by her,*' are not *taxative*, but
 ' *demonstrative* only. Similar cases have occurred; and the prin-
 ' ciple of construction is well established, wherever the scope of the
 ' settlement will admit of it. The Lord Ordinary observes two
 ' old cases, which, in point of principle, appear to be applicable;
 ' Drummond, Jan. 22. 1724, *Mor.* 2261, and Douglas, Feb. 2.
 ' 1830, (1730,) *Mor.* 2262.'

The trustees *reclaimed*. At the advising, a question was raised,
 whether, supposing the additional legacy to be due, the respondents
 were entitled to the legal interest thereof from Mr Moon's death,
 or only to bank interest.

Lord Justice-Clerk.—It is impossible to read the contract, without seeing the intention was to give two legacies. The words are not taxative, but demonstrative, as the Lord Ordinary has found. On the merits I have no doubt. I agree with the Lord Ordinary on the authority of the case of Drummond, in January 1724. I think bank interest only should be given. There is much in what has been said, that the trustees are only liable qua trustees. The respondents lalled them with the idea that no claim was to be brought forward.

Their Lordships, with the exception of Lord Medwyn, concurred.

The Court found, 'that only bank interest is due on the additional legacy in question; and with this variation, adhere to the interlocutor of the Lord Ordinary, and refuse the desire of the note; find no additional expenses due, and remit to the Lord Ordinary to proceed accordingly.'

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Moon's Trustees v. Carmichael and Others.

Opinion of Court.

Lord Ordinary, Moncreiff. Act. M'Neill. Alt. Sol.-Gen. (Cunningham,)
A. Anderson. Archd M'Neill, W.S. George M'Callum, W.S. and P. Pearson, S.S.C. Agents. T. Clerk.

R.

FIRST DIVISION.

No. CLXXIII.

29th June 1836.

MARQUIS OF QUEENSBERRY AND OTHERS
against
JOHN WRIGHT AND OTHERS.

TEINDS.—INTERLOCUTOR.—RES JUDICATA.—PROCESS.—TITLE TO PURSUE.—*An interlocutor pronounced by a Lord Ordinary, in a process of augmentation and locality, assailing a certain class of heritors from paying part of the stipend due to the minister,—held, although twenty years had elapsed, not to be final, nor to form res judicata, because it had never been approved of by the Court;—and the title of certain heritors, who had been parties to the augmentation and locality, to reduce the said interlocutor, sustained.*

IN 1805, a process of augmentation and locality was brought by the minister of the parish of Lochmaben, which was conjoined with a former one which had been raised in 1792. The common agent had wished to subject certain proprietors, called the King's Kindly

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Tenants, in payment of part of the stipend of the minister ; to which they objected, that their lands were proper Crown domain, and therefore exempted from teind. In 1810, a minute was lodged by the agent for these parties, stating, that he ' understood from the common agent, that he was to desist from any further endeavour to subject them in payment of any part of the stipend due to the minister : that, in these circumstances, he had enrolled the cause for the purpose after mentioned, and duly intimated to the common agent the purpose of enrolment. He therefore humbly moved the Lord Ordinary to repel the demand made on the part of the common agent and heritors, for subjecting the said Kindly Tenants and possessors, and to assoilzie them from the conclusions of the present action ; and to find that they are not liable in payment of any teind or stipend due out of the lands possessed by them respectively, and that no allocation can be made upon them thereanent, in any manner of way.' In 1810, the Lord Ordinary, (Polkemet,) on this minute, pronounced, in absence of the common agent, an interlocutor, by which he ' assoilzied the Kindly Tenants and possessors from the process ; found they were not liable in payment of any teind or stipend out of the lands respectively possessed by them ; and that no allocation could be made upon them thereanent, in any manner of way ; and remitted to the clerk to prepare a locality accordingly.' This interlocutor, however, never was reported, and consequently was never approved of by the Court. Three interim schemes of locality were thereafter constructed, exempting the lands of the Kindly Tenants, which were approved of. No final scheme of locality, however, was ever made out.

In 1822, a third process of augmentation and locality was brought and conjoined with the previous ones, in which the common agent lodged a representation against the interlocutor of 1810, which was refused as incompetent.

Thereafter the pursuers, heritors in the parish, raised the present action of reduction, for the purpose of setting aside the said interlocutor.

The defenders objected to the title of the pursuers, maintaining, that the only parties possessing a legal right to the teinds of such lands as are liable for these, are the titular and the minister of the parish within which the lands lie ; that they are therefore the only parties entitled, by law, to have it found and declared, by a judgment of this Court, that any particular lands are liable in payment of tithes and stipend, more especially any lands which, from time immemorial, have been held and understood to have been free from that species of burden ; and that whatever remote and contingent interest one heritor

may have to be subjected in payment of tithes and stipend, it is not such as to entitle him to sue an action against his co-heritor, containing conclusions to that effect; Bulow, 4th Dec. 1684, *M.* 15,647; Lamont, 7th June 1797, *M.* 15,706; Abercromby, 5th March 1800, *Mor. v. Teinds*, *App.* No. 8; Earl of Mansfield, 21st May 1800, *Mor. v. Teinds*, No. 9; Scott, 5th Feb. 1806, *Mor. Teinds*, *App.* No. 14; Tawse *v.* Earl of Glasgow, 20th June 1821, *Shaw's Teind Cases*; Baillie, 28th Feb. 1822; Earl of Kinnoull *v.* M'Donald, 21st May 1823.

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The Lord Ordinary (Jeffrey) pronounced an interlocutor, repelling the objection to the title; to which he added the following note:

Note.—‘The cases of Abercromby, Tawse and Kinnoull, relied on by the defenders, were cases in which it was found incompetent for individual heritors in a parish to object to a valuation or surrender, or an approbation of the valuation of another heritor’s teinds, on the ground that these were acts or decrees which affected the teinds only of that individual, and to which it was not necessary or competent for other heritors to be parties. The present, however, is a challenge by certain heritors of a judgment pronounced (as they allege) to their prejudice, in a process of locality, to which it is admitted, and set forth by the defenders themselves on the record, that *the pursuers were parties*, and individually cited as such. In all localities, indeed, the whole heritors of the parish are necessarily parties; and, even where they do not compare individually, are represented by the common agent. But if they are parties, they must be entitled to complain of any judgment by which they are aggrieved; and it is not supposed that their right to *reclaim* against the interlocutor of March 1810, if exercised within the reclaiming days, would have been liable to question. But, in so far as regards the question of title, it appears to the Lord Ordinary that there can be no difference between the right to *reclaim* within the reclaiming days, and the right to reduce afterwards: and, on this ground, he has had no difficulty in sustaining the title.

‘At the same time, it must be acknowledged that the cases cited by the defender, and especially those of Tawse and Kinnoull, rest on a narrow distinction. The interlocutor of 1810, now sought to be reduced, was not a judgment approving generally of a scheme of locality, but a special finding of an immunity from payment of stipend in favour of the defenders; and it proceeded upon a separate and substantial discussion of their claim to that exemption, in memorials exclusively on that point. In substance, therefore, and effect, it was precisely equivalent to a decree of the same

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‘tenor pronounced in a declarator, or other original process at their instance, in which the titular and minister alone would have been called as parties. If their right, however, had been established in that form, it would rather appear, from the cases last referred to, that persons in the situation of the present pursuers would not have been allowed to impugn it, even in a reduction, and with a view to obtain an alteration in a locality in which they had interest. The palpable hardship, however, of such a rule is a strong reason for not extending it to cases not covered by the principle on which it rests.’

The defenders *reclaimed*, and the Court remitted to the Lord Ordinary, before further answer, ‘to hear parties on the preliminary points, with power to his Lordship to recall the interlocutor re-claimed against.’

The Lord Ordinary ordered cases on the whole preliminary points, and reported the cause to the Court.

On advising the cause, the Court had no doubt as to the title, but appointed the defenders to lodge a minute, ‘as to the power of the Lord Ordinary to pronounce the interlocutor or decree sought to be reduced, and as to the finality thereof.’

Defenders’
Pleas.

The defenders *pleaded* — By the act passed on 21st February 1707, the whole powers conferred on the Commissioners of Teinds were transferred to the Court of Session, with power to judge on teind questions, ‘as fully and freely, in all respects, as the said Lords do, or may do, in other civil causes.’ Accordingly, the practice of the Court in 1810, in teind cases, was similar to that in ordinary civil cases. Of this one striking instance is found in the fact, that appeals were then held to be competent against judgments of the Court in teind causes. See *Milligan v. Heritors of Kirkden*, 4th Aug. 1779, *Mor.* 14,816; *Mitchell v. Heritors of Tingwall*, 17th Dec. 1786, *Mor.* 14,816; *Earl of Kinnoull v. Macdonald*, 21st May 1823; *Gillan v. Duke of Gordon*, 2d Dec. 1823; and in the House of Lords, 7th June 1825, 1. *Wilson and Shaw*, 295. The interlocutors, therefore, of the Lord Ordinary, in teind processes, must have the same effect as those in ordinary civil cases; and these are declared by *Stair*, iv. 1. 63, to be as binding as the interlocutors of the Inner-House, when acquiesced in. It has been accordingly the invariable practice of the Lord Ordinary to pronounce, in teind cases, an interlocutor adjudging the matter in dispute, precisely in the same way as in civil actions; *Connell on Tithes*, iv. 3, and ii. 240; *Ivory’s Form of Process*, ii. 453; *Beveridge*, 723; *Knox*, 23d June 1773, *Mor.* 14,809; *Dundas*, 13th Feb. 1793, *Mor.* 14,820; *Skene*,

3d June 1795, *Mor.* 14,822; *Heritors of Portmoak*, 9th Dec. 1795, 29 June 1836.
Mor. 14,823; *Maxwell*, 5th Dec. 1798, *Mor.* 14,882; *Leslie*,
 14th Jan. 1800, *Mor. v. Stipend, App.* No. 2; *Locality of Peebles*
v. Elliot, 12th Feb. 1800, No. 3. *ibid.*

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The pursuers *pleaded*—The act 1707 does nothing more than transfer the powers from the former Commissioners to the Court of Session, and does not conjoin the jurisdictions in civil and teind cases, which have always remained quite distinct and separate. See *Forbes's Inst.* i. 254; *Bankton*, iv. 8. This is established by the fact, that the whole procedure before the two Courts is completely dissimilar; and, in particular, teind cases do not originate by enrolment before the Lord Ordinary in the Outer-House, as is the case in all ordinary civil processes; and farther, in teind cases, the Lord Ordinary acts merely as a delegate or reporter under remits from the Court. The words of the remit in the present case, which is in the usual form, are of importance. They are as follows: 'The Lords remit to the Lord Polkemmet, in place of the Lord Justice-Clerk, to proceed in the locality of the pursuers' stipend, to do therein as he shall see cause, and to report.' The Lord Ordinary, then, has no power to decide in processes of locality thus remitted to him, so as to give his interlocutor the effect of *res judicata*. This is evident from the late statute, 6. Geo. IV. c. 120, § 54, with the relative Acts of Sederunt, which had for its object to vest the Lord Ordinary with the power of judging, and to render his interlocutors final, without the necessity of having them approved of or confirmed by the Court; *Connell*, i. 116; *Russell on the Court of Teinds*; *Ivory*, ii. 429; *Bev.* ii. 723. In regard to the cases cited by the pursuer, in none of them has a simple interlocutor of the Lord Ordinary been held as adjudicating any question between the parties, or as forming a *res judicata*. In particular, in the case of *Dunnichen*, it appears from the report that it was the approval of the interlocutor by the Court, and judicial consent thereto by the party, which were held to render it *res judicata*.

Lord Balgray.—I have no doubt except upon one point in this case, and that arises from the special nature of the interlocutor, which appears to have passed of consent of the parties; and if the parties did proceed on that idea, then I think they ought to get the benefit of it; and in the circumstances, the approbation of all parties appears to me to be somewhat analogous to the approval of the Court. I am therefore inclined to hold the pursuer barred, personali exceptione, from reducing the decree, especially after a lapse of twenty years.

Opinion of
 Court.

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Newton and
Renton.

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Upon the death of Sir Richard Newton, without heirs, male or female, of his body, or descendants of such heirs, he was succeeded in the lands and barony of Newton by Richard Hay, fifth son of Lord William Hay, as nearest and lawful heir of tailzie and provision of Sir Richard Newton, by virtue of the bond of tailzie, conform to the retour of the service of the said Richard Hay, afterwards Richard Hay Newton, expedie before the Bailies of Edinburgh upon the 24th of June 1727; and by virtue of the unexecuted procuratory of resignation contained in the bond of tailzie, and of the retour of his service, he obtained from the Crown a charter of resignation of the lands and barony of Newton, with and under the conditions, provisions, restrictions, limitations and declarations contained in the said bond of tailzie. This charter is dated the 26th of July 1736; and he was thereupon duly infeft, conform to instrument of sasine in his favour, dated the 9th of May, and registered the 4th of July 1737. The entail was duly recorded in the Register of Tailzies on 14th December 1725.

Under the said bond of tailzie, as the subsisting investiture, the heirs of entail called to the succession continued to make up their titles to, and to enjoy the estate, as after mentioned. Upon the death of the said Richard Hay Newton, he was succeeded in the lands and barony of Newton by Richard Newton, his eldest son, under the foresaid bond of tailzie. Richard Newton died without issue, and was succeeded by William Hay Newton, his brother, under the said bond of tailzie.

William Hay Newton, with a view to propelling the succession of the entailed estate, by disposition, bearing date the 22d of May 1816, and registered in the books of Council and Session the 15th of April 1835, and not recorded in the Register of Tailzies, disposed the lands and barony in favour of himself in liferent, and of the defender, Richard Hay Newton, his eldest son, in fee, and the heirs-male of the defender's body; whom failing, the said William Hay Newton's other sons, therein named successively, and the heirs-male of their bodies respectively; whom failing, the heirs-male to be procreated of his own body; whom failing, the heirs-male of the body of his father, Richard Hay Newton; whom failing, the other heirs of entail specified in the bond of tailzie; but with and under the reservations, burdens, conditions, provisions, restrictions, limitations and irritancies, contained in the said bond of tailzie. By virtue of the procuratory of resignation contained in this disposition, a Crown charter of resignation of the said lands and barony of Newton and others was expedie in favour of the said William Hay Newton in liferent, and the said Richard Hay Newton, the defender, in fee, and the heirs-male of his body; whom failing, the

other heirs called to the succession by the said disposition, with and under the reservations, burdens, conditions, provisions, restrictions, limitations and irritancies therein contained. This charter is dated the 1st of June 1816; and in virtue of the precept of sasine therein contained, the said William Hay Newton was infeft in liferent, and the said defender in fee, conform to instrument of sasine, dated the 22d, and registered the 24th of July 1816.

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By the foresaid disposition, the fee of the lands and barony of Newton under the entail was propelled by the said William Hay Newton to the defender, his eldest son, for the purpose of creating a freehold qualification, as was wont to be done in ordinary practice in entailed estates, but, as alleged, without its being in contemplation to give any right to the lands freed from, or make any alteration upon the limitations and conditions of the foresaid bond of tailzie, the whole provisions of which it was, on the contrary, intended to carry on, and to preserve, in full force, the tailzied succession through its whole destination. The said disposition sets forth, that ' I, William Hay Newton, Esq. of Newton, have given, ' granted and disposed, as I do hereby, with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irri- ' tant and resolute, declarations and reservations after specified, ' give, grant and dispose to myself in liferent, and Richard Hay ' Newton, Esq. advocate, my eldest son, in fee, and the heirs-male ' of his body, whom failing,' and so on, enumerating the heirs called by the foresaid bond of tailzie, and describing the lands conveyed, and repeating that the conveyance is with and under the reservations, burdens, conditions, provisions, restrictions, and limitations and irritancies after expressed. The said disposition then binds the granter to infeft himself in liferent, and the defender, Richard Hay Newton, in fee, &c. : ' But always with and under the reservations, burdens, conditions, provisions, restrictions, limitations ' and irritancies which are specified and contained in a deed of ' entail, made and granted by the said deceased Sir Richard Newton ' of Newton in favour of himself and the heirs therein and above ' mentioned, dated the 18th day of June 1724, and herein after ' expressed.' Then the procuratory bears to be one for resigning for new infeftment in favour of the granter and Richard Hay Newton, for their respective rights of liferent and fee, and the other parties formerly mentioned, ' with and under the reservations, burdens, conditions, provisions, restrictions, limitations and irritancies ' contained in the said deed of entail executed by the said Sir ' Richard Newton of Newton, and herein after written, viz. with ' this provision and declaration, that all the heirs of tailzie above

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‘ mentioned,’ &c. The prohibitory, irritant and resolute clauses in the said disposition expressly refer, in the outset of each, to the provisions and declarations of the entail. The prohibitory clauses proceed : ‘ And in like manner, providing and declaring, as it is hereby, and by the foresaid deed of entail, expressly provided and declared, that it shall not be leisome nor lawful to the said heirs of entail above mentioned, or any of them, to alter,’ &c. ; and the remainder is a repetition verbatim of the prohibitory clauses of the entail. And the disposition, after setting forth the various conditions and provisions by which the right of the heirs of entail is to be limited and restricted, contains the following irritant and resolute clauses : ‘ Declaring hereby, as it is by the said deed of entail provided and declared, that if any of the said heirs of tailzie shall act and do in the contrary of the particulars above mentioned, or any of them, or neglect to fulfil the conditions after specified, or any of them, then, and in that case, all and every one of such acts and deeds, with all that shall happen to follow, or may follow thereupon, shall be ipso facto void and null, and of no force, strength or effect, sicklike and in the same manner as if the said acts and deeds had not been done, acted or committed ; and also declaring that the person so contravening or failing to fulfil the conditions above mentioned shall, for him or herself alone, immediately upon the contravention, or failing to fulfil the said conditions or provisions, or any of them, amit, lose and tyne all right and title he or she has or can pretend to the said lands and estate.’ And the disposition further bears, ‘ Upon which all and sundry provisions, conditions, restrictions, limitations, faculties and clauses, irritant and resolute, above mentioned, which are hereby and by the foresaid deed of entail appointed to be contained in the instruments of resignation, charters, infeftments, retours and others to follow thereupon, the said entail was executed, and these presents are made and granted by me to the heirs of tailzie above mentioned, and no otherways.’

The present action of adjudication, raised by Mr Turnbull, a creditor of William Hay Newton, to try the validity of the tailzie 1816, was founded upon two variations, alleged to be important, betwixt this disposition and the old bond of tailzie referred to ; for, 1st, The disposition in favour of the defender introduces a new prohibition, fenced with the irritant and resolute clauses, which is not contained in the original one, inasmuch as it provides, ‘ that if any apprising, adjudication, or any other diligence, shall be led and deduced for any of the said burdens or duties, or casualties of superiority above mentioned, or for any debts due by me, or due

‘by any of my predecessors, or for any other debts whatever, the 29 June 1836.
 ‘heir of tailzie who shall possess the said tailzied lands and estate
 ‘for the time shall be bound and obliged to purge and redeem the
 ‘said diligences,’ &c. But the old bond of tailzie contained no
 obligation to purge the adjudications led against the estate for the
 debts of the said William Hay Newton, or the heirs who had pos-
 sessed the lands between him and Sir Richard Newton. And, 2d,
 The irritant clause, contained in the disposition in favour of the
 defender, declares, that all acts and deeds of the heirs of entail,
 arising from their neglect to fulfil the conditions therein-after spe-
 cified, shall be null and void; but the old bond of tailzie declares
 an irritancy against such acts as arise from a failure to fulfil the con-
 ditions therein-before specified.

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The said William Hay Newton, with the consent of the de-
 fender, Mr Richard Hay Newton, executed, in 1821, a trust-dis-
 position in favour of the other defender, Mr Renton, accountant in
 Edinburgh, whereby they conveyed to him the lands, for the pay-
 ment of debt, and for the other purposes therein set forth, under
 the provision that such trust-conveyance should not be construed
 into a contravention of the entail, or subjecting the granters to any
 of the clauses, irritant and resolute, therein contained.

Mr William Hay Newton died on 9th February 1829, and was
 succeeded by Mr Richard Hay Newton, his eldest son, the de-
 fender. William Hay Newton was indebted to the late company
 of Molle, Turnbull and Brown, writers to the signet, in the principal
 sum of £268 : 9 : 3, a debt contracted after the date of the dis-
 position in 1816; and in 1835, the defender, Richard Hay Newton,
 and his trustee, granted a bond of corroboration in favour of the pur-
 suer, as only surviving and solvent partner of the said company of
 Molle, Turnbull and Brown.

Mr Turnbull *pleaded*—1. The entail of 1816 is not valid and Pursuer's
 effectual in a question with onerous creditors; (1.) Because the Pleas.
 prohibitory, irritant and resolute clauses are not directed against
 the defender nominatim, although he is the institute in the deed;
 (2.) Because the irritant clause is at variance with the prohibitory
 and resolute clauses; and, (3.) Because it is not recorded in the
 Register of Tailzies as a new entail. 2. The pursuer is a creditor
 of the defender, and was warranted in transacting with him on the
 faith of the records. He was only bound to look to the investi-
 ture, as entered in the records; and he cannot be affected by the
 considerations which led to the disposition in the defender's favour,
 more especially seeing that they were not set forth, either in the

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‘ against Paterson, 29th June 1784, (*M.* 15,618,) in which the
‘ Court, no doubt, found a deed, executed with reference, and con-
‘ formably, in many points, to a former entail, to be substantially a
‘ new settlement, and ineffectual against creditors, from not being
‘ inserted in the proper register. But that case was most essentially
‘ different from the present, and the Lord Ordinary, approving en-
‘ tirely of that decision, has not had the least difficulty as to this
‘ part of the interlocutor. The case of Bromfield was twice ap-
‘ pealed to the House of Lords, having been remitted for farther
‘ inquiry after the first judgment (which is the only one reported)
‘ of the Court here. It was decided a second time to the same
‘ effect as at first, but with a strong additional ground for the judg-
‘ ment, on the 11th March 1786, and finally affirmed on a second
‘ appeal. Both sets of appeal cases have been examined, and se-
‘ veral material facts, tending to support and explain the judgment,
‘ have been ascertained, which do not appear in the report. The
‘ points chiefly to be attended to are these :

‘ In 1743, Sir John Paterson made an entail, on a procuratory of
‘ resignation, for new infeftment to himself, ‘ *for all the days of his*
‘ *life, and, after his decease,* to his grandson, John Paterson,’ and
‘ other substitutes. But there was no express *provision of the fee*
‘ to John Paterson ; and as the deed contained the most absolute
‘ powers to the granter, not only to revoke and alter, but to sell,
‘ burden with debts, and do every thing that he could have done, had
‘ the right been conceived in favour of himself, and his heirs and
‘ assignees whatsoever, it appears to have been held that the fee
‘ truly remained with Sir John, and that, though sasine was taken
‘ on the deed, his grandson, on his death, must have made up his
‘ titles by service, as heir of provision ; and it was partly to obviate
‘ this necessity, that the new deed was made in 1758. In the
‘ meantime, however, and with a view to the marriage of his grand-
‘ son, Sir John executed, in 1755, what was termed an alteration
‘ and amendment of tailzie, by which, after some slight variations,
‘ he renounced the farther power of altering and burdening, reserved
‘ by the original deed of 1743 ; but the instrument containing this
‘ renunciation, though recorded in the Register of Tailzies, was not
‘ inserted in the Register of Sasines ; so that any person dealing with
‘ the heir in possession, and consulting that register, would find
‘ there only the infeftment on the deed 1743, in which the full power
‘ of revocation, already mentioned, was engrossed at length. The
‘ renunciation was likewise referred to in the grandson’s contract
‘ of marriage, of equal date. But this, though personally binding
‘ on Sir John, in so far as regarded the heir of the marriage, was not
‘ onerous, even against him, as to any other person, and, being a

‘ mere *personal* obligation, was of no avail whatever against creditors contracting with him on the faith of the record.

‘ In these circumstances, the new deed was executed by the same Sir John in 1758; and though it undoubtedly proceeded on the recital of the original entail of 1743, it is most important to observe, that it not only makes one most material alteration in the destination and series of heirs contained in that deed, but sets forth distinctly that it was executed *for the very purpose* of making two other alterations, one of which, at least, was plainly incompetent, except to a person who still possessed a power to revoke and alter. The first was to vest the fee for the first time in the person of the grandson, and to restrict the granter to a naked liferent, which was probably allowable as a mere act of propelling. But the second was actually to dispense with the radical prohibition against *alienation*, in so far as to enable the grandson to dispose as much of the entailed superiority as might afford two freehold qualifications; while the change on the destination, on the other hand, was no less than a total omission of *James Paterson*, (the granter’s second son,) and the heirs of his body; for which heirs comppearance was made after the remit from the Lords, and their existence, and the granter’s knowledge of their existence, fully established before executing the deed of 1768. The ultimate judgment of the Court, therefore, in March 1786, finds specially, that in respect of the alterations in that last deed, ‘ and, *in particular*, that ‘ certain heirs called by the entail 1743 *are omitted* in the disposition 1758,’ the said disposition is to be held as a new settlement of the estate, and not being inserted in the Register of Tailzies, is not effectual against creditors.

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‘ Coupling the extent of these alterations, therefore, with the fact, that on looking into the Record of Sasines, Sir John must have appeared to any inquiring creditors, in 1758, still to have full power to revoke and alter and make new deeds at his pleasure, it is apprehended that no doubt can be entertained, either of the soundness of this judgment, or of its being quite inapplicable to the circumstances of a case like the present.

‘ The alleged variations in this case are of the most minute and insignificant description; and indeed the pursuer scarcely founded at all on them, but almost entirely on the general form and style of the deed of 1816, in support of his argument, that it was to be regarded as a new settlement. He relied on them chiefly as such imperfections in the recital of the burdening clauses, as to let in the claims of creditors, under the special provision of the statute referred to in the interlocutor, even on the supposition that the deed itself was not a new settlement, but only a propelling of the tail-

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—
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‘ zied fee. But in either view they appear to the Lord Ordinary
‘ entitled to no serious attention.

‘ They are but two in number ; and the first consists in this, that
‘ in transcribing *the irritant clause* in the original entail, a part of the
‘ conditions of entail are, by a clerical error, described as being *after*
‘ instead of *above* mentioned. Now, critical as this is, the Lord Or-
‘ dinary is inclined to think that it might be fatal to the validity of
‘ the deed, if it had occurred in the description of any thing that
‘ truly fell, or could fall under the operation of the *irritant clause*,
‘ in the close of which it is found. But what is the case here ?
‘ The reference to all *the prohibitions* of the deed, and all *the acts*
‘ *and deeds* that may be done in contravention, is perfect and cor-
‘ rect ; the clause setting forth distinctly, ‘ that if any of the heirs
‘ *shall act or do* in the contrary of the particulars *above* mentioned,
‘ or any of them, &c. *all such acts and deeds* shall be void and null,’
‘ &c. But it is in adding a superfluous and substantially absurd
‘ clause, endeavouring to extend this declaration of nullity to *mere*
‘ *omissions* or neglect of what was enjoined, that the verbal blunder
‘ referred to has been committed ; the clause continuing, ‘ or shall
‘ *neglect to fulfil* the conditions *after* specified ;’ to which unmeaning
‘ reference (in such a place) there is in fact no sequel in the rest
‘ of the deed, there not being, as in fact there *could not be*, any de-
‘ claration of nullity, except of *the facts and deeds* already correctly
‘ referred to. The Lord Ordinary apprehends it to be clear, that
‘ the proper and only objects of the *irritant* or annulling clause are
‘ *prohibited acts and deeds* that admit of reduction or recall ; and
‘ that as it is a mere absurdity to reduce or declare null a mere
‘ neglect or omission, so any reference to such neglect or omission
‘ in the *irritant* clause is entirely out of place, and being without
‘ any possible effect or operation, is mere surplusage, that may be
‘ held as *non scriptum*, and any verbal inaccuracy in the expression
‘ of which is therefore of no consequence. The only clause which
‘ can operate as to *omissions* is the resolute, and in that clause the
‘ conditions to which it refers are in this case correctly described as
‘ *above* mentioned. It is a separate and independent clause, and
‘ bears, that heirs either contravening, ‘ or failing to *fulfil* the con-
‘ ditions *above* mentioned, shall amit, lose and tyne all right,’ &c. It
‘ is humbly conceived, therefore, that both clauses are sufficiently
‘ engrossed and repeated in the instrument in question.

‘ The other alleged variation is of still less importance. It is
‘ said to consist of an incompetent *addition*, made to the provision of
‘ the original entail, and is of this nature. By that original deed,
‘ the heirs are taken bound to purge any adjudications that may be
‘ led against the lands ‘ for debts due by *me*, (that is, the entailer

“himself,) or any of his predecessors.’ Now, the alleged blunder here has arisen from the granter of the deed 1816 copying these words *too literally*, and forgetting that he, though the maker of that deed, was not the entailor; thus taking the future heirs bound to purge any adjudications for *his* debts or those of *his* predecessors, that is, for debts contracted previous to 1816 instead of debts previous to 1724. There is little doubt that the hasty adoption of the very words of the original deed has given rise to this possible variance in the meaning. But the Lord Ordinary conceives that it can be of no avail to the pursuer, for the three following reasons: 1st, He apprehends that the unwarranted adjection of an *additional* condition to the provisions of a former entail will result merely in the nullity of that condition, and will not let in creditors under the special enactment of the statute, provided all the original conditions be fairly and fully engrossed in the body of the right. 2d, If the entail was otherwise unexceptionable, (and if it was not, *cadit questio*;) it is plain there *could* be no adjudications after those of the entailor, all debts subsequently contracted being null as against the estate, under the clauses against contracting debt duly fenced by the irritant and resolute clauses: And, 3d, Which is conclusive per se, it appears on reading on, both in the original and propelling deed, that the clause objected to in the latter, however idle and inoperative it may be, is truly warranted by, and comprehended in the sequel of that clause in both deeds, which extends the obligation to purge, in express terms, to all adjudications that may be led ‘*for any other debts whatever*,’—a description which unquestionably includes the debts of the successive heirs, from the time of the entailor to that of the maker of the deed 1816. The Lord Ordinary is humbly of opinion, therefore, that there is nothing in this objection. In the case of Bromfield, in which there was a separate finding as to this clause of the statute, the whole irritant and resolute clauses were omitted in the deed 1758, which contained only a general reference to the original entail.’

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Renton.

Note.

The pursuer *reclaimed*.

Lord Glenlee.—The heir in possession must, by the deed of 1816, hold the estate under the old entail, otherwise he does not hold it at all. Opinion of Court.

Lord Medwyn.—I concur with Lord Glenlee in the construction of the deed, more especially having reference to the distinct clause in the disposition, by which the defender is to take the estate in terms of the original entail, and by no other title. I think, how-

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ever, that the second ratio of the second finding in the Lord Ordinary's interlocutor is unnecessary, and might be recalled.

I may farther notice, that we are indebted to the Lord Ordinary for the very accurate account of the case of *Eccles v. Paterson*, given in his note.

The other Judges concurred.

Judgment.

The Court unanimously *adhered*, recalling the second ratio of the second finding of the interlocutor reclaimed against.

Lord Ordinary, Jeffrey.
(Cuninghame.)
W. S. Agents.

Act. Rutherford, Anderson.
George Turnbull, W. S. and Walker, Richardson & Melville,
R. Clerk.

Alt. Sol.-Gen.

R.

SECOND DIVISION.

No. CLXXVI.

29th June 1836.

WILLIAM DAUNEY AND ANOTHER, (STEAM-CARRIAGE
COMPANY OF SCOTLAND,)

against

ROBERT SCOTT AND OTHERS, ROAD TRUSTEES.

PROCESS.—(JURY TRIAL.—ISSUES.)—REPARATION.—*In an action of damages by proprietors of a steam-carriage, for injury sustained through obstructions put down on a public road by road trustees,—found, (1.) That although malice was alleged in summons and condescendence, it was not necessary that malice should make part of the issue; and, (2.) That the proper question to be put in the issue, was, whether the defenders wrongfully performed certain operations, to the loss, injury and damage of the pursuers.*

THE following note by the Lord Ordinary, in making avisandum with a proposed issue, in order that the Court might determine whether malice should make part of an issue, sufficiently explains the nature of the question submitted for the opinion of their Lordships:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having heard parties' procurators on the form of the issue proposed, makes avisandum with the cause to the Court, in order that the issue may be settled in their presence; and appoints printed copies thereof, and of this interlocu-

'tor and the subjoined note, to be put into the boxes of the Lords of the Second Division of the Court *quamprimum*.'

Note.—'This issue is reported, on account of a question which it is of importance for the parties to have settled without delay, in order that the cause may go to trial, and which cannot be settled without the opinion of the Court.'

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Note.

'The action is an action of damages by the proprietors of a steam-coach, for injury done in consequence of certain circumstances in the state of the road on which it ran, and is directed against the trustees of the road. The coach is stated to have been broken and overturned, and several people killed and wounded.'

'The summons libels, that the acts or operations which are said to have produced the mischief were done by the defenders *maliciously*, and *for the purpose* of injuring the steam-carriage, or preventing it from travelling the road. In the condescendence, the same facts are set forth for inferring the *purpose* of injury; and in two places, though not throughout, the word *malicious* still occurs.'

'The Lord Ordinary understands, that, in preparing the issue, a question arose, whether this is a *privileged case*, to render *malice* essential, as a substantive part of the issue; and that the issue clerks, conceiving that it is not, made out the issue as it stands, with the word *wrongfully* only, and not putting it on the pursuers to prove malice positively.'

'The defenders say, that, from the nature of the case in the summons and condescendence, it consists essentially in an averment of malice, and therefore the pursuers are bound to take an issue of that nature.'

'The pursuers state distinctly, that they do intend to prove the case as averred, that the operations on the road were performed for the *express purpose* of impeding or injuring the steam-coach, and not for the fair purpose of repairing the road. But they say that they are not on that account bound to take an issue on malice, because the case is *not privileged*; and proof of any wrongful act, whether amounting to positive malice or not, is sufficient to entitle them to a verdict; but they state also, that if the Court were to hold that they would not be entitled, under the issue now proposed, to prove the direct intention to injure the steam-coach, and that, to entitle them to do so, malice must be in the issue, they will then take that issue.'

'The Lord Ordinary is of opinion that the case is not in any view privileged, and that the nature of the particular facts on which the action, as for wrongful acts producing damage, is to be sustained, ought not to alter the nature and form of the issue for

29 June 1836. 'trying such a case, where there is no admitted privilege; and therefore he thinks, 1st, That the pursuers are not bound to take an issue of malice; and, 2d, That without such an issue, and under that already framed, they will be entitled to prove all the facts set forth in the condescendence: but the question is reported for the judgment of the Court, and in order that the precise effect of the issue may be understood before the case goes to trial.'

Dauney, &c.
v. Scott and
Others.

The following was the issue proposed:

Issue.

'Whether, during the months of June and July 1834, or either of them, the defenders, or any of them, by themselves, or another, or others acting under his or their authority, wrongfully performed certain operations on all or any part of the road leading from the city of Glasgow to a place called the Three-Mile-House, on the road from Glasgow to Paisley, whereby, on or about the 29th July 1834, a steam-carriage, the property of the pursuers, was injured, to the loss, injury and damage of the pursuers?'

Dean of Faculty, for the pursuers, declared himself satisfied with the issue. It was not a privileged case, and there was no occasion for introducing malice into the issue.

Rutherford, for defenders, contended, that as malice was averred throughout the summons, and in the condescendence, it was incumbent on the pursuer to instruct it. The action was grounded on that averment, and the issue should embrace the ground of action. This was not a case of alleged ordinary neglect, but a charge against the defenders, of purposely and maliciously adopting proceedings, under the pretence of discharging their duty, which are said to have been, as they were intended to be, highly detrimental to the pursuers.

Opinion of
Court.

The Lord Justice-Clerk.—I cannot lay down the principle that this is a privileged case, and therefore it is not necessary to aver malice, or to prove it. The term, wrongfully, is sufficient to enable the pursuers to prove the nature of the proceedings complained of, and also to let in every competent defence.

Lord Glenlee.—If the pursuers had not only averred malice in the summons, and in their condescendence, but also founded upon malice in their pleas in law, I think there might have been something in the objection taken to the issue; but as the pleas are framed independently of malice, that shews that the pursuers abandon the statement, and do not undertake to prove it.

Lord Meadowbank expressed a wish that the cause might stand over. 29 June 1836.

Lord Medwyn entertained doubts of the correctness of the issue. The second plea was, that the defenders had 'purposely' put down obstructions on the road. He was willing that the point should be farther considered. *Danney, &c. v. Scott and Others.*

The *Court*, accordingly, took time to consider; and at the moving of the cause this day,

Lord Meadowbank.—I cannot agree to the issue in its present shape, looking to the nature of the action and the proceedings complained of. The defenders are road trustees under the provisions of an act of Parliament. They have certain duties imposed on them in reference to the state of the roads, as suitable for carriages drawn by horses, and the other modes of conveyance existing at the time when the Legislature imposed these duties. It might happen to be the duty of the trustees so to repair and metal the road, with reference to carriages drawn by horses, as inevitably to infer a wrong to a steam-carriage. Two feet of metalling might impede or stop a steam-carriage, while six inches might not. Additional metalling, to the extent of six inches, might do to keep the road in sufficient repair for ordinary carriages, but a greater depth, say two feet, might be proper or necessary. Are road trustees to refrain from doing their duty, because the inevitable effect may be to stop steam-carriages? I think it within the privilege, and the bounden duty of the trustees, to repair the roads effectually for these carriages, which were in the contemplation of the Legislature in passing the road act. I would propose to add the words, 'with intent thereby to injure the property of the pursuer.'

Lord Justice-Clerk.—There is really not a wide difference in our opinions; for my idea is, that unless the pursuer establish that the defenders purposely and intentionally put down obstructions, for the very purpose of creating impediments and stopping these steam-carriages, this action must fail. But I think the word 'wrongfully' answers this view of the action. If, under the pretext of keeping the road in repair, the trustees ordered a quantity of metal to be thrown down, more than sufficient, or differently broken from the usual mode practised, the question for the Jury would be, whether they were satisfied that this had been wrongfully done; and if so, they should find for the pursuers. I cannot find, in the Lord Chief-Commissioner Adam's late work on Jury Trial, any thing to lead me to think that malice is necessary. I can find no authority for holding that road trustees have any privi-

29 June 1836.

Daunev, &c.
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Others.

Opinion of
Court.

lege. If it be set forth that the obstructions were wrongfully laid down, it must be proved that this was done illegally, intentionally, and injuriously to the pursuers; and I think the word wrongfully comprehends that.

Lord Glenlee.—I see no use for the word malice.

Lord Medwyn.—I have no intention of differing from your Lordships, so as to create delay in the trial of this cause. I do not mean to say unqualifiedly, that wherever malice is charged in the summons, the pursuer is bound necessarily to take an issue on malice. But when I see in the summons that malice is broadly alleged, and that over and over again, and made the ground of action, and that in the condescendence malice is also specifically stated as often, and in every article where it can be, I must say it becomes matter for serious consideration, how far a party, by afterwards departing from the charge of malice, can be allowed completely to alter the nature of the action in which the defender has prepared his defence. It has been said that malice is not included in the pleas in law for the pursuer; but, on looking at them, the second plea looks very like a plea of malice. The purposely putting down obstructions on the road, so as to injure the steam-carriages and prevent them plying with safety, is really very little different from a distinct charge of malice; and if any words were introduced into the issue to limit the meaning of the word *wrongfully*, so as to apply to that plea, I should feel quite satisfied. No doubt, the Judge at the trial will be able to direct the Jury properly under this issue; but there is a risk, from the nature of the expressions used, of the Jury taking a different view of the law from that given by the Judge. I think, if possible, that is to be guarded against, as much better for all parties, than having it set right by a bill of exceptions and second trial. But I am not inclined to press my difficulty against the opinion of your Lordship and Lord Glenlee.

Judgment.

The Court remitted to the Lord Ordinary to adjust and approve of the issue accordingly.

Lord Ordinary, *Moncreiff*. Act. Dean of Fac. (*Hope*), *P. Robertson*. Ak.
Sol.-Gen. (*Cuninghame*), *Rutherford*, *M'Neill*, *Ivory*, *Sandford*, *H. Bruce*, *M.*
Napier. *Smith & Kinnear*, W.S. *A. Douglas*, W.S. *Hopkirk & Imlach*, W.S.
and *W. A. G. & R. Ellis*, W.S. Agents. *Mr Russell*, Clerk.

R.

FIRST DIVISION.

No. CLXXVII.

30th June 1836.

SIR THOMAS J. INGLIS COCHRANE

against

BASIL COCHRANE'S TRUSTEES AND MRS VERNOR.

ENTAIL.—STAT. 10. GEO. III. c. 51.—ASSIGNATION.—(INTIMATION.)—PROCESS.—*An heir of entail in possession having made improvements at two different times, and assigned his statutory claims for the respective sums expended, as ascertained by separate decrees, to two different persons,—found, in a multiplepinding at the instance of the succeeding heir, that the assignee to the claim created by the first improvements, for the sum ascertained by the first decree, was entitled, although the second assignee pleaded prior intimation, to be preferred primo loco on the fund in medio, in respect that, as the assignments related to different subjects, there could be no room for the question of intimation.*

Opinion expressed by the Court, that the assignments of such claims were as effectual before as after decree.

THIS case is clearly stated in the following note, added by the Narrative. Lord Ordinary to his interlocutor of the 12th May 1835: ‘ *Note.* —This is a multiplepinding brought by Sir Thomas Cochrane, the successor of his late father, Sir Alexander Cochrane, in the entailed estate of Murdieston. The fund in medio consists of such sums as are due by the raiser, in virtue of the 10. Geo. III. c. 51, for improvements executed on the entailed estate by his predecessor, Sir Alexander, in implement of which obligation he proposes to assign, in terms of the statute, one-third of the free rents of the estate. The object of the action is to determine the claims of preference respectively maintained by two parties, who each hold an assignment to a certain extent of the sums expended in improvements by Sir Alexander.

‘ Upon considering these claims, and the terms of the statute, the Lord Ordinary cannot perceive any ground of preference on either side. The late Sir Alexander executed certain improvements between Martinmas 1815 and Martinmas 1816, the amount of which, in so far as transmissible against the subsequent heirs of entail, was ascertained by two decrees of the Court, the one of the 8th March 1817, and the other of the 11th February 1818,

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Note.

‘ to be L.2459. This sum, as well as the decrees ascertaining it, are now by assignation in the person of the claimants, the trustees of the Honourable Basil Cochrane. Further improvements were executed by Sir Alexander, between Martinmas 1816 and Martinmas 1817, and the amount of these, in so far as transmissible against the succeeding heir, was ascertained to be L.7115, by decree obtained on 7th July 1818, and this sum, with the decree, was assigned to the author of the other claimant, Mrs Elizabeth Vernor, in security of L.3700, borrowed from her by Sir Alexander Cochrane. Sir Alexander Cochrane died in January 1832, and the last-mentioned assignation was intimated notarially to the raiser, his successor. The assignation held by the other competing party was not thus formally intimated, though it is averred by them that intimation was actually made, and that their rights were recognised by the raiser.

‘ The claim of preference advanced by the Honourable Basil Cochrane’s trustees is founded on the priority of the improvements to which the sum assigned to them relates, and of the decrees by which it was ascertained. The Lord Ordinary is not aware of any such question having been raised till now, and it does not seem to him that there are any grounds for sustaining such preference. The statute permits the heir in possession to create obligations good against succeeding heirs to the extent of a certain number of years’ free rent; and it also enables any succeeding heir to be discharged of these sums, on assigning one-third of the free rent of the estate during his life, or until the money be paid. Each person, then, to whom the heir executing the improvements has assigned any part of the sum so expended, becomes a creditor to that extent of the succeeding heir, under the conditions and qualifications of the statute. But the Lord Ordinary sees nothing in the statute to distinguish such partial assignations from assignations of any other personal debts, or to warrant, in a competition between such partial assignations, a claim of preference on the mere priority of the constitution of the debt.

‘ On the other hand, it appears to the Lord Ordinary that the claim of preference maintained by the other claimant, Mrs Vernor, is equally unfounded: that rests mainly on the alleged priority of the intimation of her assignation to the present heir in possession, Sir Thomas Cochrane. But it will be observed that there is here no proper competition of assignations, such as might have arisen if each party had held an assignation to the same debt. Here, on the contrary, each party has an assignation to a separate debt, though originally due by the same debtor to the same creditor. If a creditor assigns the same bond successively to two par-

'ties, the first intimation will of course establish the preference, 30 June 1836.
'though in favour of the last assignee. But if the creditor holds
'two separate bonds for different debts due by the same debtor,
'and grants separate assignations of each, the intimation can have
'no greater effect in each case than that of completely vesting in
'the assignee the right of credit so assigned; and in the event of
'a deficiency of the debtor's funds, there seems to be no grounds
'for admitting the priority of intimation as a ground of preference,
'or for applying any other rule of ranking than that which would
'have held if the two bonds had been originally granted to different
'parties.

*Cochrane v.
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Trustees, &c.*
Note.

'As to the clause in the statute requiring intimation to be made
'to the succeeding heir by the parties in right of such claims within
'a particular period, it appears quite obvious that they were in-
'tended, not in any way to affect the preferences of parties, having
'partial conveyances of the debt so created, but solely for the pro-
'tection of the future heirs of entail, in the event of the assignees
'failing to make good against the immediate successor of the heir
'creating the burdens, the amount for which he was properly liable
'under the statute.'

The Lord Ordinary accordingly pronounced the following inter-
locutor: 'The Lord Ordinary having heard parties' procurators,
'and considered the closed record and process, repels the claims of
'preference respectively maintained by the parties; finds, that they
'must rank *pari passu* on the fund in medio, according to the sums
'contained in their respective assignations, the ranking of the
'claimant, Mrs Elizabeth Vernor, being restricted to the effect of
'enabling her to recover the principal and interest of the sum of
'£3700 sterling, the debt in security of which the assignation in
'her favour was granted, and decerns accordingly, but finds no
'expenses due: Quoad ultra, appoints the case to be enrolled, that
'parties may be heard on the actual amount of the fund in medio,
'and mode of its division.'

Lord Ordinary's Inter-
locutor.

Both parties *reclaimed*, and the Court ordered cases, in which
Cochrane's trustees *argued*—(1.) The Lord Ordinary seems to
assume that the heir of entail has an unlimited power under the sta-
tute; but instead of having an unlimited power of making a propor-
tion of the expense of all his improvements, however extravagant,
and at whatever time made, a charge against his successors, he has,
on the contrary, no more than a limited power or faculty to burden
the succeeding heirs; which is in every case measured by, and
limited to, four years' free rent of the particular estate. And an

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heir of entail having once exercised that faculty, and made his improvements to the extent of four years' free rent a 'subsisting charge' against the succeeding heirs, has exhausted his power under the statute. Section 9. declares, no doubt, that the heir making the improvements 'shall be a creditor to the succeeding heirs of entail for three-fourth parts of the money laid out in making said improvements.' But observe the limitation introduced by the immediately succeeding section: 'Provided always that the sum or sums of money laid out upon such improvements by any one heir of entail during his or her possession shall not in any case whatever be effectual to constitute a claim against the succeeding heir of entail for more than four years' free rent of the said entailed estate.' This, again, is followed by the enactment in the 13th section, 'That when a sum equal to four years' free rent shall have been laid out in manner above mentioned by one or more heir or heirs of entail, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for any subsequent heir or heirs to lay out any more money under the authority of this act for any of the improvements afore mentioned.' The sum due to claimants is equal to four years' rent of the estate, and, therefore, to admit the claim of the opposite party would be to raise up a second improvement debt by the same heir of entail, which would evacuate a prior subsisting statutory charge without payment, or any of its equivalents. (2.) A debt to a certain amount having been once constituted under the statute by a special decree, and transferred to an onerous assignee, no subsequent constitution can competently interfere with the assignee's right. (3.) Where a subsequent debt has been contracted by improvements even within the statutory amount, the debts being completely separate, the rules of law which regard intimation cannot apply. (4.) Intimation of the assignation to a debt under the statute to the parties who may successively become chargeable therewith, is neither recognised nor enjoined by the statute as a necessary ingredient in the creation of such charge.

Mrs Vernor's
Argument.

Mrs Vernor answered—(1.) The statute gives no countenance to the idea, that the heir of entail is not to expend more than a specific sum on improvements. Sections 9. and 10. do not certainly prohibit an heir from laying out as much as he pleases in improvements. But the 13th section removes all possibility of doubt on this matter; for it enacts, 'That when a sum equal to four years' free rent shall have been laid out, in manner above mentioned, by one or more heirs of entail, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for

‘any subsequent heir or heirs to lay out any more money, under the authority of this act, for any of the improvements before mentioned.’ By this section, then, the prohibition against laying out more money on improvements, after ‘a sum equal to four years’ free rent shall have been laid out,’ and shall have been made ‘a subsisting charge,’ is against the subsequent heirs of entail only, and is not directed against the heir by whom the money is expended. This construction is not only borne out by the express words of this last section, and the whole object of the statute; it is also the only one which could be adopted in order to render the machinery of it practicable. Cochrane’s trustees maintain, that whenever an heir expends a sum that shall be equal to four years’ rent of the estate, as the said rent may happen to be at the term of Whitsunday after his death, he cannot expend more money in improvements, so as to be the foundation of any debt against the next heirs. If this be the case, how can an heir of entail know where to stop, or rather where would he ever begin to make improvements? He of course does not know what rent the estate will yield at Whitsunday after his death; and, therefore, it is quite impossible for him to know what sum he will be entitled to expend on improvements, for which he and his assignees may come against the next heir for repayment. When Sir Alexander Cochrane commenced these improvements in 1815, it was seventeen years before his death; and it is stated that in that year he expended twice as much as four years’ free rent of the estate at the time of his death. According to the doctrine maintained on the other side, it was incompetent for him to expend one farthing beyond the amount of this four years’ rent, and that any decree taken for a larger sum was irregular and incompetent under the act. The consequences of this doctrine to heirs of entail would be very serious. The object of the act is to encourage them to advance their money, or to induce and enable them to borrow, for the purpose of improving the estate, on the assurance that a certain portion should be repaid by the heirs of entail; but who would ever lend to heirs of entail, on an assignment of a decret, if it was liable to be set aside, on the ground of its being obtained for a sum that might turn out to have been incompetent for the heirs to expend? The plain meaning of the act is, that it is only after the death of the heir who expends the money, that the precise sum which is to form a subsisting charge shall be ascertained, beyond which subsisting charge, when so ascertained, it ‘shall not be lawful for any subsequent heirs to lay out’ for more improvements. There is nothing incompetent in an heir of entail laying out as much as he pleases, and obtaining as many decreets as he likes for the said sums—provided there is no already ‘sub-

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Cochrane v.
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Mrs Vernor’s
Argument.

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Trustees, &c.

Mrs Vernor's
Argument.

'sisting charge' equal to four years' free rent. The only condition to which he or his assignee is subjected is, that he cannot enforce payment of a larger sum than what will be equal to four years' free rent of the estate when the succession opens to the next heir. It is then, and not till then, that the four years' free rent (if the expense of improvements amount to so much) is made a 'subsisting charge against the succeeding heirs.' (2.) Each assignee, to whom the legal proportion of sums expended in improvements has been transferred, acquires right to one and the same subject, viz. a certain proportion of the rents, or, as their equivalent, a personal claim upon the next succeeding heir; and, therefore, whichever first completed his right by assignation to the succeeding heir acquired a preferable claim. (3.) Intimation being a necessary solemnity, it is equally requisite whether specially recognised and required by the statute or not.

At advising,

Opinion of
Court.

Lord Balgray.—I found considerable difficulty in this case. In regard to the nature of the debt, it is not an heritable debt burdening the estate, but in fact it is a mere personal claim against the heirs of entail. In the first place, the question occurs, whether, under the statute, the assignation requires intimation for its completion. On turning to the act I do not find any statutory intimation prescribed. The machinery of the statute is this: The heir who makes the improvements is bound to have the vouchers of the expenditure recorded within a certain time. These vouchers are then returned to him, as the ground of a personal claim against the heir succeeding. This claim, he is entitled by the act to transfer to any third party. In the present case, the claim for the sum expended in the first improvements, as ascertained in the first decree, is transferred to one party, and the claim for the sum contained in the last decree, as the expenditure on subsequent improvements, is assigned to another party. These two claims are quite distinct, creating separate personal rights, and having no connection with one another. How then can a person who has had the prior right, as ascertained by the first decree transferred to him, be cut out by the assignee to the posterior right contained in the other decree, seeing there is no room for a question of intimation at common law, and no special intimation is required by the act to complete the assignation? I do not think, therefore, they can come in *pari passu*, because, if the right which was constituted by the first decree was vested in the assignee by the bare assignation without intimation, I cannot see how the heir in possession can create an equality of rights by a subsequent assignation

to a claim for posterior improvements. It is optional to the improver to take decree or not, in his lifetime: the assignation, therefore, would have been just as good before as after the decree.

Lords Gillies and Mackenzie expressed similar opinions.

Lord President.—I fully concur in the above opinion. If an assignation of the same claim or debt have been made to two different people, then there might be a question of intimation; but that is not the case here. I concur in thinking the liability is created, and the assignation perfectly good, even without a decree of declarator during the heir's lifetime.

The *Court* pronounced the following judgment: 'Alter the interlocutor of the Lord Ordinary reclaimed against; find the trustees of the Honourable Basil Cochrane entitled to be preferred in the fund in medio, hoc statu, and decern: Quoad ultra, remit the case back to the Lord Ordinary, to proceed farther as shall be just: find no expenses due to either party.'

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Opinion of
Court.

Lord Ordinary, *Fullerton*.

For Mrs Vernor, *Dean of Fac. (Hope,) Miles.*
J. R. Skinner, W. S. Agents.

For Cochrane's Trustees, *Rutherford, W. Bell.*

Thomson Paul, W. S. and

S. Clerk.

C. R.

FIRST DIVISION.

No. CLXXVIII.

30th June 1836.

CHARLES KNIGHT MURRAY AND MANDATARY
against
GEORGE, EARL OF ROTHES, AND OTHERS.

HERITABLE AND MOVEABLE. — MARRIAGE-CONTRACT. — CONSTRUCTION.—*In a marriage-contract between a domiciled Englishman and a Scotch lady, all subjects, heritable and moveable, belonging, or that should pertain and belong to the lady during the subsistence of the marriage, were, on her part, conveyed to trustees, for the purpose of 'paying to the husband and wife, and to the survivor, the interest of 'said sums; and after their death, to pay the said sums thereby assigned to the children of the marriage; whom failing, to the heirs and assignees of the wife.' The wife having died intestate, the husband claimed right to certain heritable securities in Scotland, as her heir in mobilibus by the law of England,—Held, that the word 'heirs,'*

30 June 1836.

as above quoted, imported the heirs at law in heritage by the law of Scotland.

Murray and
Mandataray v.
Earl of Rothes
and Others.

Narrative.

THIS was an action at the instance of the pursuer, a domiciled Englishman, who had married a Scotch lady, by which, libelling on the terms of the marriage-contract, he claimed, as her administrator-in-law, besides moveable property, certain sums which had been vested in trustees, inter alia, for her use, and were at the time of her death heritably secured in Scotland. The findings of the Lord Ordinary are sufficiently minute to shew the only points substantially in issue without farther narrative. His Lordship found as follows: ‘ Finds, that, by a marriage-contract of the 15th day of December 1827, in the Scotch form, between the pursuer and the late Lady Henrietta Ann Leslie, the latter conveyed to certain trustees ‘ all and sundry goods, gear, sums of money, and “ debts heritable and moveable, of every description, presently belonging, or that shall pertain and belong to her during the subsistence of the said marriage;’ and without prejudice to the foregoing, her share of the heritable bond for L.10,000 sterling, granted by her mother, the late Countess of Rothes, over the estate of Rothes, in favour of the said Lady Henrietta and the Countess’s younger children: Finds, that the conveyance to the trustees in the marriage-contract was made for the purpose of paying to the pursuer, Charles Knight Murray and Lady Henrietta Ann Leslie, and to the survivor, the interest of the said sums, and of paying, after their death, the said sums to the children of the marriage; ‘ whom failing, to the heirs and assignees of the said Henrietta Ann Leslie.’ Finds, that Lady Henrietta Ann Leslie died on the 14th day of April 1832, without leaving children, and having been domiciled in England during the subsistence of her marriage: Finds, that George Leslie, the father of Lady Henrietta, died in the year 1829, and that by his settlements, viz. a will, of date the 8th day of June 1817, and an additional deed of 5th June 1820, Lady Henrietta Leslie was, amongst with the other younger children of her said father, entitled to an equal share, first, of the two heritable bonds of L.5000 sterling and L.4000 sterling, over certain lands in Scotland; and, secondly, of the whole residue of his personal estate: Finds, that the said property and effects, carried by the will of George Leslie, are now vested in the defender, the Earl of Haddington and others, as executors and trustees of the said George Leslie: Finds, that the present action is brought by the pursuer in the character of “ heir and representative of his foresaid wife, Lady Henrietta Ann Leslie, by the law of England, and as such entitled to the said

“ Lady Henrietta Ann Leslie’s share of the said sum of L.10,000 sterling, as also to her share and interest under the foresaid settlement of her said father :’ Finds, that the action is directed against the executors and trustees of George Leslie, against the Earl of Rothes, his eldest son, and against his other surviving younger children : Finds, that the summons concludes against the defender, the Earl of Rothes, for Lady Henrietta’s share of the heritable bond for L.10,000 sterling ; and, secondly, against the other defenders, the trustees of George Leslie and his surviving youngest children, for Lady Henrietta’s share of the whole property carried by the said George Leslie’s settlements above mentioned : Finds, that by the terms of the marriage-contract between the pursuer and Lady Henrietta Ann Leslie, the property and effects falling under the destination to her heirs and assignees, failing children of the marriage, became at her death, without leaving any settlement, subject to the ordinary rules of intestate succession : Finds, that agreeably to those rules, her personal succession must be regulated by the law of England, where she was domiciled at the time of her death ; and in respect of the admission, that the pursuer is by the law of England her representative in mobilibus, finds, that he is entitled to Henrietta Ann Leslie’s share of the moveable property of her father, George Leslie : To that extent repels the defences, and sustains the declaratory conclusions of the action, and appoints the defenders to give in a state of their intromissions with the said George Leslie’s moveable means and estate : Quoad ultra, and in regard to Lady Henrietta’s alleged share of the heritable bond for L.10,000 sterling, claimed from the defender, the Earl of Rothes, as well as her share of the heritable bonds for L.4000 and L.5000 sterling, now vested in the defenders by the settlements of George Leslie, finds, that these being secured over landed estates in Scotland, must descend according to the law of Scotland, and did not, in virtue of the destination to Lady Henrietta’s heirs and assignees in the marriage-contract, devolve upon the pursuer, who is not Lady Henrietta’s heir in heritage according to the law of Scotland ; and therefore assolizies the defender from the whole conclusions of the action in regard to the said bonds of L.10,000 sterling, L.5000 sterling, and L.4000 sterling : Finds no expenses due to either party, and decerns.’

30 June 1836.

Murray and
Mandutary v.
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and Others.

Lord Ordinary’s
Interlocutor.

The pursuer *reclaimed*, when the Court ordered cases, in which it was *argued* for the pursuer—(1.) In regard to the L.10,000. It was not a case of intestacy. The marriage-contract plainly operates as a mortis causa conveyance. The purposes of the trust created by

Pursuer’s
Argument.

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Murray and
Mandatory v.
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Pursuer's
Pleas.

that contract necessarily imply that the trustees were to call up the whole of the debts assigned to them. They are not instructed to divide, but to pay. The interest of the children, had they existed, would plainly have been moveable, and so must that of those who will now take as conditional institutes. (2.) In regard to the other two bonds for L.5000 and L.4000. The English and Scotch property were conveyed by separate deeds. The English property was first conveyed by a previous will, and then the Scotch, by a subsequent deed. The English property was directed to be ultimately invested in the funds for certain purposes; and the Scotch property was to be applied to the purposes of the English will. No step could be taken towards executing the trust till the whole property was so vested. The right of the parties taking under this trust is not constituted, or even mentioned, until after it is directed and supposed that the stock has been bought; and the stock is the only subject in which they take any interest.

In all cases of this kind, in considering the nature of the interest taken by beneficiaries under a trust, it must be supposed that the trustees have done that which the truster directed them to do. Now, it is too plain to require any argument, that if the trust-estate had been all converted into money, and the residue then vested in L.3 per cent. consolidated stock, the interest of the residuary legatees in that stock must have been of a moveable nature. It is true, that the two heritable bonds in question were not carried by the English will; and that the uses and purposes declared in that will had not originally any reference or application to them. But the operation of the subsequent Scotch settlement was precisely the same as if this had been the case; for the Scotch settlement conveys these bonds to the trustees under the English will, for the uses and purposes of that will. There is no want of connection between these two instruments, such as was felt in the House of Lords to constitute the great difficulty, in the analogous case of *Cameron v. Mackie* and others, relative to Mr Dick's bequest in favour of the schoolmasters of three counties in Scotland. In that case, the Scotch deed conveying the Scotch heritage was executed previous to the date of the English will, in which the purposes of the trust were declared. Of course the Scotch deed could only refer generally, and by anticipation, to the purposes contained in any English will that the testator might afterwards execute. On the other hand, the English will made no reference whatever to the previous Scotch deed, or to the Scotch heritable property. The great doubt, therefore, was, whether the English will could be considered as the instrument referred to by the Scotch deed, as declaratory of the uses and purposes for which the Scotch heritage was conveyed. When

this difficulty was obviated, no doubt was entertained that the Scotch heritage must just be massed with the English property into one common fund, to the whole of which equally the uses and purposes declared in one of the instruments was applicable.

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and Others.

In the present case no such difficulty occurs. The Scotch deed being subsequent in date, refers very particularly to the English will, and ratifies and confirms it. And it is to be remarked, that the last part of the testator's settlements, viz. the codicil of 1826, which is added to the Scotch deed of settlement, sets out by mentioning the English will also, in the following terms: ' This is a ' codicil to my will in the English form, bearing date the 9th June ' 1817, and to my deed of settlement, bearing date the 5th June ' 1820.'

Pursuer's
Pleas.

The defenders argued, generally, that as the subjects in question were heritably secured in Scotland at the death of the pursuer's wife, it was plain that, under the term heirs, as there were no assignees, the only party who could acquire the beneficial interest was the heir-at-law by the law of Scotland. He founded on *Coutts v. Durie*, 30th Nov. 1791, *Dict.* 4624; *Burrell v. Burrell*, 4th Dec. 1825, and *Cathcart v. Cathcart*, 26th May 1830, *S. & D.*

Defenders'
Pleas.

At advising,

Lord Balgray.—I acknowledge I was struck by the terms of the contract of marriage. In it there is a conveyance of bonds, heritable sua natura, to trustees, to be held in liferent for the spouses jointly, and failing their children, in fee, for the heirs and assignees of the lady. The question is, there being none of the latter, who is the heir; and as the subject is heritable, it falls to the heir in heritage by the law of Scotland.

Opinion of
Court.

Lord President.—I am of the same opinion. If there had been an assignation, the case would have been different; but I do not consider the implied assignation in the marriage-contract sufficient.

Lords Gillies and *Mackenzie* concurred, and the Court adhered, finding no expenses due.

Lord Ordinary, *Fullerton*.
Rutherford, Tail.
Agents. S. Clerk.

Act. *Dean of Fac. (Hope,)* and *H. J. Robertson*. Alt.
Jas. Hope junior, W. S. and *Tait & Young*, W. S.

C. R.

SECOND DIVISION.

No. CLXXIX.

30th June 1836.

JOHN GRAY AND OTHERS, COOPERS IN ABERDEEN,
against
 WALTER SMITH AND OTHERS, WRIGHTS IN ABERDEEN.

CORPORATION.—(ELECTION OF OFFICE-BEARERS.)—CONSUE-
 TUDE.—PRESCRIPTION.—*Circumstances in which it was found,
 that long-continued usage in terms of an ancient law, alleged to have
 been unanimously enacted by a corporation, in presence of certain
 members of the Town-Council, was sufficient to establish a rule of
 election, by which the corporation was obliged, in all time coming,
 to elect their office-bearers, in equal numbers, from the two trades
 which composed the corporation; the original seal of cause con-
 taining no regulations nor directions as to the election of office-
 bearers.*

Narrative.

THE coopers, wrights and masons of Aberdeen were united as one corporation, by seal of cause, dated 5th August 1527. From the terms of the seal of cause it appeared that, at its date, there were three deacons of the three trades, and that the privileges were granted to them and ‘to their successors, deacons of the said crafts, for ever, and all manner of time to come;’ but it contained nothing further relative to the election of office-bearers.

The earlier records of the corporation had been lost or destroyed; but it appeared that, at a very early period, the masons had ceased to be members of the united craft. After their secession the two other bodies continued to act under the seal of cause, as the corporation of wrights and coopers of Aberdeen.

The oldest minute-book in existence reached no farther back than the year 1682, at which time it appeared that the corporation had ceased to have separate deacons, and was ruled by one deacon and six masters. This book contained at the commencement a table of laws, purporting to be ‘Acts and Statutes made be the Deacons, Maisters and Members of the Wright and Cooper Trade in Aberdeen, recorded in their former court-books, and now revised, homologat and approven, the day of January 1694.’ The first page only of this table bore the signature of the clerk of the corporation, and one of the subsequent pages contained the following enactment: ‘Item, In presence of George Leslie and Alexan-

‘ der Gordone, Baylyes, it is statute and ordeant eunanimtly be
 ‘ the haill traid, for holding and keeping peace and concord amongst
 ‘ them as formerly, and also according to antient practique, that
 ‘ ane wright be still deacone to the traid for ane year, and ane
 ‘ cooper for ane other year, and so to continue, vicissim, tyme
 ‘ about. And upone the day of election only the thrie maisters of
 ‘ that traid who falls to be deacone to go downe stairs, and not the
 ‘ haill six masters ; and this to be observed in all tyme coming.’

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 Others,

Narrative.

This minute-book also contained a list of the deacons from the year 1616 downwards; from which it appeared, that between the years 1618 and 1655, this alternation had not been regularly adhered to, but that, subsequently to the latter date, the rule of alternate election had been invariably followed. It was admitted that this rule had not been again departed from down to the year 1833. It was also admitted, that, so far back as the records went, the six masters had invariably been chosen in equal numbers from the two trades.

In all other respects the corporation had continued to act as one body. The whole trade voted in the election of office-bearers from both branches, and the whole of the corporation funds were held in common. The coopers had all along been the less numerous body; and in 1833 it was alleged that they did not amount to more than one-sixth of the members of the corporation.

At a meeting of the corporation, on the 22d October 1833, it was moved, that in future elections there should, as formerly, be an equal number of wrights and coopers to hold the office of deacon and masters alternately, and it was countermoved that no such rotation should take place; and both motions embraced an open, free election of office-bearers. The counter motion was carried by the deacon's casting vote. At subsequent meetings, upon the 25th October and 1st November 1833, the resolutions of the previous meeting were again brought before the corporation, and adhered to by large majorities; and an election of office-bearers took place, on the 6th November 1833, in terms of these resolutions. In these circumstances the pursuers raised an action of declarator and reduction, concluding that it should be found and declared, that the wright trade and cooper trade are entitled to stand upon a footing of perfect equality; and that, accordingly, the deacon should be elected the one year from among the wrights, and the next year from among the coopers, and so on alternately; and that the masters should be elected, in equal numbers, from the two trades; and also concluding, that the resolutions of the corporation at the above-mentioned meetings, and the election which had taken place under them, should be reduced and set aside as illegal, and contrary to the constitution and practice of the corporation.

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In defence it was pleaded, that in the absence of any original charter or seal of cause giving a specific constitution to the corporation, and having regard to the repeated acts of the corporation, modifying their constitution and regulating the mode of election from time to time, the corporation was entitled within itself, and by the vote of a majority of its members regularly convened in a corporate meeting, to alter and remodel the rules for the election of the corporate office-bearers, and that this power was validly exercised in the instances complained of.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the process, and heard parties, sustains the defences, assolizies the defenders, and decerns: Finds no expenses due.'

Note.

Note.—'There is no authentic written constitution of the corporation, by mere reference to which this question can be settled. What is termed the Seal of Cause of 1527, refers to the corporation in its pre-existing condition, and not to its actual state then or now, and, at any rate, does not touch the case which has arisen; and the writing, called the Act of Corporation of 1694, cannot, in the circumstances, be taken as such. In this situation, the case must depend on the general principles of such societies.

'The wrights and coopers, so far as is known, never formed separate corporations, so that they did not unite on the principle of each retaining distinct and independent privileges. It has always been one corporation, though formed of men practising certain different trades. It anciently admitted masons, who however have dropped out, and now consists of coopers and wrights alone. Being thus composed of only two classes of tradesmen, it was natural that they should choose their office-bearers from both equally, whether by rotation or otherwise. Accordingly this has been the general, though not absolutely the invariable practice for a long period. It is needless to examine the exceptions critically; for the general fact is indisputable, that the election of a cooper and of a wright alternately has for a long while been the prevailing usage, and that it has been the uniform course of proceeding for at least forty years prior to the institution of this action.

'This fact is the basis of the pursuers' case. They infer from it that the practice must now form the rule; and that whatever may be the disproportion of numbers, there must be an equality in the office-holders. But the Lord Ordinary thinks this does not follow.

'1st, The inherent right of all corporations to elect any member an office-bearer cannot be restricted to a particular rotation of

‘ persons, merely because it has been found convenient to follow such a course in time past. Such schemes for avoiding jealousy and discussion are extremely common in many societies, but mere usage will not make them obligatory. A practice plainly implying *the adoption of a rule*, and which rule is liable to be challenged, may often have this effect; because, if not objected to, it may justly be held to be meant to be acquiesced in. But where, as here, the usage could not have been legally prevented, and may be explained by resolving it into the mere periodical pleasure of the body, it cannot establish a permanent restriction of the general powers of the society.

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—
Note.

‘ 2d, This rotation, and the occasional deviations from it, have always been introduced, or, at least, sanctioned by the act of the corporation itself, flowing from the consent of both its component parts, on the principle that it had power to regulate such matters. Accordingly, important changes have been made by this social authority, in so much, that the pursuers, as their summons shews, were, on this very occasion, favourable to the abolition of leets, though these had been immemorially used.

‘ The rule contended for by them might have some foundation in justice, if they had had any original and separate corporate powers, or paid different fees, or had any peculiar privileges. But they are in all respects the same as the other members, except that the trades which they profess to practise *when they enter* are different. Yet their plea implies, that though they may be a mere fragment of the whole, (as at present they are,) they are still not only entitled to obtain, but to demand election to one-half of the chief corporate offices. A principle leading to such a result cannot be adopted easily, and the Lord Ordinary sees nothing to make its adoption in this case necessary.

‘ But he gives no expenses, because, after such an usage, it was proper for the whole corporation that the necessity of continuing it should be tried.’

The pursuers *reclaimed*, and the Court ordered cases.

Pleaded for the pursuers—1st, The seal of cause, granted on the 5th August 1527, authorised the election of separate office-bearers for the different incorporated trades, and thus provided for their equal and independent government. The substitution of one deacon in place of two, to be chosen alternately from each of the united trades, was consistent with the principle of this provision, and was obviously adopted solely for the purpose of facilitating its operation. 2d, The old statute, originally enacted in presence of certain members of the town-council, and ratified and homologated in 1694,

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was equally authoritative with the seal of cause, and established the rule in plain terms. The evidence of the authenticity of this old law was complete, and, at all events, unimpeachable in a question with the members of the corporation themselves; *Hope v. Magistrates of Selkirk*, *Murray's Reports*, iv. 390. 3d, The admitted usage was of itself conclusive of the question. Prescription alone has been held sufficient to establish a corporation, and to entitle them to exercise exclusive privileges; *Wrights of Glasgow v. Cross*, 8th March 1765, *M.* 1961, note at the end of report; *Tailors of Perth v. Lyon*, 10th Dec. 1756; *Skirving*, 19th Jan. 1803, *M.* 10,129. A fortiori, prescription was sufficient to establish the internal constitution of a corporation. It is a maxim in corporation law, that usage is equally binding and necessary to be followed with an express rule of the set; *Wight on Election Law*, iv. 1. 333; *Bell on Elections*, 474; *Connell on Elections*, 348. It has even been solemnly decided, that forty years' usage was sufficient to establish, as the only rule of election, a practice at variance with the express terms of the set of the corporation; *Gardner v. Magistrates of Kilrenny*, 9th March 1826, *Shaw*, v. 539; remitted by House of Lords, 23d March 1827, *Wilson & Shaw*, ii. 531. Ultimate decision 5th March 1828, *Shaw*, vi. 693. Multo majus is it sufficient to establish a rule consistent with the spirit, and not at variance with the letter of the original set.

Defenders'
Argument.

Pleaded for the defenders — 1st, There is no evidence that the act of council, 5th August 1537, was the original seal of cause of the corporation. On the contrary, it appears from its terms that the corporation had previously existed. At all events, it contains no regulations whatever relative to the election of office-bearers. 2d, The alleged old statute of the corporation is not authenticated in the usual manner; at all events, it cannot prove the consent of the members of council without their signature, and must at best be viewed as a bye-law of the corporation. 3d, The corporation, by its constitution, possessed an inherent power of self-regulation, which had been at various times exercised, to the effect of altering their rules of election. 4th, The usage was not of such a nature, and did not exist under such circumstances, as to create an imperative rule, which could not be altered at the pleasure of the corporation. 5th, The pursuers themselves, by supporting the counter motion at the meeting 22d October 1833, which tended so far to alter the previous practice, acknowledge the inherent power of the corporation to alter its rules of election at pleasure, and were bound by their own admission.

At advising,

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The *Lord Justice-Clerk* said—I think that there are strong grounds for reversing the judgment of the Lord Ordinary in this case. I cannot refuse credit to the ancient record. I cannot think of treating the ancient statute of the incorporation as the defenders do, as unworthy of consideration. It is a very ancient document. It appears to have originally passed in 1686, and at all events has existed, and has been in operation since 1694. It is clear that there had been a more ancient record, from which the one in 1694 was copied, which contained the original authentication of this law, but which has now been lost. We cannot refuse to give effect to a law authenticated as this one is. If we shut our eyes to it, what must we do with the records of our public institutions, in many of which the originals are lost and copies only preserved? It is quite clear, that by refusing to give effect to this law, we would open a door to most extraordinary changes throughout the country. Then, looking to the original constitution of the corporation, I cannot doubt that it was established upon a footing of perfect equality. The seal of cause 1527 must be looked upon as the original constitution. It establishes an equality; and then the authentic statute of 1694 declares the ancient practice. It is of no consequence what proportion the trades bear to each other in number. The rule may be productive of inconvenience; but we are not on that account to alter the constitution of the corporation, as proved by its records. Then we have the admitted practice of the corporation for a period of much more than forty years. This is of itself sufficient to decide the question. Lord Chancellor Eldon's exposition of the law in the *Kilrenny* case was most sound. The ground of the remit was, in his opinion, that the usage established the rule; and the Court went upon his opinion in deciding the case. Suppose that, in interpreting the old burgh law, a duty from which we are now most happily relieved, such a question as this had come before us. Suppose that the deacon of this corporation had had a constitutional voice in the town-council, and that, owing to some difference in political sentiments, the corporation had proceeded, in defiance of the admitted practice, and in the face of the old law, to depart from the system of alternation, and to return a deacon whose politics pleased the more numerous body, could we have doubted that it was our duty to set aside the election as an innovation and an abuse? And although these corporations have now taken a different turn, must we not decide such questions as this now, as we would have decided them then? We are bound to consider whether we are entitled to overturn the constitution of this body before we allow the privilege of election in every case to a class which, by the usage of the

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30 June 1836. corporation, had only an alternate right to have the deacon elected from among them.

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I cannot discover any thing in the nature of the practice to take it out of the common rule. It was not more referable to the periodical pleasure of the body than any other practice would have been. I cannot agree with the Lord Ordinary's views.

Lord Meadowbank concurred.

Lord Glenles.—I have no doubt upon the question. There is sufficient reason to hold that the old law had been sanctioned by the magistrates. But whether the corporation had a right or not to alter the rule, they had not proceeded sufficiently formally to do so. They appear to have acted with excessive precipitation. No notice was given of their intention. The question was taken up at an ordinary meeting, and at once put to the vote. Even if there had been no regular law appointing this rule of election, they were not entitled so suddenly to alter it. Strong grounds must always be shewn, and full time for deliberation given, before making a new law which touches the constitution of a body such as this. We have held so in former cases. I remember particularly that we did so in reference to one of the Canongate corporations. Upon various grounds, therefore, I agree that the Lord Ordinary's interlocutor should be altered.

Lord Medwyn.—I agree with your Lordships in holding that the Lord Ordinary's interlocutor ought to be altered. It appears to me of little consequence, whether there were independent corporations of wrights and coopers previous to 1527. I think it likely that they did previously form each a craft or company of artisans, headed by a deacon, with such powers as were conferred by the act 1424, c. 39, 'till govern and assay all warks that beis made before the craftesmen of his craft, sua that the kingis' lieges be nocht defraudit and scaythit in time to cum, as thai have bene in tyme bygane, through untrew men of craftes.' I have always considered that this act did not apply to corporations as they now exist merely, for I can scarcely conceive any proper corporation without a deacon or head, but just to the private associations of particular trades, which were common at that time, such as the Confrairies in France, and the associations in Flanders and the towns of Germany, when the inferior citizens or artisans formed themselves into companies, according to their occupations, and were regarded with great jealousy by the higher class of burgesses, who formed a body similar to the merchant guild in our burghs. And this accounts for what otherwise I could not well understand; namely, the prohibition of the election of deacons, as dangerous to the public safety, by the subsequent act, 1426, c. 86. This prohibition, it appears from a sub-

sequent statute, 1491, c. 43, proved inoperative, as was then too commonly the case with many enactments. It is not clear, therefore, that the wrights and coopers formed different corporations previous to 1527, but merely, that they existed as fraternities, each with its deacon or head.

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But the seal of cause 1527 was sufficient to constitute them a corporation of wrights and coopers within the great corporation of the burgh. It is addressed to the deacons and their successors, deacons of the said crafts for ever; and gives them full powers to receive brethren, and to punish and fine for all trespasses and faults, except for blood and debts. It thus bestowed upon them the chief features of a corporation.

Opinion of
Court.

It would appear that they persevered in the system of having separate deacons, at least till 1565. But this system was probably found to be inconvenient, and they therefore thought it more judicious to have a single deacon alternately elected from the two bodies. Probably, in these days, the relative numbers of the two trades were not so unequal as now, for there was then a great export-trade of salmon at Aberdeen, as may be seen from the old acts 'anent salmon barrels.' Since then, the system of alternation has been regularly followed. I think the old enactment of the corporation, referred to by the pursuers, is sufficiently authenticated. The table of laws copied at the beginning of the Minute-book must be held just the pandects taken from a previous book. Then, the usage is uniform for much longer than the period of prescription, and is decisive of the question. A rotation might be followed for the purposes of mere temporary convenience, without necessarily implying the adoption of a rule; but when it is founded in reason, sanctioned by a law of the corporation, and adhered to for such a length of time, it could only be altered, if it were alterable at all, on the most pregnant grounds, and in the most formal manner. I agree, therefore, with Lord Glenlee, that even if the corporation had possessed the power of alteration, they did not, in the present instance, exercise it properly.

The Court recalled the interlocutor, and found the pursuers entitled to expenses.

Lord Ordinary, *Cochburn*. Act. Sol.-Gen. (*Cunninghame*), and *Outram*. Alt.
Dean of Fac. (*Hopie*), *Ivory*, *G. Moir*. *Greig & Morton*, W.S. and *Scott &*
Balderstone, W.S. Agents. T. Clerk.

R.

SECOND DIVISION.

No. CLXXX.

30th June 1836.

ANDREW M'LEOD
against
 GEORGE TOSH AND JOHN TOSH.

NOVATION.—SOCIETY.—*An acknowledgment of a loan of a sum of money having been granted by a company, held, according to circumstantial evidence, that the debt, if originally a company debt, was, notwithstanding said acknowledgment, converted into a debt by one of the partners as an individual, and recourse lost against the other partner.*

Narrative.

GEORGE and JOHN TOSH carried on business in Glasgow as calenderers, under the firm of 'George Tosh and Son,' which was dissolved in August 1828, when, by advertisement in the newspapers, it was intimated that John Tosh was to 'pay all the debts due by the company, and authorised to receive and discharge those due thereto.' Andrew M'Leod at this time held the following obligation under the company firm: '*Glasgow, 9th February 1826.—Borrowed from Mr Andrew M'Leod L.40 sterling.*' (Signed) 'GEORGE TOSH AND SON.' This acknowledgment was holograph of John Tosh. After the date of the dissolution, John Tosh carried on the business in his own name, till he was sequestered in 1830.

On 11th November 1828, M'Leod rendered an account to John Tosh, holograph of himself, in which the above sum of L.40 was entered as a debt due by John individually, along with other sums lent to him as an individual, and the amount of a private account of furnishings. On 28th October 1829, another account, holograph of M'Leod, was presented to John, in similar terms, to which John added the following acknowledgment: 'I have borrowed from Andrew M'Leod, surgeon, the following sums of money, at the several dates, for which I have granted two bills, one of L. 00, payable at six months, and the other of L. 000, payable at three months.' In neither of these accounts was any notice taken of the loan of L.40 as being a company obligation, but in both it was included in the same terms as the other private debts of John, and as one of them. Instead of granting two bills, John Tosh gave a promissory-note at two months for L.172; and in a letter to M'Leod, accompanying the note, he repeated the acknowledgment of the

loan of the several sums (including that of L.40) of which it was composed. Partial payments were made by John to the amount of L.50, which left, at 10th April 1880, a balance of L.128:0:11 due on the note. For this balance M'Leod made a claim on the sequestrated estate of John, and in his affidavit expressly swore, 'that no part of said sum is paid or compensated, nor is any security held for the same, or any part thereof, save and except the 'promissory-note above mentioned.' Two dividends were paid to M'Leod on his claim.

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Tosh.

Narrative.

In 1833, M'Leod raised an action against both George and John Tosh, libelling on the acknowledgment under the company firm for the sum of L.40, and concluding for payment of it against both, as of a company debt. The Sheriff (Mr Alison) having assailed the defenders, M'Leod advocated, and *pleaded*—1. The obligation libelled on having been granted to him by the company of George Tosh and Son, socio nomine, is obligatory on the said company, and on the respondent, George Tosh, as an individual partner thereof. 2. The including of the said company debt in the bill granted to the advocator by John Tosh did not either instruct that the said debt was originally a private debt of John, nor did it amount to a novation of the said debt from a company to an individual obligation; in respect, (1.) John Tosh was one of the partners of the company, and as such liable in solidum; (2.) John Tosh was constituted the mandatary of the company in winding up the business; and by claiming from him, the advocator followed the very course in which claims against the company were, by the respondent, George Tosh, directed to be made: (3.) By getting a bill from John, M'Leod acquired a right having important legal privileges, both probative and executive. 3. The affidavit by M'Leod, when claiming on the sequestrated estate of John Tosh, is no way inconsistent with the existence of the advocator's claim against the respondent George Tosh, in respect, 1. That the 24th section of the Bankrupt Act, which provides for the valuing and deducting of securities, regulates only the qualification for voting, and does not affect the ranking or the right of the creditor to recover: 2. That John Tosh was, in a question between himself and the respondent George Tosh, the principal or primary obligant under the arrangement entered into by these parties at the dissolution of the copartnery, and the said clause of the statute excepts the case where the common debtor 'is the principal or primary obligant, and liable 'to relieve the others:' 3. That a creditor is entitled to rank on the estates of co-obligants, and is only bound, by the 50th and 53d sections of the Bankrupt Act, to specify the securities which he may hold on the estate of the bankrupt or other obligants. But the ad-

Pursuer's
Pleas.

30 June 1836. vocator held no such security; *Young v. Baillie*, 14th Feb. 1835, *F. C.*; *Buchanan*, 20th June 1833.

M'Leod v.
Tosh.

George Tosh's
Pleas.

George Tosh *pleaded*—1. There are facts and circumstances stated and proved, which shew that the alleged loan was not made to or for behoof of the company, but to John Tosh individually; and M'Leod, by taking a document bearing the signature of the company, in the knowledge of this fact, was participant in, and guilty of a fraud. 2. Supposing that there was evidence of the existence of a debt against the company, it was extinguished novatione, of which there is ample evidence in the circumstances. 3. In any view, the advocator has, by his conduct and by his mora in not intimating any claim against the respondent till after the bankruptcy of John Tosh, and the sequestration of his estate, lost all claim against the respondent.

John Tosh's
Pleas.

John Tosh *pleaded*—That as the advocator held a bill from the respondent, and had claimed without objection on the respondent's sequestered estate, and was ranked thereon, and received payment of dividends, he was not entitled to raise the present action against the respondent.

Note.

The Lord Ordinary remitted the cause to the Sheriff simpliciter, and found the respondent entitled to his expenses, adding the subjoined note: 'The Lord Ordinary concurs generally in the views expressed by the Sheriff, though he does not, perhaps, attach so much importance, as that Judge appears to have done, to the terms of the complainer's oath in the sequestration. At all events, the Lord Ordinary does not consider that oath as importing a renunciation or abandonment of the claim on the respondent, if such claim had really existed of its date. He views it merely as an ingredient in the mass of circumstantial evidence, which seems to him clearly to establish, either that the debt in question was from the beginning a private debt of John Tosh, and was consequently transferred to a more appropriate document, when the bill of L.172 was granted for the whole sum of his private debts, or being originally a company debt, it was converted novatione into an individual debt of the younger partner. But even in this view, that oath is a most important piece of evidence; and taken along with all that was done, and all that *was not done* by the complainer after John Tosh's sequestration, seems really to relieve the case of all difficulty. From the moment of that event, it was evidently hopeless to look for full payment from that person, as the party appointed to pay the company debts; and if this, therefore, had been regarded by the complainer as truly a debt of that

‘description, it is almost inconceivable that he should not have applied *instantly* to the solvent partner. In every one of the cases where the question of novation has been raised, this was the course which was adopted; and its not being followed here is of itself almost conclusive against the pleas of the complainer. John Tosh was sequestrated so long ago as 1830; and not only does the complainer claim upon his individual estate on the bill for L.172, and swear that he holds no other security for any part of its contents, but he makes no claim, judicially or extrajudicially, on the respondent till *three years thereafter*, when he brings this action in June 1833. This alone renders all the cases referred to by the complainer inapplicable; as well as the other very remarkable specialty, that not only is this alleged company debt mixed up and massed into one obligation with the private and individual debts of the party, but that, previous to the granting of that obligation, the complainer had himself spontaneously entered it as an individual debt in various memoranda, framed by himself, and furnished to his individual debtor, with a view to a settlement of their transactions. He draws out in his own hand, and transmits to John Tosh, to be copied and returned to him as a voucher, a state, in which he makes John Tosh say, ‘I have borrowed from you the following sums at the several dates mentioned;’ and then follows a list of seven several sums, including this L.40 of February 1826, all the rest (some of an earlier date, and some of a later date) being, confessedly, and without doubt, sums due by John Tosh as an individual. There is nothing the least like this in any of the cases, where the plea of novation has been repelled. The Lord Ordinary has no doubt that the complainer was bound to have specified, in his oath, any other security he held for the debt, and any other co-obligants bound to him along with the bankrupt. This is expressly provided by the 53d section of the statute, and without reference to valuing or deducting; and it is in vain to say that the complainer took the oath only under the 24th section, and with a view to voting only, for it is the oath under which he actually *drew his dividends*; and, from a comparison of dates, it rather appears that he never could have voted at all. But even if it had been under the 24th section, the Lord Ordinary is of opinion, 1st, That he was not within the exceptions there mentioned; and, 2^d, That the company obligation for the L.40 ought to have been valued and deducted (if held worth 20s. in the pound) from the L.172 in the bill. Looking at the oath, however, as a mere piece of evidence, it is not necessary to discuss these questions. The Lord Ordinary’s own opinion is, that at the date of the sequestration, the complainer

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M^r Leod v.
Tosh.

Note.

30 June 1836. 'thought that the receipt under the company firm had been given
 M^r Leod v. 'up when the L.172 bill was granted; and that it was its acciden-
 Tosh. 'tally coming to his hands three years after, that tempted him to
 'try this way of getting full payment.'

The advocate *reclaimed*. On advising—

Opinion of
 Court.

Lord Justice-Clerk.—I am perfectly clear novation is not to be presumed; but the present question is one depending on evidence, partly written, partly parole. I can arrive at no other opinion than that the Sheriff and Lord Ordinary have decided the case rightly. Circumstances took place which led to the novation of the debt, the conduct of the parties being inconsistent with any other view.

Lord Glenlee concurred.

Lord Medwyn.—I think the authority of the case of *Buchanan v. Sommerville* much weakened by the subsequent case of *Buchanan and Company v. Denny*, 20th June 1833, which seems a well-decided case, and in many respects is similar to the present: The money was borrowed by John Tosh for the company; for though the document may be unstamped, there is sufficient admission by the defender to make the company liable; and the only question is the effect of the obligation or novation. When George retired he received a sum of money, and arranged that John should both take and pay the company debts. When this creditor applied to John for payment, he did so in furtherance of this appointment; and the memorandum in November 1828, and letter 28th October 1829, were with a view to this arrangement; and the statement of the sum, without specifying that it had been borrowed for the company, cannot, under such circumstances, imply that he had no claim against the company, just as little as the bill taken on the same day. Novation is never to be presumed. There must be something to shew that a preference or security is to be given up, when an obligation is taken from the party who is now to pay it. Thus, the creditor of an ancestor does not lose his preference over the estate of the ancestor by taking a bill from the heir; *Cult*, 2d Aug. 1781. The affidavit is referred to and founded on by the Sheriff as alone sufficient to indicate his abandonment of the security of the company; but the Lord Ordinary only considers it as a feature of evidence that this security was not noticed and valued. Although I do not understand that it is customary or even competent to give an affidavit for voting, and another for ranking, although, no doubt, an error may be corrected by a subsequent oath, and the effect in the one case, as to having collateral obligants, is not the same as in the other, yet the creditor here may have been misled by the terms of the section 24. of the Bankrupt Act. He had another ob-

ligant, no doubt, bound with the bankrupt; but the bankrupt was liable to relieve that other, by the terms of his agreement to pay the debts of the company; and having no preferable security over the debtor's property, he was entitled to rank and draw a dividend for the whole of his claim; so that, without intending to give up his claim against the obligant, or thinking he had none, he may not have mentioned it in his affidavit. I can therefore lay no stress on this even as evidence; and, on the whole, think nothing has been done to innovate this claim.

Lord Meadowbank.—I have felt much difficulty; but for the reasons stated by your Lordship, and because I would not trench on the rule, that novation is not to be presumed, I am for adhering.

Their Lordships, except Lord Medwyn, who differed, expressed a similar opinion, and the reclaiming note was accordingly refused.

Lord Ordinary, *Jeffrey*.
T. Mackenzie.
R. Clerk.

Act. *Rutherford, James Anderson*.
James Pedie jun. W.S. and W. B. Campbell, W. S. Agents.

Alt. *D. McNeill*.

R.

30 June 1836.

McLeod v. Tosh.

Opinion of Court.

Judgment.

FIRST DIVISION.

No. CLXXXI.

1st July 1836.

THE BANK OF SCOTLAND

against

DURIE'S TRUSTEES AND MISS AITKEN.

CAUTIONER.—CASH-CREDIT.—JOINT OBLIGANT.—GUARANTEE.

Circumstances in which, where a bank, on the death of a party, had allowed a cash-credit, granted to the deceased on a bond with three co-obligants, to be operated upon by his son, on the faith of a letter signed by two only of the three co-obligants, requesting the bank to continue the credit 'in terms of, and to the extent of our said bonds,' which shall continue in full force,' &c.—the Court found that the two parties signing the letter were liable, conjunctly and severally, to the bank for the whole sum due under the cash-credit; though they pleaded, inter alia, that they signed only on the faith that the signature of the third co-obligant was to be obtained by the bank, and that the bank having failed to do so, and having given no notice of the

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—
Narrative.

omission, had no claim at all against them, or, at least, only to a limited extent.

ROBERT MUDIE senior, of Balmule, obtained a cash-credit at the Bank of Scotland's office at Dunfermline to the extent of L.1000, on his granting a bond, on 7th October 1813, to that amount, along with the late Henry Aitken of Lochhead, and William Flockhart of Annafreck, as co-obligants. After the death of Henry Aitken and William Flockhart, the cash-credit was continued, in 1820, on a bond of corroboration, on which their representatives, Miss Aitken and Henry Flockhart of Annafreck, together with the late Robert Durie of Craigluscar, bound themselves, conjointly and severally, as co-obligants with Mudie senior.

In 1830, Robert Mudie senior died, leaving a balance due by him to the Bank upon the cash-credit amounting to L.695. After his death, his only son, Robert Mudie junior, applied to the Bank and to the cautioners to have the credit, which had been operated upon by his father, continued in his own favour. With a view to this being granted, the following letter, addressed to the Treasurer of the Bank, was drawn up by an officer of the Bank :

' SIR,—We request of the Bank, that the credit of one thousand pounds, in name of Robert Mudie of Balmule, with the Bank at its Dunfermline office, on our bonds, may be continued thereon, in name and under operation of his only son, Mr Robert Mudie, now of Balmule, in terms and to extent of our said bonds, which shall continue in full force for all such sums or balances due or to be due from him to the Bank, in like manner with any sums or balances, if any, due to the Bank from his father, in terms of these bonds. We are,' &c.—Subjoined to this letter of obligation, and in the same handwriting, was the following memorandum :

' Henry Aitken of Lochhead and William Flockhart of Annafreck, corroborated by Miss Marian Aitken, Henry Flockhart of Annafreck, and Robert Durie younger of Craigluscar.'

This letter was signed by Mrs Aitken and the other defenders, but it was not signed by Flockhart. Mudie junior operated on the cash-credit till his bankruptcy in December 1832, at which time the whole sum of L.1000 was drawn out, and there was besides due a sum of L.46 : 4 : 3 of interest. Miss Aitken having paid up L.524, the Bank instituted the present action for payment of the balance.

Miss Aitken averred that she signed the letter on the understanding, that before it was to be acted upon it should receive the signature of Henry Flockhart. The other defenders averred, that after the signatures of Robert Mudie junior and Miss Aitken

were adhibited to this letter, five crosses were made upon it, apparently to point out where the five trustees of Mr Durie were to sign, and one cross below Miss Aitken's signature, to point out where Flockhart was to sign, and that they also signed upon the faith of Flockhart's signing.

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The pursuers *pleaded*—The defenders are liable under the bond of corroboration and the letter of obligation. That letter constitutes a valid obligation against the defenders who have subscribed it; and that obligation being quite unqualified by any condition of the nature of that alleged by the defenders, it is not competent or relevant to enter upon any inquiry as to their alleged understanding of the existence of any such condition. The reference in that letter to the former bonds means merely that the obligation should be conjunct and several, and of the extent formerly undertaken. It was the duty of the defenders to see that all the intended obligants had signed before the letter was delivered, and they must therefore suffer for any omission, on the principle of the case of Macdonald, 5th July 1810, *F. C.* No argument against the Bank can be drawn from the crosses affixed to the letter, as the Bank denies all knowledge about them.

Pursuers'
Pleas.

The defenders *pleaded*—The Bank was not entitled to continue the credit of Mudie junior after the death of his father, without the consent of the whole co-obligants; and having done so, and having transacted with, and given time to the heir of the principal debtor, the whole cautioners are liberated from their obligations. The letter of the 27th October 1829 having been signed on the faith that it was a joint obligation by the cautioners, and not to be acted upon till signed by Flockhart, which was the understanding of all the parties at the time, as appeared from the terms of the document, and from the insertion of crosses affixed to it, and not having been so executed, the intended agreement never was completed, and can import no obligation on the defenders for any advances made by the Bank subsequent to the death of the original principal debtor. The pursuers having, by their own proceedings, and without the consent of the defenders, changed the nature and extent of the liabilities of the parties, making it impossible for the defenders to operate the relief that might have been otherwise competent to them, have lost all recourse on the defenders; Loudon, 19th Feb. 1825; Hume, 12th Jan. 1830; Padon, 21st Dec. 1825. At all events, the defenders are not liable to the pursuers for the advances either to Mr Mudie senior, or Mudie junior, to any far-

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nary's Note.

ther extent than they would have been if Mr Flockhart were still bound for his share of the credit given to both these parties.

The Lord Ordinary pronounced an interlocutor, in which he repels the defences, decerns in terms of the libel, but finds no expenses due.'

Note.—'The cash-credit by the Bank of Scotland in favour of Mr Mudie senior was granted on a bond dated in 1813, in which Henry Aitken and William Flockhart were co-obligants; both these co-obligants having died, a bond of corroboration was granted in 1820, subscribed by their representatives, Miss Aitken and Henry Flockhart, and by a third party, Mr Robert Durie. Mr Mudie senior having died, the cash-credit was continued in favour of his son, on the security of the obligatory letter libelled on, subscribed by Miss Aitken and the trustees of Mr Durie, who also had died. There were, therefore, two co-obligants besides Mr Mudie in the original bond, and three co-obligants in the bond of corroboration. The question is, whether the obligatory letter, subscribed in 1829, by two co-obligants only, Miss Aitken and the representatives of Mr Durie, which was given into the Bank by Mr Mudie junior, and on which he operated from its date till his bankruptcy in 1833, is ineffectual, because it was not also subscribed by Henry Flockhart, whose father was a party to the bond of corroboration. It is very possible that Miss Aitken and the trustees of Mr Durie understood that all the three parties to the bond of corroboration, or their representatives, were also to be parties to the letter on which Mudie junior obtained his credit. But there is no evidence offered that this understanding among themselves, if it existed, was made known to the Bank. If the defenders meant to subscribe under that condition, the obligatory letter ought not to have been placed in the hands and under the control of Mudie junior, until all the subscriptions were adhibited; at least the defenders should have communicated this circumstance to the Bank, instead of allowing the letter to be delivered and relied on as a security, without objection, for a period of more than three years. The defenders have referred to the terms of the letter itself, but neither the names nor the number of the intended obligants are there specified, although it is implied that they were to be of the number of those who were parties to the original bond or the bond of corroboration. It is said that they agreed to be bound 'in terms of, and to the extent of our said bonds;' but that imports only that they were to be bound conjunctly and severally, and to the extent of £1000. It cannot mean that the number of obligants was to be the same as in the

‘two bonds, for the number in the one bond is different from the number in the other, and the individuals bound are different. The only point in which the Bank had an interest was, that the obligation should be conjunct and several, and that it should be to the amount specified in the former credit. Being satisfied with the names adhibited to the letter, they had no concern with the question of relief among the obligants inter se, except that they were bound to give every facility for that purpose. The defence, that the Bank has given time to Flockhart, to the prejudice of the defenders, is plainly unfounded; for it was by their own consent that the credit was continued to Mudie junior. If the Bank has any claim against Flockhart, in consequence of his being a party to the bond of corroboration to the extent of the advances made to Mudie senior, they are entitled to an assignation to that claim. As the case is a hard one, and not unattended with difficulty, no expenses have been found due.’

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—
Note.

The defenders reclaimed. At advising,

Lord President.—It is my opinion that these cautioners must be held liable. Some one of them ought to have seen that Flockhart had signed the letter before it was put into the hands of the Bank, if the intention was that he was to be bound along with them. The obligation in regard to these defenders is complete. It does not commence by stating various parties, some of whose signatures do not appear; but the style used is, ‘We request,’ &c.; and it bears the signature of two parties, so that it is perfectly formal as to them. The Bank might very probably have thought that Flockhart was to join in the obligation; but the letter was delivered without his signature; and the Bank made no objections, considering the names that appeared sufficient security; and thus the parties seem to have acquiesced in Flockhart's signature being omitted. The proper course for these cautioners to have taken, if they did not wish the balance of L.600, due at the death of old Mudie, to be transferred against them, was to have come forward and paid the sum, and stated they would no longer have any more responsibility in the matter. But instead of doing this, they allow the balance to be transferred against them, and I think they must be held responsible.

Opinion of
Court.

Lord Mackenzie.—I concur, though I think the case a hard one. It is not very clear how the signatures were obtained. The way in which the transaction was gone about kept the Bank clear. No doubt the Bank prepared the letter; but they aver they gave it to Mudie junior, and that they were in no way concerned in obtaining them. There is no distinct admission of this averment by the

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defenders; but then they do not aver the contrary, which is tantamount to an admission. I suppose, then, we must hold that the signatures were got by Mudie; and, on the whole, I am inclined to adhere to the Lord Ordinary's interlocutor.

Lord Gillies.—The case is not free from difficulty; but after the statement by Durie's trustees, (No. 5,) 'that Mr Mudie was succeeded by his only son, Robert Mudie, then a minor, who applied to the Bank, and also to the cautioners, for permission to operate upon and continue the credit established in his father's name,' I think it is evident that Mudie must have obtained the signatures. But if he failed to apply for the signature of Flockhart, who is to be liable for that omission? In my opinion certainly not the Bank.

Judgment.

The Court unanimously adhered, awarding no expenses.

Lord Ordinary, <i>Corehouse.</i>	Act. <i>Keay, Walker.</i>	Alt. Sol.-Gen. (<i>Cuninghame</i>),
for Durie's Trustees.	<i>Wilson, for Miss Aitken.</i>	<i>Davidsons & Syme, W.S.</i>
<i>Æneas M'Bean, W.S.</i>	and <i>Douglas & Graham, W.S.</i>	Agents. <i>S. Clerk.</i>
		C. R.

FIRST DIVISION.

No. CLXXXII.

2d July 1836.

JAMES BENNETT.

PROCESS.—(TAXING AGENT'S ACCOUNT.)—AGENT AND CLIENT.
—THE petitioner having applied to the Court to have his account taxed by the Auditor as between agent and client,—objection, that the account was partly made up of charges for private business, sustained: and a remit granted to the Auditor to tax only the charges for judicial proceedings.

Act. *Russell.*
D. Clerk.

Alt. *Wood.*

James Bennett, W. S. and J. Hunter, Agents.

C. R.

SECOND DIVISION.

No. CLXXXIII.

2d July 1836.

ROBERT OGILVIE
against
 PETER SCOTT.

PROCESS.—JURY TRIAL.—(ISSUES.)—JUSTIFICATION.—*Continuation of case reported ante, J. S. vol. xi. p. 34.*—At the trial, Lord Justice-Clerk allowed the party on whom the assault was committed to be examined as a witness for the defender, although there was no issue taken by him in justification of the libel.

The pursuer *moved* for a rule to shew cause.

The defender *answered*—The only case in which an issue in justification is necessary, is, where the plea is *veritas convicii*.

Their Lordships unanimously *refused* the rule.

Act. *Rutherford, P. Robertson.* Alt. *Dean of Fac. (Hope,) Maitland.* Wother-
 spoon & Mack, W.S. and T. Ranken, S.S.C. Agents. Mr Russell, Clerk.
 R.

FIRST DIVISION.

No. CLXXXIV.

5th July 1836.

SMITH
against
 BANK OF SCOTLAND.

PROCESS.—JURY TRIAL.—(NOTICE OF TRIAL.)—A motion by the pursuer in a *Jury cause*, to extend the term fixed by the Court for giving notice of trial,—refused.

Act. *Robertson.* Alt. *Whigham.*

C. R.

FIRST DIVISION.

No. CLXXXV.

5th July 1836.

MRS MILLER OR MORRISON, AND OTHERS,
against
 JAMES WRIGHT.

BANKRUPT.—SEQUESTRATION. — TRUSTEE.—COMPETITION.—*A trustee on a sequestrated estate having charged the bankrupt to enter as heir of line of his father, and prepared to adjudge an estate from him in that character ; and a declarator and suspension having been raised at the instance of certain parties, to have it found that the trustee was bound to complete the bankrupt's title under a disposition from his father, in which real burdens in favour of these parties were intended to be created,—the Court held that the trustee was right in the course which he had adopted.*

Narrative.

IN 1822, James Miller senior executed a general disposition and settlement in favour of his eldest son, James Miller junior, by which he conveyed to him his whole heritable and moveable estate, including the lands of Milton, 'with and under the burden, provisions and declarations and faculty after mentioned, and which 'must be inserted in the infeftments to follow hereupon,' (1.) Of payment of an annuity of L.100 to the granter's wife; and (2.) Of the sum of L.1000 to each of his four daughters.

These provisions were declared real burdens upon the lands. The procuratory of resignation and precept of sasine were granted under these burdens and conditions, and with a declaration that they should be inserted in the infeftments.

James Miller senior died in 1728, and parties were at issue whether he was then insolvent or not. James Miller junior entered into possession on his father's death, recorded the settlement, but did not make up any titles. It was averred by the pursuer that he paid his mother's annuity, and the interest of his sister's provision, and acted so as fully to recognise the settlement. This, however, the defender denied. In 1834, James Miller junior became bankrupt, and was sequestrated. The defender, who was appointed his trustee, gave him a special charge to enter heir of line to his father, and prepare to lead a special adjudication of the estate of Milton. Against this the pursuers presented a bill of suspension and interdict, on the ground that the trustee could only make up a title in

terms of the disposition and settlement. The bill was passed to try the question; the interdict being refused, and all questions as to the rights of parties reserved.

5 July 1836.

 Miller or
 Morrison, &c.
 v. Wright.
 —
 Narrative.

In support of this proceeding the pursuers raised the present action of declarator, and the actions were conjoined. Thereafter, on the application of the pursuers for special adjudication, a concerted interlocutor was pronounced, (8th July 1835,) adjudging and decerning in terms of the petition, but reserving the rights of the pursuers in the lands, as they should be ascertained in the conjoined processes.

The pursuers *pleaded*—The late James Miller having died solvent and feudally vested in the estate of Milton, was fully entitled in liege poustie to impose the provisions made by him in favour of the pursuers, as effectual conditions and burdens upon his eldest son's right of succession to that estate; and the eldest son was not in law entitled to take, and could not, without being guilty of fraud, attempt to take his father's estate of Milton, without fully discharging those provisions. Independently of all the acts of possession of the bankrupt referable to the settlement, he must be presumed to have possessed under it, as he was bound in justice to do so. As the eldest son had no other title to the moveable estate except the settlement, his possession of the moveable estate, as well as that of his trustee since the sequestration, must be held, in a question with the widow and children, as a clear acceptance of, and acting upon the settlement, which neither of them could both approbate and reprobate. The same conclusion is deducible from the other circumstances of the eldest son's possession and conduct for a course of years. That after these acts of possession, the eldest son could not, without a fraudulent breach of contract, attempt to set aside or evade any one condition of the settlement, or to serve himself heir to his father in special, so as to supersede the title competent to him under the settlement. The trustee upon the sequestrated estate of James Miller is not entitled, by any form of completing in his own person a title to his father's estate, to take up the estate of Milton for the benefit of the son's creditors, without paying to the pursuers those provisions which, by their father's settlement, were made conditions and preferable burdens on the son's right of succession. That the trustee, as acting under the Sequestration Statute, § 31, was bound to complete the personal title of the bankrupt, by infesting him under the settlement. That by the adjudication in his favour, the trustee obtained right to the bankrupt's personal title under the settlement, but with the burdens of the pursuers' provisions, as the right was held by the bankrupt himself. That with-

Pursuers'
 Pleas.

5 July 1836.

Miller or
Morrison, &c.
v. Wright.

out an action of reduction of the pursuers' provisions, it is incompetent to allege that they are invalid on account of the testator's alleged insolvency, or to inquire into the causes of James Miller the son's bankruptcy. The provisions contained in Mr Miller's settlement are onerous, and not gratuitous.

Defender's
Pleas.

The defender *pleaded*—The provisions in favour of the pursuers not having been constituted real burdens, by infestment passing on the disposition and settlement executed by the late Mr Miller in favour of the bankrupt, who was his heir *alioqui successurus*, the right to the lands has been carried to the defender by the statutory adjudication, unaffected by these provisions, and the defender is not bound to complete; on the contrary, it is his duty not to complete titles in the person of the bankrupt under that disposition and settlement, or so as to render real burdens on the bankrupt's property the provisions therein contained, and make them preferable to the other debts. At all events, the obligation imposed on the bankrupt, to deliver to each of the late Mr Miller's unmarried daughters such provisions as his eldest daughter received at her marriage, is inoperative, from being indefinite, and is besides discharged by the survivance of Mr Miller's spouse. And farther, supposing it otherwise, the sum concluded for being denied, the pursuers are bound to prove the amount. There are no grounds in law or equity on which the pursuers should be preferred to the other creditors of the bankrupt. Finally, the solvency of the late Mr Miller at the period of his death being disputed, the pursuers are not entitled in this action to decree to the full extent of the conclusions of their libel.

Lord Ordinary's
Interlocutor.

12th May 1836.—The Lord Ordinary, 'in the declarator, assoilzies the defender from the conclusions of the action, and decerns; and in the suspension, refuses the interdict; finds the letters orderly proceeded, and decerns: Finds the pursuers and suspenders liable in expenses, and remits to the Auditor to tax the account thereof when lodged, and to report.'

Note.

Note.—'It is the duty of a trustee on a sequestrated estate to take measures for dividing the whole heritable property to which the bankrupt has right, and over which preferable securities have not been completed previous to the bankruptcy among the general body of personal creditors, including those who have inchoated securities remaining imperfect at that date. It is not incumbent upon him to make up the bankrupt's title in such a way as to create preferences, *jure accretionis*, in favour of one creditor, and to the prejudice of the rest. On the contrary, he is bound to avoid any such proceeding. The bankrupt has failed in all his

' engagements, and neither he nor his trustee can take any step by 5 July 1886.
 ' which an advantage is given to one creditor over another. If 
 ' some of them had the means in their own hands of gaining such Miller or
 ' an advantage prior to the bankruptcy, and have neglected to use Morrison, &c.
 ' them, it is their own fault. The pursuers and suspenders in this v. Wright.
 ' case might have made the real burden which Mr Miller senior Nota.
 ' intended to create in their favour, effectual in various ways; but
 ' they neglected to do so, and therefore they cannot be distinguish-
 ' ed from any other personal creditor. It follows that the trustee
 ' is at liberty to charge the bankrupt to enter as heir of line to his
 ' father, and to adjudge the estate from him in that character, in-
 ' stead of completing his title under the disposition from his father,
 ' in which the real burdens intended to be created in favour of the
 ' pursuers are specified. The principle is so fully illustrated in the
 ' cases of Douglas of Kelhead, 22d February 1765, and that of the
 ' Creditors of Ross of Kerse, 31st January 1792, that it is unne-
 ' cessary to say more upon the subject. Mr Bell holds the point
 ' as settled in the case of a trustee upon a sequestrated estate. The
 ' Bankrupt Statute declares, that ' the trustee shall take the most
 ' safe and eligible method of completing the bankrupt's title in such
 ' way and manner as the law requires.' But this certainly does
 ' not import that the trustee shall complete the title in the bank-
 ' rupt's person, for this would make way for all the effects of the
 ' jus accretionis, which it is a main object of the equalising process
 ' of sequestration to avoid. He is in right of the bankrupt, and
 ' therefore the bankrupt's title is to be completed in his (the trus-
 ' tee's) person, when the object of the statute requires it. The
 ' pursuers refer to the case of Tatnal, 2d February 1827; but, as
 ' Mr Bell remarks, the merits of the question were not there at
 ' issue. He adds, that if there had been ' time to enter into them,
 ' it would not appear that there could be much room for doubting
 ' the right of the creditors and their trustee to proceed in com-
 ' pleting the title, whatever effect it might incidentally produce on
 ' the individual creditor.' Reference is also made by the pursuers
 ' to a case, M'Kenzie or Ross v. M'Kenzie's Trustees, decided in
 ' the Outer-House in 1836. But that case is plainly inapplicable.
 ' Kenneth M'Kenzie of Dundonald burdened Thomas his heir with
 ' certain provisions in favour of his sister and children; but he after-
 ' wards executed a trust-deed to make his settlement effectual, and
 ' the trustee was infeft upon it at the period of the truster's death.
 ' Neither Thomas, the disponent under the settlement, though heir-
 ' at-law to his brother, nor the trustee on Thomas's estate, could
 ' make up a title to any thing but the reversion in the hands of
 ' Kenneth's trustee, and that reversion was necessarily burdened

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Note.

‘ with the provisions in favour of Mrs Ross and her children. The
‘ intervention of Kenneth’s trust forms a radical distinction between
‘ that case and the present. It is thought unnecessary to consider
‘ another defence urged for the trustee, namely, that Mr Miller
‘ senior, the granter of the provisions in question, died insolvent,
‘ and consequently that his son, the bankrupt, is not liable for them,
‘ because parties are at issue on the fact of insolvency, and the
‘ troublesome and expensive investigation which might be requi-
‘ site to ascertain it appears unnecessary for the decision of the
‘ cause.’

Opinion of
Court.

The pursuer *reclaimed*. At advising,

Lord Balgray.—This is a very clear case. The cases of Douglas of Kelhead and Ross of Kerse, adverted to by the Lord Ordinary, are quite in point. There is here no reserved right by the settlement of old Miller; no reservation of property creating a real burden, but merely an obligation on his successors to pay certain provisions. Where there are two titles in the person of the bankrupt, creditors are entitled to take up the one which is most beneficial. The trustee has acted most properly. I am satisfied that the Lord Ordinary’s interlocutor is quite right; but the expenses may be altered.

Lord President.—I am of the same opinion. Was there any thing to have prevented the bankrupt from making up titles in fee-simple, and could not the creditors have charged him to enter thus? Mr Miller senior ought to have secured the provisions, which he might have done in several ways. I am quite satisfied with the Lord Ordinary’s interlocutor, though I am sorry for these parties.

Lord Gillies.—I am sorry for the result of this case; but after the cases of Douglas and Ross, the law is quite plain.

Lord Mackenzie concurred.

Judgment.

The Court unanimously *adhered*, except as to expenses, which were not found due to either party.

Lord Ordinary, <i>Corehouse</i> .	Act. Dean of Fac. (<i>Hope</i>),	<i>H. J. Robertson</i> .	Alt.
<i>Rutherford, Handyside</i> .	<i>Miller & Forbes</i> ,	and <i>John Christie</i> ,	Agents.
			S. Clerk.
			C. R.

FIRST DIVISION.

No. CLXXXVI.

5th July 1836.

EDWARD RAILTON

against

JAMES WATSON.

JURY TRIAL.—ISSUE.—PRIVILEGE.—STAT. 43. GEO. III. c. 141, 9. GEO. IV. c. 29, AND 1. WILL. IV. c. 37.—*Malice appointed to be inserted in the issues in an action of damages against a Sheriff-substitute, founded on alleged irregularity in taking a precognition, and in other steps of a criminal cause.*

THIS was an action of damages brought by the pursuer against the defender, Sheriff-substitute of Glasgow, for apprehension and imprisonment, alleged to be illegal, because the procedure on which it followed was said to have been irregular, and contrary to law, in so far as the defender had cited witnesses before him for precognition, on a complaint by a private party, with concurrence of the public prosecutor, without notice to the party accused: That the defender did not attend the precognition, but allowed it to be conducted by the agents of the complainer before an under clerk of the Sheriff-clerk's office, without the presence of a magistrate; and that the declarations of the witnesses were never authenticated: That the defender, on this precognition, granted warrant to apprehend the pursuer for examination: That he was brought before the Sheriff-depute, and, after examination, ordered by him to be incarcerated till liberated in due course of law, yet no further proceedings had been taken against him. Narrative.

The defender rested his defence, inter alia, on the statutes 43. Geo. III. c. 141, 9. Geo. IV. c. 29, and 1. Will. IV. c. 37, which extend to irregularities in apprehending a party, or in regard to any criminal cause or proceeding, or to any prosecution for a pecuniary penalty. The following issues were then prepared: Defender's Pleas.

‘ 1. Whether, on or about the 20th of August 1834, the defender, James Watson, wrongfully and irregularly caused the pursuer to be apprehended and detained, to the loss, injury, and damage of the pursuer ?

5 July 1836.

Railton v.
Watson.

‘ 2. Whether, on or about the 21st day of August 1834, the defender, James Watson, maliciously, and without probable cause, wrongfully caused the pursuer to be imprisoned and detained in the jail of Glasgow, to the loss, injury, and damage of the pursuer?’

‘ Damages laid at L.1000.’

The Lord Ordinary, (Corehouse,) 28th June 1836, appointed ‘ malice ’ to be inserted in both issues.

The pursuer *reclaimed*.

At advising,

Opinion of
Court.

Lord President.—In the circumstances, the defender might, without a precognition, have granted warrant to apprehend Railton for examination upon the complaint. But even if irregularities did occur in taking the precognition, the defender was acting as a judge; and therefore it is quite plain that malice must be inserted in the issue.

The other Judges concurring,

Judgment.

The Court *adhered*.

Lord Ordinary, *Corehouse*. Act. Dean of Fac. (*Hope*,) *Rutherford*. Alt. *Kear*,
Anderson. John Cullen, W. S. and W. A. G. & R. Ellis, W. S. Agents.
Jury Clerk.

C. R.

SECOND DIVISION.

No. CLXXXVII.

5th July 1836.

CHRISTIAN STEWART

against

JOHN MENZIES.

PROCESS.—(RECORD.)—PROOF (BY COMMISSION.)—*A. having raised an action against B., libelling alternatively marriage or seduction; and a record having been made up, and the case remitted to the Commissaries to take the proof; and the pursuer having closed her proof so far as concerned the conclusion of marriage, and asked judgment thereupon; and the judgment negativing the marriage—Found, that the pursuer was not entitled to a new record as to the alternative conclusion; (2.) The Court refused to send the case to a*

Jury, and held that any additional proof to be offered on the said ground of reduction must be by commission.

5 July 1836.
Stewart v.
Mennies.

Sequel of case reported ante, vol. xi. p. 342.—THE pursuer having moved the Lord Ordinary to have an additional record made up, on the conclusions of her summons for damages for seduction, and to have the case remitted to the Jury Roll, ‘The Lord Ordinary (31st May 1836) having heard parties’ procurators on the motion of the pursuer, Christian Stewart, to have a new additional record made up on the remaining conclusions of her summons for damages on account of seduction, and also to have the cause remitted to the Jury Roll, with a view to the justice and extent of her claim for such damages being determined by a verdict, and having made avisandum with the debate and whole process, in respect that the existing record was made up on the whole process, and embraces both the alternative conclusions thereof; that there is no allegation of *res noviter veniens ad notitiam*; and that it is clearly competent for the pursuer to prove her alleged seduction under the record as it stands; refuses to allow any new or additional record now to be made up, or to report to the Lords of the Second Division, with a view to making up such a record; and in respect that the process libelled alternatively, as the pursuer chose to libel it, was a proper consistorial cause, and must have gone to the Commissaries, while that Court subsisted, for decision on both alternatives; that the original interlocutor of the former Lord Ordinary, (8th March 1833,) remitting to the Commissaries ‘to take the proof of the parties,’ necessarily imported a remit to take their proof upon both the said alternative conclusions, and that it appears to have been so held and understood by the pursuer herself, inasmuch as the report (or interim report) of the proof by the Commissary (3d July 1835) proceeds upon a minute by the pursuer, in which it is stated, that she had now closed her parole proof, only ‘in so far as the conclusions applicable to marriage were concerned,’ and craved that the proof as it stood might then be reported accordingly; and in respect also, that in her reclaiming note against the said interlocutor of 8th March 1833, the pursuer prayed specially, that in the event of the defender’s allegations being found relevant, ‘the process should be remitted to the Jury Court instead of the Commissaries,’ and that this reclaiming note was refused by an interlocutor long ago final; finds, that it is not now competent to send this case to a Jury, and that the pursuer can only be let into any additional proof she may be entitled to offer on the ground of seduction, un-

Lord Ordinary’s Interlocutor.

5 July 1836. ‘der a renewal of the remit to the Commissaries, or a commission to some other proper persona.’

Stewart v.
Menzies.

Note.

Note.—‘There is more authority than the Lord Ordinary (looking at the terms of the Judicature Act) could have expected, for allowing a record regularly closed in this Court, to be opened up or added to, though it does not clearly appear whether, in all these cases, this was not done substantially of consent; at least, not in spite of the opposition, or in face of a plea of incompetency seriously maintained by an adverse party. For the reasons stated in the interlocutor, however, this is conceived very clearly to be a case not fit to be added to those exceptions from the rule of the statute, independently altogether of the peremptory renitentia of the defender. As to the suggestion, that the case should now go to a Jury, there is no doubt that a separate and independent action of damages for seduction must have gone to that tribunal; and that it is in itself the fittest and best tribunal both for deciding whether damages are due, and especially for assessing their amount; but, besides the reasons stated in the interlocutor, which seem legally conclusive, it is to be considered, that even on a view of mere equity and expediency, such a course would be liable to great practical objections. The pursuer by no means proposes to lay aside the witnesses already examined, and the documents already produced under the interim report of the Commissaries; but she wants to enlarge and add to the proof she has thus already obtained, to re-examine before the Jury such of the surviving witnesses as she may select, and to read at her pleasure from the depositions of those who are dead, and to produce de novo the writings already recovered, together with any other she may still be able to make forthcoming—in short, to use the proof taken by the Commissaries, under the general remit already noticed, as a precognition for a Jury trial upon one branch of the cause then generally remitted to the Commissaries for probation, and partly proved in relation to this branch as well as the other. It is needless to point out the hazards and abuses to which such a course of proceeding must be liable; and the Lord Ordinary is not aware that it has ever been sanctioned.’

The pursuer reclaimed.

Opinion of
Court.

Lord Meadowbank.—She has made her election to bring a consistorial action, and has of course shut herself out of the benefit of an ordinary action of damages.

Lord Justice-Clerk.—Whether or not the statute gives us a discretionary power to grant trial by Jury in consistorial cases, I am satisfied it would be inexpedient to do so in this instance.

: *Lord Medwyn*.—When the cause was originally before me, a 5 July 1836
proof by commission was asked, and granted, applicable to the
whole cause, and was so reported. The party cannot now go back
upon that, and ask for trial by Jury. *Stewart v. Menzies.*

Lord Glenlee concurred in adhering.

The Court adhered.

Judgment.

Lord Ordinary, *Jeffrey*. Act. Sol.-Gen. (*Cunninghame*), *Patton*. Alt. *Whigham*.
Greig & Morton, W. S. and *James Fergusson*, W. S. Agents. T. Clerk.
R.

No. CLXXXVIII.

SECOND DIVISION.

6th July 1836.

ALEXANDER, EARL OF CAITHNESS, against EATON, HAMMOND AND SON, AND
MANDATARY.

INHIBITION.—MANDATE.—An action was raised by English bankers against certain parties in Scotland, acceptors of a bill, designing them 'executors' of a party deceased, and concluding against them as so named; letters of inhibition were raised upon the said action; a petition to recall the inhibition refused, although, 1. The bill for the letters of inhibition was passed before a mandate was granted by the pursuers, such mandate being only given previous to the signing of the letters themselves; and, 2. The diligence was directed against the petitioner personally, although designed as executor,—the nature of the action truly inferring personal responsibility.

Tax petitioner, along with his sister, Lady C. Murray Macgregor, and Sir Evan J. Murray Macgregor, as executors of the late Major-General A. M. Macgregor, were the acceptors of a bill for L.5500, dated 16th October 1827, drawn by Mr Archibald Campbell, army-agent in London, and accepted by them. This bill was obtained by Campbell, who had been a personal friend of General Macgregor, and held a factory from his executors, who entrusted to him the entire management of the estate, on a representation that a debt to the amount was due by General Macgregor to the estate of the late Sir Alexander Campbell, formerly commander-in-chief at Madras, and was drawn by Archibald Campbell as one of his executors. Campbell had discounted this bill with the respondents, who are bankers at Newmarket, and applied the money to his own purposes. He afterwards became bankrupt, leaving the sum for which General Macgregor's executors had granted the bill, unpaid. Various renewals of the bill had taken place, and various procedure had been had on it. At last an action was raised at the instance of the respondents for payment, the summons in which narrates simply the original bill of 16th October 1827, as drawn on the petitioner, Lady Murray Macgregor and Sir Evan Macgregor, "all executors of the deceased Major-General Alexander Murray Macgregor"—the renewal of that bill by the subsequent acceptances—the failure to pay the amount, and the bankruptcy of Campbell—and the conclusion is, that these parties, so named as executors, should be decreed to pay the amount to the respondents, with interest. The summons was executed against the petitioner on 2d September 1834. On the 4th, an application by the pursuers was made for letters of inhibition, which were signed on the 12th. These letters set forth the terms of the summons verbatim, and

5 July 1836.

Earl of Caithness v. Eaton, Hammond and Son, &c.

Narrative.

then subsumed, that the defenders, knowing that decree would be obtained against them, were dilapidating their lands, &c. in common form; and also, that they were putting away their whole moveable goods, gear, &c. The will of the inhibition was, therefore, 'to inhibit and discharge the said Lady Charlotte Murray Macgregor, the Right Honourable Alexander Earl of Caithness, and Sir Evan Macgregor, personally, or at their respective dwelling-places,' &c. 'that they in nowise sell, alienate,' &c. any of their lands, heritages, &c. in prejudice of the decree to be obtained on the said depending process. Under this inhibition, executions were returned against the petitioner individually, and arrestments were used in the hands of his tenantry, to the number of seventy-four, and of his factor. The bill for the letters of inhibition was passed on the 4th of September, while the only mandate from the respondents which was produced was one dated at Newmarket on the 9th of September, authorising the mandatary to raise, prosecute and follow out all proceedings which he might deem requisite in the courts of law in Scotland, to be taken against Lady Murray Macgregor, the petitioner, and Sir Evan, 'all executors of the said Major-General Alexander Murray Macgregor,' for recovery of the sum in the bill of August 1828.

In these circumstances, the petitioner presented the present application for recall of the inhibition, and for loosing the arrestments, without caution or consignation, *pleading*, inter alia—1. That the respondents being resident furth of Scotland, no diligence could be sued out, or action raised in their name, without a mandate; and if so, the mandate of 9th September never could give validity to the inhibition which was authorised by a bill presented on the 4th of September; and that the mandate in this case, such as it was, authorised no individual proceedings against the petitioner, but only against the executors of Sir Alexander Macgregor, who stood as acceptors on the bill as such. 2. The use of inhibition against the petitioner individually, and directly against his private estate, was wholly unwarrantable and incompetent,—the summons setting forth the acceptance as having been granted by three parties jointly as executors, and there being no conclusion in that action against any one of them severally or individually; and that even had the diligence been competently raised, the use of it had been nimious and oppressive in its unprecedented extent and consequences to the petitioner.

Answers were lodged to the petition; but the discussion was delayed in consequence of the death of Mr Hugh Macqueen, W.S. the mandatary. Another mandatary having been sisted, the case was again put to the roll.

At advising,

Petitioner's Picas.

The *Dean of Faculty*, for the petitioner, contended, that the material question arose at the outset, whether the diligence was authorised, and whether the late mandatary had power to use personal diligence under his mandate, which was not in existence at the time the warrant for the letters had been obtained. The fiat on the bill was dated on the 4th, while the mandate bore date the 9th of September. Thus the diligence, which bears the same date as the warrant, was not sufficiently authorised. It was one thing to take steps for recovery of a debt, and another to use personal diligence. The mandate, besides, only authorised proceedings against the parties as executors; and, *2dly*, The diligence was not used in the way the warrant authorised it, as it contained no authority for personal diligence. The bill for the letters of inhibition, and the letters themselves, as founded on the action, were no sufficient warrant for individual diligence; and, without any allegation that the executry funds had been misapplied, was it competent to go against the executors? Something must have been set forth on the face of the summons in the action, to warrant a personal decree against the executors, and personal diligence against them.

Keay, for the respondents.—No use was made of the warrant until the mandate was obtained, and no diligence was used on it. When the mandate was obtained, the mandatory then rendered himself liable for all the consequences, as sanctioned by the cases of *Lockhart v. Ferrier*, 22d Dec. 1832, and *Campbell v. Montgomery*, in June 1833. Then, as to the objection that the parties are charged as executors, the bill was not accepted by them merely as executors, and this is not a diligence as against executors, though they are called designative as such.

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Respondents' Pleas.

It was intimated from the bar, that the respondents would consent to the recall of the inhibition and arrestments, on caution being found for L.1500.

Lord Justice-Clerk.—As to one part of the case, the formality and regularity of the diligence, I think the objections stated are not well founded. The will of the letters is not against these parties merely as executors. The action on which the letters proceed is on a liquid document of debt, and the diligence has reference to that action. As to the other point of the mandate, it is one requiring consideration; and having given it that consideration, I am now satisfied the objection of want of the mandate is not good. No doubt the warrant for the letters of inhibition was issued on the 4th September, though the mandate only bore date the 9th; but then it sanctioned every thing that had been done. It was not until the 12th that the letters were signeted, and until then nothing had been done. It is of no signification that the ordinary style of the letters draws back to the date of the warrant, because, in fact, no execution could be done in the diligence until the signet was appended to it. I hold the signeting to be the true beginning of the proceedings, as, until this was done, the letters were not valid. A mandate is in time at the date of a caption, though not in existence at the date of the horning. I by no means approve of the rigid execution of this diligence against the noble petitioner; but with regard to whether it, as following on the action which is in dependence, is nimious and oppressive, I cannot consent to its recall on any supposition that we have considered the merits of that action, which I think a very delicate matter, and improper for us to give any expression of opinion upon. I do not think, therefore, we are in a condition to recall this inhibition; but now that the offer is made to withdraw it on caution for L.1500, I think it should be closed with.

Opinion of Court.

The other Judges acquiesced.

The proposal of the respondents was subsequently accepted, but the petition Judgment for recall was refused, with expenses.

Act. Dean of Fac. (*Hope*,) *Rutherford, P. Robertson*.
Robert Roy, W.S. and Sang & Adam, Agents.

Alt. *Keay, Buchanan.*

R.

FIRST DIVISION.

No. CLXXXIX.

7th July 1836.

SIR GEORGE WARRENDER

against

LADY WARRENDER.

PROCESS.—HUSBAND AND WIFE.—DIVORCE.—ADULTERY.—

PROOF.—*A defender in an action of divorce for adultery, who had stated various acts of recrimination in defence, and in support of that defence had raised a counter action of divorce, in which, however, the oath de calumnia had not been returned,—found not entitled to a proof of recrimination, nor to demand that the order for proof in the original action should be sisted until the counter action admitted of being sent to proof.*

PROCESS.—STAT. 6. GEO. IV. c. 120, § 19.—*The Court held, that on a verbal report by the Lord Ordinary, they were entitled, under the Judicature Act, § 19, to pronounce a judgment which should be considered as a judgment of the Inner-House, although the Lord Ordinary had not made avizandum with the cause.*

Narrative.

THIS case was an action of divorce for adultery, raised at the instance of the pursuer in 1833, in which acts of recrimination were stated in defence. In support of this defence of recrimination, a counter action of divorce was raised by the defender in 1836, but the report of the commission to take the defender's oath de calumnia had not yet been returned.

The record in the original action having been closed, a motion was made by the pursuer, for a commission to take a proof of his averments. This was opposed by the defender, on the grounds stated by the Lord Ordinary in the following interlocutor :

‘ 17th June 1836.—The Lord Ordinary having heard counsel for
 ‘ the parties, appoints the pursuer to print the record, and put copies
 ‘ thereof in the boxes of the Lords of the First Division of the
 ‘ Court, that the Lord Ordinary may report verbally the questions,
 ‘ 1st, Whether the defender is entitled, in hoc statu, to a proof of the
 ‘ articles in her statement of facts containing recriminatory charges
 ‘ of adultery against the pursuer? and, 2d, Supposing the former
 ‘ question to be decided in the negative, Whether the defender,
 ‘ having raised a counter action of divorce, which is now awaiting
 ‘ the report of a commission to take her oath de calumnia, is en-

'titled to demand that the order for proof in the original action at 7 July 1836.
'the instance of her husband shall be sisted until her counter action
'admit being proceeded in, to the effect of allowing her a proof?' Warrender v.
Warrender.

The Lord Ordinary reported the cause verbally.

The defender *pleaded*—On the authority of the case *De la Motte v. Jardine*, 9th March 1787, a proof of recrimination should be allowed even before a counter action has been brought; but, at all events, when such action has actually been raised in support of the defence of recrimination, stated at great length in the original cause, the process should be sisted until the whole cause is in a position for a joint proof. Defender's Pleas.

The pursuer *pleaded*—Recrimination requires to be stated in a separate action; *Lockhart v. Henderson*, 7th Dec. 1799. Therefore, until that is done, that defence cannot have any effect in the present case. But it is still uncertain whether the action of the lady will go on, as the oath de calumnia has not been reported. Pursuer's Pleas.

The pursuer is therefore entitled to lead his proof, *hoc statu*; nor is it any reason for delay that a decision can not be given until the defender's proof has also been taken.

The Court (23d June) unanimously pronounced an interlocutor Judgment allowing the pursuer a proof, and granting a commission in the action at his instance.

A doubt having been expressed from the bar, whether the judgment was to be considered as a judgment of the Inner-House or an interlocutor of the Lord Ordinary, as the cause had come before the Court on a verbal report without *avizandum* having been made by the Lord Ordinary, the Court were of opinion, that by the Judicature Act, § 19, they were entitled to pronounce a judgment which should be final although *avizandum* had not been made.

After the oath de calumnia of the defender had been returned, a motion was made for repeating the counter process at the defender's instance in the action at the instance of the pursuer, and for being allowed a proof, *hoc statu*, of the recriminatory articles stated in defence in the latter action. The Court refused the motion, on the ground that a commission to take a proof having been granted by the Court, which had not yet been reported, the motion was incompetent at that stage of the procedure.

Lord Ordinary, Fullerton. Act. Dean of Fac. (Hope,) Anderson. Alt. Keay,
Rutherford, H. J. Robertson. John Murray, S. S. C. and Æneas Macbean,
W. S. Agents. D. Clerk.

C. R.

FIRST DIVISION.

No. CXC.

7th July 1836.

JOHN PARKER, ASSISTANT CLERK OF SESSION, PETITIONER,
against
 LORD CAWDOR AND OTHERS, IN THE DIVISION OF COMMONTY OF HARMUIR.

PROCESS.—DIVISION OF COMMONTY.—STATE OF THE PROOF.—

CLERK'S FEES.—*The whole of the parties in a process of division of commonty found conjunctly and severally liable for the clerk's fees for preparing the state of the proof, reserving to the parties their relief against each other.*

Narrative.

MR BRODIE of Brodie raised a process of division of the commonty of Harmuir, in which Colonel Gordon of Cluny, Lord Cawdor, and Sir James Dunbar, were called and appeared as defenders. The usual commission having been granted, the proof was taken, and, along with the procedure held before the Commissioner, was reported to the Lord Ordinary, who pronounced circumduction and great avizandum, in February 1835. The cause was immediately transmitted by Colonel Gordon's agent to the petitioner's office, in order that a state of the proof might be prepared, in common form, for the Inner-House. The state being ready, printed copies were sent to all the agents, and boxed to the Court. Those sent to the agents of Lord Cawdor and Mr Brodie were returned to the clerk, accompanied by letters, declining to receive them, or to pay any part of the expense; and a minute was lodged in process for these parties, stating that they were quite satisfied with the portion of the commonty allocated to them respectively by the Commissioner, and that though there were disputes between Colonel Gordon and Lord Cawdor, the adjustment of these would not affect, to any extent, the shares allotted to the other parties. They therefore craved decree of division, in terms of the Commissioner's report, so far as Lord Cawdor and Mr Brodie were concerned; and they protested they should not be liable in any part of the expenses to be occasioned by the other parties, nor for preparing and printing the state.

After several ineffectual attempts to obtain a settlement, the petitioner applied to the Court, stating the circumstances, and craving judgment 'either against all the parties, conjunctly and severally, or, at least, against Colonel Gordon,' (whose agent had or-

dered the state,) 'reserving to him his relief against all concerned.' The petitioner referred to the Act of Sederunt, 11th March 1800, § 9, passed for the very purpose of protecting the clerks in such cases as the present.

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At advising the application, *Neaves*, for Sir James Dunbar and for Colonel Gordon, stated there had been some misapprehension among the parties here. There was no doubt that Mr Parker was clearly entitled to payment of the fees of the prepared state, whatever discussions might arise between particular parties; and he had no objection to the petitioner's request, on the understanding that Colonel Gordon's relief against the other parties should be reserved to him.

Defenders'
Pleas.

Sandford, for Lord Cawdor, stated, that his Lordship had been quite satisfied with the portion of the commony assigned to him by the Commissioner appointed by the Lord Ordinary; and he complained of being obliged to pay for discussions amongst other parties with which he had no concern; or for the preparation and printing of the state, which he had not ordered, and which was not necessary to enable him to obtain decree in terms of the report.

Lord Balgray.—I am afraid the objectors are out of shape. A division of commony is an Inner-House process, and before it can come before your Lordships, a state of the proof must be prepared by the clerk, and boxed. The state is absolutely necessary, not merely for the purpose of ascertaining the amount of expenses against each party, but also before decree of division can be pronounced. The question of relief, inter se, may be subsequently settled; but, in the meantime, the expense of the state must fall upon all the parties, conjunctly and severally.

Opinion of
Court.

Lord Gillies.—After the division of the commony is finished, two of the parties have a dispute about their respective portions. Now, that question may be carried to appeal, and lead to a long and protracted litigation, and is a third party to be subjected to the expense of all this?

Lord Mackenzie.—Although one party has contested a point, is he to be subjected in the whole expense? Before doing so, you must discriminate how that party is to blame; otherwise it would be very hard. In my opinion they ought at present to be found liable, conjunctly and severally, reserving to them their relief inter se.

Lord President.—I concur in the view last stated. This is just as much a common expense for which the parties interested are lia-

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Judgment.

ble, conjunctly and severally, as the fee to the Commissioner, or the expense of the survey which we lately decerned for.

The following is the judgment of the Court: 'The Lords having advised this note, and heard counsel, &c. find the said parties liable to the said John Parker for the sum of L.78:13:6, conjunctly and severally, and decern accordingly; reserving to the parties their relief against each other as accords: Farther, find the said John Parker entitled to the expenses of this application, modify the same to L.10:16:4, and decern therefor against the said parties, conjunctly and severally, with the expense of extract, and allow this decree to be extracted ad interim.'

For the Petitioner, *Dean of Fac. (Hope.)*

For the Parties, *Newnes and Sandford,
Mackenzie & Sharpe, W. S. Tod & Romanes, John Bowie, Gordon & Stuart,
and Alex. Scot, W. S. Agents.*

C. R.

SECOND DIVISION.

No. CXCI.

8th July 1836.

ROBERT THOMSON AND OTHERS

against

THE MAGISTRATES OF WICK, &c.

BURGH-ROYAL.—(ELECTION OF TOWN-COUNCILLORS.)—STAT. 3. AND 4. WILL. IV. c. 76, § 16.—*Petition and complaint against the election of councillors for the burgh of Wick held incompetent under the Burgh Reform Act.*

Narrative.

IN virtue of the ancient set and usage of the burgh of Wick, the council consists of twelve persons; and by the 16th section of the statute 3. and 4. William IV. c. 76, four councillors go out of office annually, and a similar number are to be elected in their room.

The annual meeting for electing councillors for the burgh of Wick was held at Wick on 3d November 1835, when an election of four councillors took place. The petitioners now challenged that election by complaint to the Court of Session, founded on the Act of Parliament 16. Geo. II. c. 11, § 24, by which it is enacted, 'That it shall and may be lawful to and for any constituent member, at any meeting for election of magistrates or councillors, or any

‘ meeting previous to that for the election of magistrates and coun- 8 July 1836.
 ‘ cillors respectively, who shall apprehend any wrong to have been
 ‘ done by the majority of such meeting, to apply to the said Court Thomson and
 ‘ of Session by a summary complaint for rectifying such abuse, or Others v. The
 ‘ for making void the whole election made by the said majority, or Magistrates of
 ‘ for declaring and ascertaining the election made by the minority, so Wick, &c.
 ‘ as such complaint be presented to the said Court of Session with- Narrative.
 ‘ in two calendar months after the annual election of the magistrates
 ‘ and councillors ; and the said Court shall thereupon grant a war-
 ‘ rant for summoning the magistrates and councillors elected by the
 ‘ majority, upon thirty days’ notice, and shall hear and determine
 ‘ the said complaint summarily, without abiding the course of any
 ‘ roll, and shall allow to the party who shall prevail their full costs
 ‘ of suit :’ And founded also on the 14. Geo. III. c. 81, § 1, by
 which it is enacted, in relation to the foresaid act, and the com-
 plaints thereby authorised for redress of wrongs committed in the
 annual elections of royal burghs, that from and after the 12th of
 June 1774, ‘ the Court of Session shall grant warrants for the ser-
 ‘ vice of all such complaints as aforesaid, upon fifteen days’ notice.’
 The petition narrated the 3. and 4. Will. IV. c. 76, particularly
 sections 4, 5, 8, 11, 15, 16, and 36, within the operation of which
 the burgh of Wick falls, being entitled, along with several other
 burghs, to send a member to Parliament. The petition then set
 forth various grounds of complaint and irregularity in the lists of
 election and qualifications of the respondents, and prayed the Court,
 inter alia, to ordain the town-clerk and provost to receive the peti-
 tioners as councillors, duly elected at the meeting of 3d November
 1835.

Answers were given in, and the case was remitted to the Lord
 Ordinary, who appointed a condescendence and answers, and after-
 wards reported them to the Court. The respondents, inter alia,
pleaded—That the proceedings at the election were not subject to
 the review of the Court. At advising,

Lord Justice-Clerk.—We cannot sustain this petition. I give no Opinion of
 opinion as to the competency of a reduction ; but I would not, as Court.
 has been moved for, sist this petition in the meantime, because it
 would be sanctioning the old practice. The review of election pro-
 ceedings was never meant to be in the Court of Session under the
 Reform Acts.

Their Lordships concurred, and unanimously *dismissed* the peti- Judgment.
 tion as incompetent, with expenses.

Act. D. M’Neill, Names.

Alt. Rutherford, Paterson.

Horne & Ross, W.S.

and William Sutherland, W.S. Agents.

R. Clerk.

FIRST DIVISION.

No. CXCH.

9th July 1836.

JAMES HAMILTON
against
 TENNENT & COMPANY.

PROCESS.—JURY TRIAL.—(NOTICE OF MOTION.)—THE pursuer of this Jury cause having given notice at the Jury Office of a motion to have the issues remodelled, but having sent no intimation to the opposite party, the Court ordered the motion to be withdrawn as irregular, in respect that the words of the act being, ‘to apply to the Court by motion,’ the usual notice to the opposite party was requisite.

Act. *Dean of Fac. (Hope,) Monteith.* Alt. *Robertson.* *Wotherspoon & Mack,*
W.S. and Fisher & Duncan, W.S. Agents. Jury Clerk.

C. R.

FIRST DIVISION.

No. CXCH.

9th July 1836.

WILLIAM SWANSON
against
 ROBERT WIGHT.

TRUSTEE.—SEQUESTRATION.—*An ex-trustee, who admitted a balance in his hands, ‘but subject to a deduction of such further payments as he can instruct,’ ordained to consign the full balance admitted.*

IN consequence of a petition and complaint at the instance of the petitioner, trustee on a sequestrated estate, against the respondent, the former trustee, and, in compliance with an order of the Court, ‘to state the precise sum, if any, which he admits he has in his hands, ‘or under his control, as trustee,’ the respondent lodged a minute, in which he admitted that a balance of L.2049 : 9 : 6½ remained in his hands, ‘subject to a deduction of such further payments as he can

‘instruct.’ On the report of the Lord Ordinary, the Court, holding the trustee amenable till discharged, and looking to the balance admitted, whilst no deductions were proved, ordained consignment of the admitted sum before Lammas next, and after that allowed interim extract to go out.

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Swanson v.
Wight.Lord Ordinary, *Cockburn*.Act. *Rutherford, Montsith*.Alt. *A. M'Naill*.*Gibson-Craigs, Wardlaw & Dalziel*, W. S. and *J. Adam*, W. S. Agents. S.

Clerk.

C. R.



JURY SITTINGS.

No. I.

21st December 1835.

PATULLO
against
ANDERSON.

(BEFORE THE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

ASSAULT.—DAMAGES L.50.—The pursuer and defender were medical practitioners in Cupar-Angus. The pursuer, a surgeon, had been for some time attending a poor boy. The boy being in a very dangerous state, his friends called in the defender, a physician, without informing the pursuer. At their first meeting in the sick-room of their patient, who died two days afterwards, the defender accused the pursuer of having administered improper medicines to his patient: the pursuer retorted by questioning the defender's right to interfere: this was replied to by an opprobrious epithet from the defender, to which the pursuer rejoined in a similar strain. The defender then struck the pursuer, who remained passive under the infliction. The Lord Justice-Clerk stated to the Jury, that while they must understand that no words would justify a blow, and while it also appeared that the defender was the aggressor, still, as the circumstances did not reflect much credit upon either party, he considered they would be justified in making the damages as low as possible. Narrative.

Verdict for pursuer, Damages L.50.

For Pursuers, *Keay, Robertson.*

M'Intosh & Ducat, W. S. Agents.

For

Defenders, *Dean of Fac. (Hope), A. M'Neill.*

James Brodie, Agent.

Mr

Russell, Clerk.

R.

No. II.

22d December 1835.

SAMUEL JAMES HALLAM
against
 FREDERICK GYE AND COMPANY.

(BEFORE THE LORD JUSTICE-CLERK (BOYLE) AND A COMMON
 JURY.)

JUDICIAL SLANDER.—WRONGOUS ARREST.—*Action of damages for slanderous matter in judicial proceedings, and for an arrest in England, pending proceedings here for the same debt, the said arrest being further alleged to be in itself funditus illegal and informal. Verdict for pursuer, £.2000.*

PROOF.—(2.) *Not competent to question a witness who has examined the books of a concern, as to the mode in which the balances were adjusted, when the books have not been produced.*

(3.) *Judge's notes on a previous trial are not evidence.*

ISSUE, (COMPETENCY OF).—(4.) *Question, whether an issue could be allowed, on a mere allegation that a party had instituted an ordinary action, in which he made claims, which a Jury might think he ought, or must have known to be unjust?*

Narrative.

THE defenders are extensive tea-dealers, having their principal establishment in London. In July 1827, the pursuer was appointed by the defenders to take the management of a shop, in Waterloo Place, Edinburgh, which was opened by them under the name of the London Genuine Tea Company. In consequence of a report to the defenders by one of the shopmen, that he had been struck in the shop by the pursuer, in presence of customers, the defenders resolved to dismiss the pursuer from their employment. Accordingly, in November 1829, shortly after receiving this report, the defenders sent down a person of the name of Tress, with powers to supersede the pursuer, and with a letter dismissing him. Upon receiving this letter, the pursuer delivered up to Tress the keys of the desk and safe, paid over a balance of cash, appearing from the books to be due to the defenders, and proceeded, with the assistance of Tress and the other shopmen, to take an inventory of the stock. The letter dismissing the pursuer contained, *inter alia*, the following passage: ‘ If you can point out any situa-

‘tion in our establishment likely to suit you, we shall be happy to
 ‘hear from you, and to promote your interest in any shape in our
 ‘power, except at Waterloo Place.’ In January 1830, the pursuer took a lease of a shop in the immediate vicinity of the defenders, for the purpose of establishing himself as a tea-dealer. In February following, the defenders raised and executed against the pursuer a summons of count and reckoning, narrating, ‘That having opened a branch of their business in the city of Edinburgh in
 ‘August 1827, and having placed the pursuer as their managing clerk therein, they from time to time transmitted large quantities
 ‘of teas, sugars, coffees and other articles of merchandise, in order
 ‘that the same might be disposed of for their behoof by him as
 ‘their managing clerk: That these goods were disposed of, and the
 ‘prices thereof duly received by him, and that he continued to act
 ‘as managing clerk of the defenders in the branch of their business before described, from the month of August 1827 down to
 ‘the 30th day of November 1829, during which period he made
 ‘various remittances of cash to them, being part of his intrusions as managing clerk aforesaid, but there was still a considerable balance in his hands belonging to the defenders;’ and concluding, that the pursuer should render a just account of his intrusions, and setting forth the balance as L.500, with interest from the period of the pursuer’s dismissal. The summons was called in Court upon the 4th March thereafter. The statements made by the defenders in the course of this action form the subject matter of part of the issues after quoted. This action resulted in an issue, upon which the parties went to trial, in these terms: ‘Whether
 ‘the defender is indebted and resting owing to the pursuers in the
 ‘sum of L.120, or any part thereof, as the value of stock not accounted for by him, or of moneys received by him on account of
 ‘the pursuers, and not accounted for?’

At the trial, the present defenders adduced certain evidence, instructing a balance due to them, amounting to L.84:19:3. The present pursuer considering said evidence to be matter of surprise, allowed a verdict to pass against him, and immediately thereafter applied for, and obtained a new trial. On 7th January 1833, the parties again went to trial, when they agreed to withdraw a juror, and to refer the whole matters in dispute to Mr James Brown, accountant. On 6th January 1834, Mr Brown pronounced an award, finding the balance due by the pursuer to be L.4:3:11½, as the amount of certain immaterial errors or omissions in the books; and he concluded his award as follows: ‘I think it fair to add, that
 ‘keeping in view the extent and magnitude of the business under

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Narrative.

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Narrative.

‘ the defender’s charge, the errors and omissions above alluded to are less, in my opinion, than might reasonably have been anticipated; and considering, on the whole matter, the pursuers to be the losing party, I order them to pay all the costs.’ On the 18th January 1834, the Court pronounced judgment in terms of the award; and on an appeal against this judgment, the House of Lords affirmed it. (See Reports.)

In March 1830, the pursuer went to London, where he made large purchases of tea, which he shipped on board the City of Edinburgh steam-packet. On the evening of Saturday, the 27th of March, when the pursuer was about to go on board said vessel, to accompany his purchases, he was arrested at the instance of the defenders, by virtue of a writ of *capias* issuing from the Court of Common Pleas. The writ of *capias*, which issued the same day on which the arrest took place, proceeded on an affidavit sworn before the deputy-filacer for the county of Surrey, by Henry Dixon Parker, clerk to the defenders, and acting on their employment, and by their authority, which bore, that the pursuer was justly addebted to the defenders in the sum of L.94, money had and received by the pursuer to and for the use of the defenders. The pursuer was detained in custody till Monday morning, the 29th, when he was liberated on bail in common form. Thereafter, the attorney of the defenders, in pursuance of a judge’s order, delivered to the attorney for the pursuer the particulars of their demand; and it was admitted in the present pleadings, that these particulars were included in the original action of count and reckoning, raised in this Court.

The issues upon which the parties went to trial in the present action were as follows:

Issues.

‘ It being admitted, that on the 3d day of February 1830, the defenders, Gye and Hughes, raised and thereafter insisted in an action against the pursuer for payment of the sum of L.500, or of such other sum as should appear to be due by him, as a balance due by the pursuer to the defenders:

‘ 1. Whether, in a paper or pleading, entitled, Revised Condescendence in the said action, the said Gye and Hughes did insert, or cause to be inserted, the following words, or words to the following effect, according to the meaning hereinafter set forth, *videlicet*, ‘ The defender’ (meaning the present pursuer) ‘ was responsible for this deficiency, and if he had rightly discharged his duties subsequent to the 30th September 1829, he would have been enabled to shew how it had arisen. It arose entirely from

“his culpable management, neglect, or embezzlement; and the greater part, if not the whole, had occurred prior to 30th September 1829.’ And the following words, or words to the following effect, viz. ‘His’ (meaning the present pursuer) ‘final removal was resolved upon, in consequence of his failure to give any explanation of his conduct, or meet the serious charges preferred against him by the other young gentlemen of the establishment.’ And the following words, or words to the following effect, viz. ‘Admitted that the concern prospered, but it was from the good quality of the tea sold, and not in consequence of the defender’s’ (meaning the pursuer) ‘management. The diminution of the business of the pursuers’ (the defenders) ‘since the defender’s’ (the pursuer’s) ‘dismissal, is owing to the public having discovered his improper conduct, and to the competition which he has entered into with them in a concern opened on his own account, which competition he has supported, in some instances, by the most improper means.’ And the following words, or words to the following effect, viz. ‘The deficiency in both these periods arose under circumstances which necessarily infer gross negligence or embezzlement on the defender’s’ (meaning the pursuer) ‘part, and he is responsible for the consequences of such misconduct;’ meaning that the pursuer was dishonest in his dealings, and unworthy of confidence? and, Whether the whole or any part of the said words are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or maliciously caused to be inserted, in the said paper or pleading, to the loss, injury and damage of the pursuer?

‘2. Whether, in London, on or about the 27th day of March 1830, the defenders, maliciously, and without probable cause, wrongfully arrested the pursuer, or wrongfully caused him to be arrested, or wrongfully detained the pursuer, or wrongfully caused him to be detained, to the loss, injury and damage of the pursuer?’

Robertson, in opening for the pursuer, cited the following cases: *Authorities Shaw v. Robertson*, 13th Dec. 1803, (*Mor. Lis alibi pendens, App.*); *cited for pursuer.* *Cotton v. James*, 1. *Barnewall and Adolphus*, 128; *Mitchell v. Jenkins*, 2. *Neville and Manning*, 301; *Nicolson v. Coghill*, 4. *Barnewall and Cresswell*, 21.

The pursuer called Mr Ogilvie, accountant, who had examined the books on his part, in the proceedings before the arbiter, with a view to establish the accuracy of the result of his investigations, but

Not competent to question a witness who has examined the

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books of a concern, as to the mode in which the balances were adjusted, when the books have not been produced.

the Dean of Faculty objected to the examination going beyond a mere statement of the result, in respect of the non-production of the books, and the pursuer did not press it farther. Mr Brown, the arbiter, was also called, who identified his award, and stated that he considered it the business of Gye and Company to make out their case, which he did not consider they had by bringing out so small a balance. The Dean of Faculty again objected to any examination as to the accuracy of the data on which the award proceeded. The pursuer then called persons who had had large dealings with Hallam, who expressed the highest opinion of his honesty, but stated, that the legal proceedings had led them to contract their dealings.

Evidence.

The arrest was proved by the requisite evidence, and also the circumstances attending it, as above detailed; and to prove the law of England as applicable thereto, the pursuers called

Mr Samuel Hughes, barrister-at-law, practising in the Court of Common Pleas. After stating, that when a person brings an ordinary action for an alleged debt, it is not necessary that he should arrest the defendant; interrogated, For what sort of debt is it competent to arrest at the beginning of a suit? It must be a money demand of an ascertained amount; and, therefore, if the action is brought for general damages only, however large they may be expected to be, no arrest can lie. Suppose a person, in business in London, establishes a shop in a town in England, and sends a person there to manage and conduct the concern; and that the London merchant, having sent goods to the agent, institutes an action for an unascertained balance of accounts, is that such a claim as would justify an arrest? If the merchant could take upon himself to swear that the agent has received any certain amount of money, he can arrest for that: he must, however, swear that that particular sum has been received by the defendant; but if it is an action for not accounting for goods forwarded to the agent, then it is an action of accounting, which will not justify an arrest. If the money is either not received, or the principal has no evidence that the agent has received it, there is not sufficient ground for an arrest. It is not because money has not been accounted for, that the action for money had and received will lie. If a merchant in London forwards goods to his agent in the country to be sold, and he proceeds against him, simply on the ground that he has not settled accounts, the action for money had and received will not lie, unless you can prove that the agent has received the proceeds. Being shewn the affidavit on which the arrest proceeded, and interrogated, Would you understand that affidavit to be founded on a claim for not accounting for goods? Certainly not. Being interrogated as to the consequence of a party arresting another on such an affidavit, when his true ground of action was for not accounting for goods, and having answered, that it would infer a malicious arrest, the witness added, To sustain the action for malicious arrest two things are necessary, malice and want of probable cause. The pleadings always allege

that the arrest is made. Malice is partly a question for the Jury, partly for the Court. What is probable cause is a question for the Court, after the Jury have found the fact from which the existence of probable cause or the want of probable cause is to be inferred. Proof of want of probable cause is evidence of malice to go to the Jury. The witness then referred to the provisions of the statute 43. Geo. III. c. 46. I consider it would be a strong ingredient in proving want of probable cause, that the sum to which this affidavit refers was not in point of fact money had and received. It is partly on the principle, that the precise amount must be ascertained, that you cannot arrest on a bill of exchange without stating the amount, because part of the debt may be made up of interest; and if an affidavit for debt is bad in part, it will be bad altogether. The evidence required of want of probable cause is necessarily slight, because the plaintiff is trying to establish a negative. There are only one or two cases where such evidence can be required, and this is one of them. In this case, although an affidavit to warrant an arrest must be for a sum of L.20, only L.4 odds are recovered, I consider that no arrest ought to have taken place. (The note of particulars of the plaintiff's demand being handed to the witness,) interrogated, Does that note of particulars import money had and received? The first item is, 'Cash unaccounted for, L.1.' That is money had and received. 2d, Cash overpaid on salary account, as per do., L.6:3:1. That is money had and received. 3d, Deficiency of stock unaccounted for. That would not be money had and received: it is the subject of an action of accounting: the evidence of that item would be proof that these goods were sent to defendant on sale, and no account given of them: they might be unaccounted for, because they were stolen or abstracted from the stock without the fault of the defendant, and so he might not be liable. 4th, Difference between list and returns of book debts, as per account rendered to plaintiff by defendant. I am not prepared to say that is money had and received: the book debts may not have been got in. I conceive that the note of particulars generally does not import money had and received, or support the affidavit. At all events, the balance of items is below what an arrest could have issued for. It is not necessary to give in a note of particulars to support the affidavit at the time it is made. A person may simply swear to the debt; and if he swears, then he may have a *capias*; but afterwards he must give in the note on declaring: it is the right of the defendant to call on the plaintiff to give in a note of the particulars of his demand: it is required that the plaintiff should annex to his declaration the particulars of his demand. Interrogated, If it is a common thing to arrest a party on a Saturday night and keep him till the Monday? Certainly not: he has no means of finding bail on Sunday: the office is not open; and all parties confined must remain so till Monday. On cross-examination by the Dean of Faculty, witness stated, that a person who had furnished goods to another might arrest him, if he chose to swear that the person was due to him a debt of an ascertained amount: it is only necessary that the person should swear, and have grounds for swearing that a sum is due. Supposing a person has cause to swear, and finds the party is going to sail, and arrests him, he would not pronounce the arrest vexatious on that account. He

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22 Dec. 1835. would not pronounce an arrest vexatious merely because the party had furnished an agent with goods: the agent might notwithstanding have had money in his hands; and he might be able to swear to that, though the note of particulars was wrong drawn.

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Evidence.

The defenders called the shopman, (Stonebridge,) already mentioned, who proved the occurrence between him and the pursuer, and that he reported the same to the defenders. They also called Tress, above mentioned, who proved several of the circumstances above detailed, and also a circumstance founded on by them, as follows:

Went to Mr Hallam, and asked if he had got an order from Mr Macmichael, who had previously been a customer of witness's tea shop, and Mr Hallam produced the order open. It had been sealed. Witness requested Mr Hallam to give up the amount of the order, which he objected to, as the goods were ready then to go away, and witness saw them. Witness complained of this, and Hallam said he would execute as many orders as he got the same way, that came into his hands. The order was addressed to 'London Genuine Tea Company, No. 20.' Witness communicated these facts to Mr Seivwright at the time. Can't say when this was; but it was during the first year of Mr Hallam's trade. Can't say if in spring or summer.

Cross.—Mr Slade was down at the time of the trial. Macmichael's order was for 30s. or 40s. Can't say if Macmichael is dead or alive. Witness has the order here. He was a small tea-dealer.

They then called Mr William Galloway, accountant, who gave evidence as follows:

He examined the books of Mr Hallam before the first trial, and made a second examination before case was to be tried a second time. He spent about two months on those books before the second trial, but only a short time, eighteen days, before the first one. He also looked into some facts and circumstances during the discussion before Mr Brown, and knows all that Mr Hallam stated against the claim of Gye and Company.

The latter adduced him on first trial as a witness and also on the second, and also was examined before the arbiter, Mr Brown, for two days. His opinion had decidedly been from the first that a sum was due by Mr Hallam, and it was not shaken by what has passed, except as to a sum of L.1, 12s.

When first desired to look into those books, he was only desired to make a fair report, and give Mr Hallam the benefit of what he was entitled to. No other accountant but witness was to be examined. He reported to the agents the results of the investigations on both trials. In the course of the proceedings, he discovered no indication of an intention on the part of Gye and Company to act harshly to Mr Hallam, and only to get a fair accounting. Nothing arose to make him think, if he had reported otherwise, that they would not have dropped the case. He is satisfied they would. They were just the books of the shop, and made like a retail merchant. They were styled double entry by single, but were truly only single, with the exception of the stock. He has seen books of that description frequently.

The defenders stated, that they had also an English barrister in Court, to explain the law as to the arrest; but they were willing to hold Mr Hughes' evidence as correct.

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The Lord Justice-Clerk charged the Jury as follows :

The case with which you have been so long occupied is certainly one of considerable importance to both parties. It is important to the pursuer that he should satisfy you that there is now before you a well-grounded action, for the purpose of obtaining satisfaction for the injury which he has alleged he has received. It is important to the defender to shew he is not liable. Important as it thus is to both parties, I am sure it is almost unnecessary for me to say, that it demands your calm and deliberate attention; and I am satisfied that you have a great deal too much good sense to be carried away with any declamation on either side, and that you will be disposed to confine yourselves strictly to the bare consideration of the facts, as they apply to the questions, which, by the issues, you are called upon to decide, under such exposition of the law and the circumstances as it is now my duty to make to you.

I shall begin with at once stating, that this is not an action of an ordinary description. You are not now trying a case of ordinary slander, where one individual complains of slander by another in the ordinary circumstances of society. If such an action is brought, it is sufficient to satisfy the Jury that the statements are in themselves false, calumnious and injurious, because the law infers, if these preliminaries are established, that there is malice. The present action is raised, in the first place, for alleged defamation, or injurious statements in judicial proceedings: and, secondly, for the alleged illegal, unwarrantable and oppressive arrest of this pursuer. The first issue then puts it to you, whether this person has been injured by certain statements made, in reference to him, in the course of judicial proceedings. In respect to this matter, the rule of law is, that statements made under these circumstances are under such protection, that it is necessary for the pursuer of an action of this nature to prove that the expressions or statements of which he complains were malicious; that they proceeded from a malicious motive; that they were to his injury, and were not made use of by the party from a probable cause. The law is quite clear, that it is incumbent on the pursuer to satisfy the Jury that the statements were both malicious, and that they were made without a probable cause. I shall just read one passage in the speech of Lord Eldon, in the case of *Young v. Leven*, 1. *Shaw's Appeals*, p. 210. (His Lordship read the passage.) Now, it is true, that the malice which the law requires to be established to the satisfaction of a Jury, in a case of this description, it is not necessary to establish by direct positive evidence: that sort of direct evidence is not likely to occur: it is generally to be determined by the facts and circumstances of the case. If there are facts and circumstances established to the Jury, then they may draw the conclusion, that the statement proceeded from malice: but there must be proof of distinct facts tending to shew malice; and such facts must be made out by the evidence, before the Jury can find that the statements in question are malicious.

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In regard to the word, probable cause. If that be proved by slight evidence, you have had occasion to see it laid down in distinct terms by the gentleman from the English bar, that slight evidence will throw upon the defender the onus of proving probable cause. If slight evidence is given, that is sufficient to throw the burden on the defender. That I state generally to be the law, and you have had it so stated by the respectable gentleman who gave evidence before you, more particularly as to the arrest; but it is perfectly conformable with the law of this branch of the case. It is necessary, then, as to this part of the case, that you should be satisfied, that the statements in the issue complained of were statements made maliciously, and without probable cause. Attending to the evidence in support of that which it is incumbent on the pursuer to prove, I am bound to state to you, that it is not on conjecture of malice,—it is not on the supposition of malice you can allow your minds to rest: you must be satisfied that malice has been established to your entire satisfaction: you must be satisfied also as to the want of probable cause,—that that also has been proved to you.

It is sufficient to put you in possession of the general features of this case. You know enough of the case to see that it is impossible to overlook the proceedings on either side. The origin of the proceedings between the parties arose from Hallam being agent of this company. You have had it in evidence, that during his agency a certain circumstance occurred, which led to his dismissal. It appears from the evidence of Stonebridge, that he communicated to the company an awkward occurrence which took place; but up to that time there is no proof of dissatisfaction with him: we have no reason for thinking, that up to that time there was any ground of dissatisfaction. The communication of Stonebridge led Gye and Company to write a letter of 26th November 1829. The terms of that letter were read to you. It goes to establish this, that Gye and Company were considerably annoyed by this occurrence: they were sorry that Hallam had so far lost himself as to inflict this blow: that he could no longer be at the head of their establishment in the city of Edinburgh; but the letter distinctly bore proof, that they had no doubt of the integrity of the person at the moment, because, they expressly say, that, apart from the establishment in Edinburgh, they would do any thing to promote his interest. Then there was a farther correspondence, and these letters were read to you. It appears from this correspondence that there was something unexplained in the books; and it further appears that permission was given to Hallam to have access to the books, for the purpose of explanation. Tress swore that he had access to the books before he went to London, but that he did not apply again for access. Slade looked through and examined the books, and then it is the action is raised. The steps of procedure in the action are all before you. The summons is a simple summons for count and reckoning, and the balance concluded for is L.500, less or more. This was not an action which could be complained of in any way whatever. There is no question as to its impropriety, far less its illegality. A defence is put in, and in this defence, besides denying responsibility, the ground taken generally is, that this person was not responsible, and he refers to a period when, as he alleged, he ceased to have any thing to do in the management. That is the defence in substance; but in reality he goes further, and refers to a variety of

matters ; in particular, it goes into this matter of the dismissal, and gives a different shape to the business than was required in a simple accounting. After this defence was given in, it was necessary to prepare a regular record, and to take a condescendence as to the facts on which the case was founded. This being put in, (February 1831,) a year after the action was raised, there was a considerable time to enable the parties to be aware of the grounds of action, and the nature of their statements ; and it is in regard to this record that the pursuer states, that matter has been introduced injurious to him, and which has been inserted, or caused to be inserted, maliciously : moreover, that, in point of law, there was no probable ground for their insertion.

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Unquestionably, in considering this matter, you are to attend just generally to the progress of this case. An issue was prepared and tried before a Jury in 1832, which was followed by a verdict in favour of the then pursuers, Gye and Company, and finding a balance of L.84 odds as due to them by the defender. That was the result of the original action of count and reckoning. A great deal was said, and something attempted to be proved, as to the items composing this balance ; and an attempt was made for this purpose, to give in evidence the Judge's notes on the previous trial ; but I was under the necessity of excluding this mode of proof, which, according to my conception of the rules of the law on the subject, could not be received. However, according to the state of the evidence on the former trial, a verdict was certain in favour of the pursuer. A motion was then made in Court to have the verdict set aside, on the ground that the party was taken by surprise, in respect that a new species of evidence was brought forward, for which the defender was not prepared. On this ground, which is a legitimate ground, that the party had not sufficient notice of the line of proof to be adopted by the pursuer, the Court set aside the verdict, and allowed a new trial ; but expenses were at the same time allowed to the party. A new trial was had, when, after the examination had gone a short way, the case was stopped by a minute, referring the whole matter to Mr Brown, giving him ample power to decide, and with power to give the costs against the losing party. Mr Brown proceeded to discharge his duty, and after a thorough investigation of the whole of the books, involving transactions to the amount of L.45,000, as was stated by the witnesses, and is not to be disputed, he finds only a sum of L.4 : 9 : 11 due to the pursuers of that action of count and reckoning. He told you, on his oath, to-day, that this sum was composed of various small items, some of very small amount, and arose from errors and omissions. That being the result of his inquiries, he considered that the pursuers were in fact the losing parties before him, and he gave his award, with costs, against them. He thought that, in such a case, it was the duty of the pursuer, (he held it to be his business,) to make out his case. That was the result of the investigations of a professional gentleman, acting by consent of parties ; and after a careful and attentive consideration, he pronounced a solemn decree-arbitral, which was brought before the Court for their sanction, to complete the transaction. The Court could not look into the merits ; but as to the costs, there was a powerful argument. One party contended that the arbiter was going too far, and exceeded his powers. The Judges, however, on a full consideration of the whole matters before them, and looking to the whole bearing of the action, found themselves

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far as I have been able to discover, that any accountant was employed to examine the books before this time. No doubt there is evidence that Slade examined them, and made observations, and stated what he had seen in the way of errors; but we have not him as a witness: he is dead. In short, I can't discover any evidence to warrant the statement complained of. The words, culpable mismanagement and embezzlement, are most important.

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As to the alleged improper competition, I am not quite prepared to agree in all the observations of Mr Robertson on this point. I must take leave to state to you, I cannot give the slightest approval of the conduct of the pursuer as detailed by Mr Tress. It is not long ago an action of damages was sustained against a company, for taking orders addressed to another company, and heavy damages were given. (His Lordship here repeated the evidence of Tress, and stated to the Jury that this matter ought to be taken into consideration.) This proceeding Tress communicated to Sievwright, and he communicated it to Gye and Company.

I said to you before, that the gravamen of the charge is the allegation of embezzlement. The other matters are of trivial importance in comparison with it. A crime ought to be charged against no man breathing without some ground. Keeping in view, then, the indispensable necessity of proving both malice and want of probable cause, I shall now bring the evidence shortly under your notice. (His Lordship detailed the evidence.)

But then comes the second issue. Now, as to the legality and competency of this proceeding, the evidence you have, in the first place, are various written documents—the office copy of the affidavit by the clerk of Gye and Company, &c. and in reference to these, you have had a person from the English bar, who is competent to explain to us the law, which is matter of fact to us in Scotland. You are to judge whether the statement of this person has sufficiently shewn that this proceeding was illegal. He certainly does swear, that if a person gives an affidavit, it will warrant an application for a *capias*. But then the affidavit must be supported by the subsequent proceedings in the cause. Here the affidavit applied to an action for money had and received, and not to an action of accounting. Here the person had taken upon himself to swear that a certain sum was due as money had and received, and he afterwards specifies four items, only two of which can be considered as money had and received. Accordingly, the gentleman referred to states, that he does not conceive that the affidavit will support the arrest. If, notwithstanding this, however, you can be of opinion the arrest was regular, then of course you will find no damages due on this head. But if you are satisfied that it was irregular, then you will consider the circumstances under which it was executed. It has been stated to you, on this point, that it is not usual to arrest a person on Saturday night; but occasions may arise when it would be justifiable, as when a person is going to sail; and in such circumstances, he stated to you, he would not pronounce it vexatious on that account. Taking then the whole circumstances, it is for you to consider whether the proceedings were illegal; and under this issue, of course, there will be an award of damages, provided you are quite satisfied that the proceedings were illegal.

Again, with regard to the first issue, you must be satisfied that the statement was made both maliciously and without a probable cause. There must

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be proof both of malice and want of probable cause, before there can be a finding in favour of the pursuer. If their proceedings are lawful—if they don't exceed those bounds which the law prescribes, the lieges are entitled to exercise their privileges—they are entitled to assert their rights, if they do so with probable cause.

I have now only to remind you, that if you should come to the conclusion that damages are due in this case, you can only give such as you conscientiously consider fair and reasonable. No Jury ought to give vindictive damages, but only such fair and reasonable damages as will afford a just compensation for the injury which the party has received.

Verdict for pursuer, L.2000.

Judge's notes
on a previous
trial are not
evidence.

In the course of the above trial, the defenders offered to produce the notes of Lord Cringletie on the first trial, to instruct the items of which the sum of L.84 : 19 : 3, found for the defenders, was composed; but they were rejected by the Lord Justice-Clerk, who observed, that in Scotland, from the novelty of this mode of trial, we have been in the habit of allowing these notes to be copied and printed, but they cannot be received as evidence.

Question,
Whether an
issue could be
allowed, on a
mere allegation,
that a
party had instituted an ordinary action,
in which he
made claims,
which a Jury
might think he
ought, or must
have known
to be unjust?

In adjusting the issues for trial, the following was sanctioned by the Clerks: 'Whether, on or about the 3d day of February 1830, the defenders maliciously, and without probable cause, raised, and thereafter insisted in an action against the pursuer, for payment of the sum of L.500, or such other sum as should appear to be due by him to the defenders, to the loss, injury and damage of the pursuer.'

The Lord Ordinary (Jeffrey) refused this issue, according to the following interlocutor and note: 'Finds, that the pursuer is not entitled, in the circumstances of this case, and under the summons on which the action proceeds, to an issue in terms of the first issue reported, or suggested by the Issue Clerks, in the said draft issues, or to any issue under which he would be entitled to prove, as a separate and substantive ground for an award of damages, that the action raised by him in February 1830 was so raised or insisted in maliciously, and without probable cause, it being reserved to him to establish, by all competent evidence, that the arrest and injurious expressions which he undertakes to prove under the other issues were made and used maliciously, and without probable cause.'

Note.—'The Lord Ordinary would have great hesitation in

‘sanctioning an issue for damages, on a mere allegation that a party
 ‘had instituted an ordinary action of count and reckoning, in which
 ‘he made claims on the defender, which a Jury might ultimately
 ‘think that he must or ought to have known to be unjust. But he
 ‘is clearly of opinion that the summons, as laid, does not embrace
 ‘any such allegation. At the same time, he has no doubt, though
 ‘he neither gives, nor is entitled to give any finding or judicial de-
 ‘termination on the subject, that the pursuer will be entitled, at
 ‘the trial, to prove all facts and circumstances, either in the con-
 ‘duct of such action, or otherwise, as may be relevant to establish
 ‘that the acts and expressions which are the subject of the other
 ‘issues were done or used maliciously.’

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Nota.

Lord Ordinary, *Jeffrey.* For Pursuer, *Robertson, Anderson.* *Thos. Darling,*
 S.S.C. Agent. For Defenders, *Dean of Fac. (Hope,) Maitland.* *Campbell*
 & *Mack,* W.S. Agents. *Mr Russell,* Clerk.

R.

No. III.

5th January 1836.

JAMES DICK
against
 JAMES STEWART.

(BEFORE THE LORD PRESIDENT (HOPE) AND A COMMON JURY.)

DAMAGES.—MED. FUG. WARRANT.—*Action of damages by a tenant against his landlord, for preventing him, by injurious statements, from disposing of his lease, and also for improperly arresting him as in med. fugæ.—Verdict for defender.*

NEW TRIAL.—*Motion for new trial, on the ground of misdirection by the presiding Judge, refused.*

THE pursuer obtained a lease of certain premises in Queen Street, *Narrative.*
 from Whitsunday 1829, for five years. He entered to said pre-
 mises, and occupied the same as a butcher's shop. Thereafter the
 defender purchased said premises, and on the 19th February 1833,
 by missive of lease, of that date, entered into between him and the
 pursuer, he let him said premises for same purpose, from Whitsun-
 day 1834, for the five following years, at an advanced rent. On
 the 22d March 1834, the pursuer, as he himself admitted, intending
 to leave this country for America, inserted an advertisement in the

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newspapers, offering the lease for sale, and the good-will of his business, and stating, that entry would be given to the premises when required. When this proceeding became known to the defender, he wrote to the agents of the pursuer, objecting to it. The pursuer, however, commenced treating with different persons on the subject, and in particular with a poulterer, who had a shop next door, and wished to occupy the premises as a fishmonger's shop. It appeared in evidence that the defender, on said party intimating his intention of so taking the premises, stated that he would oppose his entering to the premises, and the arrangement was ultimately broken off. On the 24th of April 1834, the defender applied for and obtained a *meditatio fugæ* warrant against the pursuer, on which he was apprehended, and was ultimately liberated, on caution. The pursuer averred that this proceeding was unwarrantable, 1st, In respect that he had no intention, and could not go to America till the ensuing spring, his accounts being still to collect, and his stock, &c. to dispose of; and, 2dly, That his father was cautioner in the lease, who was in good credit, was possessed of considerable property in houses, &c., and held a farm in lease, which did not expire till Martinmas then next; and he had sown his last crop, which he had the power of disposing of in the ensuing harvest. It was admitted, however, that the father had also some intention of emigrating to the other hemisphere, though that intention was alleged not to be immediate.

The following were the issues :

Issues.

‘ It being admitted, that in terms of the missive, No. of process, dated the 19th February 1833, the pursuer was tenant of certain premises, the property of the defender, No. Queen Street, Edinburgh, for the period of five years from Whitsunday 1834 :

‘ 1. Whether, in the house of the defender, in Young Street, Charlotte Square, Edinburgh, on or about the 3d day of April 1833, the defender, for the purpose of preventing the pursuer from selling or disposing of the said lease, and of the good-will of the business in the said shop, did wrongfully and falsely state to Charles Muirhead, poulterer, 79. Queen Street, Edinburgh, that the pursuer had no right to let the said premises, and that he would not permit him to let them; and that if the said Charles Muirhead should take the premises, he, the defender, would prevent him from entering into possession, or would turn him out of possession, or did wrongfully and falsely use or utter words to that effect, to the loss, injury and damage of the pursuer ?

‘ II. Whether, for the purpose aforesaid, in or near the said

‘shop of the said Charles Muirhead, on or about the said 3d day of April, James Grandison Barr, S. S. C., with the authority of, and as agent for the defender, did wrongfully and falsely say to the said Charles Muirhead, that the pursuer had no right to let the said premises, or did wrongfully and falsely use or utter words to that effect, to the loss, injury and damage of the pursuer?’

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‘III. Whether, for the purpose aforesaid, in or near the shop last aforesaid, on or about the 5th day of April aforesaid, Mrs Stewart, the wife of the defender, with the authority of, and acting for the defender, did wrongfully and falsely state to the said Charles Muirhead, and his wife, Mrs Muirhead, or one or other of them, that the pursuer had no right to let the said premises, or did wrongfully and falsely use or utter words to that effect, to the loss, injury and damage of the pursuer?’

‘IV. Whether, for the purpose aforesaid, in the house of Dickson, stabler, Young Street, Edinburgh, on or about the 18th day of April 1834, the defender and his wife, with his authority, and acting for him, or either of them, did wrongfully and falsely state to the said Dickson, that they, the defender and his wife, were to apprehend the pursuer, and that they would confine him in jail for six months at least for his impudence, meaning the pursuer’s refusal unconditionally to surrender the lease of the said shop, or did wrongfully and falsely use or utter words to that effect, to the loss, injury and damage of the pursuer?’

‘V. Whether, at Edinburgh, on or about the 24th day of April 1834, the defender maliciously, and without probable cause, wrongfully apprehended and detained the pursuer, as in meditatione fugæ, or wrongfully caused him to be apprehended and detained as aforesaid, to the loss, injury and damage of the pursuer?’

The Lord President charged the Jury as follows :

It is now my duty to make such observations on the evidence and law, as I Judge’s think may be of use in directing you to a right verdict in this case. I shall Charge. take these issues in their order. (His Lordship read the first issue.) *The business*, that is, the business carrying on at that moment, in that shop, which was a butcher’s business. What is the fact sworn to in reference to this transaction? Muirhead told you, that, on seeing this advertisement, he had then made an offer to Dick for L.150; but what was this offer, and the purpose of it? Not the good-will of that business: he did not mean to set up a butcher’s shop: it was for another purpose altogether he wanted it: it was to turn it into a fishmonger’s shop. He thought it might be for the benefit of himself, and convenient for the public, to make it a fishmonger’s shop; but to give a price for the good-will of Dick’s shop, as a butcher’s shop, did not enter into his imagination.

Consider the situation of Stewart at that moment: he was told distinctly by Muirhead his purpose, and his answer was, If you take it for that purpose I shall turn you out; why? because my tenant below will be either ruined, or at least meet with a formidable rival. I must tell you, in point of law, I think the tenant

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in the low shop would have had a good action of damages, if Stewart knowingly brought a rival into that shop, in order to defeat the interest of that shop below. I think that tenant would have been entitled to say, I took this as a fishmonger's shop, on the faith that you, the landlord, would not set up another fishmonger's shop. I think that this would have entitled that tenant to an interdict against Stewart, or she might have had an action of damages against him, and I rather think it would have been a good one. But then, it is said that Stewart interfered for the purpose of preventing the pursuer from getting the good-will of the shop disposed of: that was not the purpose. To be sure Muirhead, who lived next door, stated to you expressly, that he saw the advertisement, and that he offered for the good-will of that shop; but that is not true; he did not offer for the good-will of this butcher's shop, because he wanted the shop as a fishmonger's shop. This was the avowed object of Muirhead in proposing to take it. Then we come to the fourth issue. There is not one word of this issue proved. Instead of their having said that they were to apprehend him, Dickson swore distinctly that the wife said to him, that they had apprehended him for six months. What was meant in reality was, that this warrant had been issued against him; and unquestionably, if he had not found caution, they might have detained him for six months. With regard to motive, not one word is proved by Dickson or any body else. Then we have the last issue, as to the *meditatio fugæ* warrant. To make out that issue, it must be proved that the warrant was used maliciously, and without probable cause. As to probable cause, it is the most probable of all causes when a man himself admits he is going to leave the country. In his declaration he expressly admitted he was to go: to be sure he said not immediately; but he reserved the power, and he indicated this sufficiently by saying to the purchaser, in his advertisement, that he would assign the debts. If he was driven to collect the debts himself, it might be necessary for him to remain; but there was such a stipulation in the advertisement as made it possible for him to leave in a week: Therefore he gave his landlord good ground to believe that he intended to leave the country; and, he likewise admits, that his cautioner intended to go also. It was in these circumstances Stewart resolved to have recourse to legal measures. He determined to have new caution. He gives notice of his intention to Dick's agent by a letter, to which no answer was returned. When a man is going to leave the country owing debts, it is no answer to his creditor to say, that he is a respectable man, or that he has funds either here or in America. This would be no answer for the wealthiest merchant in Edinburgh to make: if he admits he is going to leave the country, the creditor is entitled to say, You shall not go without giving me security: you may be worth £100,000; but that may go with you, and then I can neither lay hold of your person or your funds. I hold it to be clear, in point of law, that when a person admits he is going out of the country, his creditor is entitled to say, You shall not go till you find security. It may be, that in this instance these parties, both debtor and cautioner, have altered their views: they remain the legal tenants. Martin is in possession, on what terms I don't know; but they are legally bound for the rent. Stewart has suffered no wrong; but still the pursuer has not made out that he had no probable cause for the proceedings which he adopted: he had the most probable of all causes—this party's own admission, and the terms of his own advertisement.

Judgment.

Verdict for defender.

New trial
refused.

When the Court met, *Rutherford*, for the pursuer, moved for a rule to shew cause why a new trial should not be granted, on the ground of misdirection on the part of the presiding Judge, in respect, *first*, that his Lordship charged the Jury, that Muirhead had

not made an offer for the good-will of the business, seeing that he intended to set up a fish-shop in the premises, and that therefore they could not find that the acts charged against the defender were done 'with the view of preventing the pursuer from disposing of the lease and good-will of the business.' Mr Rutherford urged to the Court that this was a plain misdirection, for that, in point of fact, Muirhead did offer for the good-will of the pursuer's business: it was the only subject advertised for sale; and Muirhead, or any other party, must have purchased it before they could convert the shop to any purpose whatever. It did not matter whether Muirhead intended to carry on the same business, to change it to another, or to shut up the shop altogether: still the subject which was to be sold, and for which Muirhead offered, was the good-will of the pursuer's business; and therefore the defender's actings were with the view of preventing the pursuer from disposing of it, a purpose which was de facto thereby effected. The second ground was, that the presiding Judge had mistated the law to the Jury when he said, 'I must tell you, in point of law, that the tenant in the low shop would have had a good action of damages if Stewart knowingly brought a rival into that shop, in order to defeat the interest of the shop below,' &c.

5 Jan. 1836.

Dick v.
Stewart.

The Court refused the rule.

Judgment.

For Pursuer, Rutherford, Paterson.

Robert Neil, S.S.C. Agent.

For De-

fender, Dean of Fac. (Hope,) W. Bell.

James A. Robertson, S.S.C. Agent.

Mr Brown, Clerk.

C.

FIRST DIVISION.

No. IV.

16th March 1836.

MARY NIVEN OR HUNTER, PURSUER,
against

THE EDINBURGH AND GLASGOW UNION CANAL
COMPANY, DEFENDERS.

(BEFORE THE LORD PRESIDENT (HOPE) AND A COMMON JURY.)

REPARATION. — DAMAGES. — *A bridge over a canal having been raised by the person appointed by the Canal Company to manage it without any previous notice, there being no chain placed, or other*

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precaution used to prevent passage ; and a foot-passenger, who was in the act of crossing when the bridge was raised, having received serious injury in consequence of jumping from it when nearly at its full height,—damages of £.100 awarded by a Jury against the Canal Company.

Issues.

In this case the following issues were sent to trial :

‘ It being admitted, that, on the 17th day of August 1834, and prior and subsequent thereto, one William Cunningham was employed by the defenders to manage the drawbridge near Edinburgh, No. 2. on the Union Canal :

‘ Whether, on or about the said day, by the fault, negligence, or want of skill of the said William Cunningham in the management of the said bridge, the pursuer suffered severe bodily harm, to the loss, injury and damage of the pursuer ?

‘ Damages laid at L.300.’

Robertson opened for the pursuer.

It was proved by the evidence of Mrs Paterson and Mrs Shand, that they and the pursuer had occasion to go from Edinburgh to Dalmahoy. The way which they took lay by the drawbridge, No. 2. of the Edinburgh and Glasgow Union Canal Company. The three women reached the bridge in question together, and got upon it without having received or heard any intimation that it was in the act of being raised by Cunningham, (the person in charge,) for the purpose of enabling one of the heavy passage-boats from Glasgow to pass along the canal. The bridge rose in one piece, and was elevated by means of a crank, worked by one man, (Cunningham,) who, in doing so, had his back to the quarter of the street by which the pursuer and her companions reached the bridge. There was no chain or rope placed across the bridge, nor any warning given to them not to go on it. They heard no horn blown. The pursuer was behind her two companions, who successively leaped from the bridge as it was ascending. The pursuer leaped when the bridge was almost at its height, and fell on Mrs Paterson, knocking her to the ground. The pursuer, who is a heavy woman, was much hurt about her back and legs, and was carried to her lodgings. From the evidence of Professor Lizars, and Dr Black and his son, it appeared that the injury, which was of a very painful nature, confined the pursuer for about three months, and might incapacitate her from any hard work. The Superintendent of Public Works, who once had charge of the Leith Docks, deponed, that the drawbridges in Leith open in two halves, and are guarded by a chain drawn across to prevent passengers crossing at the time of being raised ; and that the person in charge was liable to be dismissed,

if he neglected to put up the chain. Other witnesses deponed, that they had been in jeopardy at the same spot, and that it was necessary to have some such contrivance as a rope or chain to warn people, and an additional man to assist the one in charge, whose back being to the people in working the machinery, could not tell whether any one was on the bridge.

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The Dean of Faculty, for the defenders, maintained that there was here no question as to the liability of the Company for want of chains or other precautions, but that the sole question before the Jury was, whether they were liable to the pursuer, for injuries suffered from the fault or negligence of the individual, Cunningham; that, by the evidence for the pursuer, nothing was proved as to the want of skill, fault, or negligence of Cunningham, which was the matter at issue, and that the accident was attributable entirely to the fool-hardiness of the pursuer, to whom the raising of the bridge ought to have been a sufficient warning; that the lawyers and agents for the poor had, besides, reported that there was no *probabilis causa litigandi*.

Evidence for the defenders was led to this effect: The driver of the horses in tow of the boat, on account of which the bridge was raised at the time of the accident, had called out to the women, warning them of their danger, when he observed them on the bridge. The horn, announcing the approach of the boat, had been blown; and the driver heard a person near the other end of the bridge call out to the pursuer to keep off, or run back. The driver deponed that the person who called was Cunningham; but it rather appeared to have been another witness, who, at the time he called, observed the pursuer then in the act of following her companions, who had jumped off the bridge. It appeared, that at the time the witness called out, Cunningham stopped for half a second; and the pursuer, who was then about half way across, might easily have returned, as it took some little time to raise the bridge. The boat could not be stopped, and it would have been very dangerous not to have raised the bridge. There was no fault or want of skill on the part of Cunningham, who was of excellent character, and had been in the employment of the defenders for a length of time. Cunningham was, however, not called to depone.

Robertson replied, and argued, that by the admission prefixed to the issue, and by the terms in which the issue was framed, it was admitted that Cunningham was employed by the Canal Company to manage the bridge. The whole charge being thus devolved on Cunningham, he ought to have taken precautions to prevent foot-passengers from approaching the bridge when it was to be raised. The accident could not be attributed to fool-hardiness, as it, in

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Reid v. Hutchinson.

Opinion of Court.

Judgment.

Robertson.—The excerpts will speak for themselves; and they are authenticated by the commissioner, on the oath of the haver, and referred to in the record. It is the first time it ever was contended that it was necessary to cite the haver as a witness. The defender may call him, and cross-examine him.

Lord President.—I think Mr Hutchinson must be called, as he is alive. Excerpts are generally taken when the party cannot appear, as the only mode of getting at the books; but Mr Hutchinson is here, and could produce the books themselves, and explain them to the Jury.

The pursuer's case broke down, and the Jury found for the defender.

Act. P. Robertson, Whigham.

Thomas Johnstone, S.S.C. Agent.

Alt.

Kenay, H. Bell.

Alexander Gifford, S.S.C. Agent.

Jury Clerks.

C. R.

FIRST DIVISION.

No. VI.

17th March 1836.

GEORGE WALLACE, PURSUER,
against

GEORGE DICKSON AND OTHERS, DEFENDERS.

CONTRACT.—LIABILITY OF MEMBERS OF A CONGREGATION.—

PROCESS.—JURY.—PROOF.—*A builder having raised an action for payment of the balance of the price remaining due for building a chapel for a congregation of the Associate Secession Church; and it having been ruled by the Lord Ordinary, and acquiesced in, that only members of the committee, or of the congregation during a certain period, should be liable,—held, by the presiding Judge, that the question who were, or who were not, members of the congregation, must be determined by the laws of the Secession Church. 2d, That however many defenders there might be, if they were all included in one summons, they must be looked on as one party, and be entitled to only six challenges. 3d, The evidence of a witness who was a defender in the action, but against whom decree in absence had been obtained, refused, in respect that he was an interested party, although the pursuer offered to discharge the claim under the decree.*

THIS action, in which a new trial was granted 19th February 1830, (ante, p. 454,) was brought for the balance of the price of building a chapel in Portobello for a congregation of the Associate Secession Church. The action was originally directed against a great number of individuals; and appearance was made for upwards of thirty, amongst others for Dickson and Miss Robertson. The defences were generally, that the work had not been performed agreeably to contract; and that the defenders were not members of the congregation or committee.

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Others.
Narrative.

In the preparation of the cause, Lord Corehouse found, 11th March 1831, 'That all the members of the committee of management of the Portobello United Associate Secession Congregation, from the period when the pursuer was employed to fit up the temporary meeting-house, or who became members of the committee between that period and the time when the new chapel was taken possession of by the congregation, and all persons who were not merely hearers or communicants in the meeting-house or the chapel, but were members of the said United Associate Secession Congregation during the said period, are liable to the pursuer in payment of the work duly and properly executed by him, in terms of his agreements or contracts with the committee.'

The pursuer acquiesced in Lord Corehouse's judgment; and it was prefixed to the issues, which were now sent to trial as the law of the case. The issues were in these terms:

'1. Whether, in the years 1824 and 1825, the pursuer was employed to erect, and did erect, a chapel at Portobello, in the county of Edinburgh, for the United Associate Secession Congregation, at the price of L.1733, to be paid by instalments? and whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of L.388, as the balance of the expense of erecting the said chapel, and of the sum of L.46 : 6 : 4½ for extra work, or of any part of the said sums, with interest on the said sum or sums?

Issues.

'2. Whether, in the year 1824, the pursuer was employed to fit up, and did fit up, a temporary place of worship for the congregation aforesaid? and whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of L.11, 3s. 4d., or any part thereof, with interest thereon, as the expense of fitting up the said place?'

In balloting for the Jury to serve, *Dean of Faculty* claimed a right of six challenges for each of the four defenders for whom he appeared, on the ground, that as each was separately liable, they must therefore be looked upon as separate parties entitled severally

Question of
process.

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Question of
process.

to challenge, and that in practice this was always allowed; the expression in the act of 'each party' meaning every separate person in the action.

Robertson, for pursuer.—I never heard of such a practice. If each defender here were to be considered as a separate party to the action, entitled to the usual challenge, the defenders might succeed, to the great prejudice of the pursuer, in procuring a Jury after their own mind. The defenders are very numerous, and the whole number of Jurymen cited by the Court would not nearly suffice for the purpose.

Lord President.—I never met with such a case. On referring to the clerk, he says that it is incompetent. The numerous defenders must be considered as one party, and the pursuer the other, in the sense of the statute, where it enacts, that each party shall be entitled to a challenge. They may have separate defences, but I know nothing of it. It may be pleaded to the Jury; but I find all the parties included in one and the same summons, and I cannot imagine, that supposing there were fifty people they can each have right of challenge*.

Graham Bell opened the case for the pursuer. *Robertson* examined various witnesses, who proved that the chapel had been well built and finished, and that no complaint had been made to the committee of management when it was taken off the pursuer's hands, and that it still remained in good repair. Evidence was also led to shew that the defenders had been present at meetings of the committee, and had attended divine service in the chapel, as well as meetings in relation to the appointment of a minister and other business; or had signed the call to Mr Arneill, who was the person appointed minister of that congregation.

Question of
the admissi-
bility of evi-
dence.

Dean of Faculty objected to the evidence of Alexander Brown, as he was a defender.

Robertson admitted he was originally a defender, but contended, that decree in absence having been pronounced against him, he was now admissible. He argued that the plea of interest was inapplicable, or was to all intents one adverse to the pursuer, in respect that his interest would be to cut down the claim altogether,

* The point was next day brought under the notice of the Lord Justice-Clerk in the following case, who intimated to the Clerk of the Second Division, (Mr Russell,) that he was not prepared to arrive at the same conclusion; and Mr Russell mentioned cases, in which (though he had wished, as clerk, to interpose,) each defender had been allowed to challenge, and referred to several cases in which that had been done by the Dean, as here stated by him.

and referred to Shaw's Digest, Proof, Nos. 441, 451, 455 and 17 Mar. 1836. 476. Besides, any claim of liability would now be passed from.

Dean of Faculty.—The interest of the witness may be to join the pursuer in an attempt to make us liable; and there could be no better instance of 'a good deed and reward,' than the relieving a witness of liability under a decree pronounced.

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Others.

Objection *sustained*. To this the pursuer excepted.

Dean of Faculty, for Robertson and the Davidsons, argued, in reply, that in order to become members, they must have been properly transferred from the former congregation, which it was proved they had not been; so that their attending meetings which were open to all, where no roll of members was called, or being present at worship, could not make them members, in the sense of Lord Corehouse's interlocutor. He stated, that the chapel had not been properly finished; for, on an exposure for sale, it was found that its value was greatly depreciated in consequence of some imperfection in the foundation.

More followed for another set of defenders, and maintained that, as sitters or communicants in the chapel, they were not members in the sense of the interlocutor; nor had they any vested right of property in the chapel upon which they might seek relief, if found liable in this action.

The Dean of Faculty then examined

The Rev. Dr John Brown, who explained the law of the church in reference to instituting a new congregation. When a number of persons, not in any way in connection, wished to be formed into a congregation, various members of presbytery were appointed to visit and converse with them. A report is made to the presbytery, and after that they are formally congregated by a clergyman. Members of other congregations in communion with the Secession Church, wishing to be joined to a new body, require to produce a certificate from their former minister or session, stating that the member desires to be transferred, and that he leaves the previous congregation in full possession of all Christian privileges. This is commonly called a certificate of disjunction. Until he produces such a certificate, he cannot become a member of another congregation, nor can he be a member of two at once. The minister should always see the certificate before an admission. A person without a certificate still belongs to his former congregation, though he may attend another place of worship. In a competition for a clergyman, if a person without a certificate voted, his vote would not be counted; and his signature to a call would not have the effect of making him a member of the congregation. A signature of such a person would be held to be a mistake. (Shewn the call

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to Arneill.) If any member of Mr Black's congregation at Musselburgh, not disjoined, signed this call, his signature would be detected on a competition for a minister, and the person would be liable to censure. The session only admits members, where, of course, there must be a moderator. Elders of themselves cannot admit members.

The Rev. John Smart corroborated the evidence of Dr Brown.

The Rev. Mr Black, of Musselburgh, deponed, that neither Mr Robertson nor the Davidsons ever received a certificate of disjunction, and that they still continued members of his congregation.

Robertson, in reply for the pursuer, maintained, that the work had been proved to be well done : That the defenders were liable, as it was also proved that they had held themselves out to the pursuer as members of the congregation, by signing a call, being present at meetings and attending worship, as they could take no advantage of any irregularity in the ecclesiastical forms of admission. It was sufficient for the present claim if they held themselves out to be members ; and the pursuer contracted with them in that capacity.

Judge's
Charge.

The Lord President.—If the result of the trial should be, that this pursuer should not recover the balance due to him from some party or another, I am persuaded that both you and I will deeply regret it. It has been proved to you, that Wallace executed the work about which he was employed in a tradesman and business-like manner ; so you cannot, and must not give any weight to the insinuation which was thrown out at the close of the argument for one of the defenders, that he could prove that the building was found afterwards to be insufficient. He had no right to say so, unless proof were offered of such an averment. No proof was offered of it ; and, in fact, it was proved that the work was well done by Wallace, and taken off his hands by the committee, as completed in every respect, in terms of the specification and agreement. Therefore, laying that matter aside, as well as some other points of minor importance, let us consider the remaining parts of the case. It was asked by the defenders, why so many persons were called in the action, and why it was not brought against a few responsible persons only ? It was answered, that the pursuer was obliged to call all the parties. Perhaps he was ; for sometimes, in the Court of Session, it is made matter of objection that all parties are not called ; and sometimes that objection is sustained, and sometimes not. But however that may be, and supposing it safe and proper to call all the parties into Court, he might have concluded only against the substantial parties, leaving them to get relief against the others, which would have narrowed the case. Now,

though I have said that we shall regret if the pursuer be not found entitled to recover from some party or another, I must also tell you, that we should equally regret, if he should be found entitled to recover from parties who are not legally bound to him. Looking to the issues, we must first consider the law as laid down in the interlocutor of Lord Corehouse. The law, as explained by him in the judgment, which has been allowed to become final by the pursuer, we are bound to receive as the law regulating this case. From it we find that it is not merely hearers or communicants in the meeting-house or chapel, but all members of the United Associate Secession Congregation during a certain time, who were to be liable. As I am not a member myself of such a congregation, I should have held, without seeing the law so explained and acquiesced in, that communicants were liable; but Lord Corehouse has laid it down, that they are not; neither are persons who signed the call or attended business meetings, but only the members of the Portobello Secession Congregation. Then, who are members? To solve that question, we are bound to go to the law regulating that peculiar church, by a variety of decisions. I need only to refer to the well-known case of *Davidson v. Aikman, Morr.* 14,584, where we found expressly that we could only decide who were members of the Burgher Congregation, by going to the Synod Presbytery of that sect. They alone can lay down and explain the rules of their own body, in a question involving who are and who are not members, otherwise there would be no toleration; for, to go to the courts of the Established Church on that point, would be the reverse of toleration. Now, we have been told to-day by the heads of this church, that the signing of a call, or attending meetings, will not alone constitute persons members of their church; and, what is more, that no one can become a member of another congregation in communion with their church, unless he have received from his former minister a regular certificate of disjunction, to entitle him to be transferred to a new congregation. Now, as we are told by the issue, that it is only members who are to be liable, we are bound to discover who are members by the law of the Secession Church. It is therefore nothing to the purpose, to hold out that Mr Robertson and the Misses Davidson, by signing the call to Mr Arneill, bound themselves to Wallace. It was argued, that by signing the call, and the terms of it, they bound themselves to support Mr Arneill, and that he had a good claim against them in consequence. Now, that is a separate question; and that question is not here. The question is solely, did Mr Robertson, the Davidsons and others, as members of this congregation, bind themselves to Wallace, the pursuer? It has been proved to

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you that these parties were still in communion, Mr Robertson at least, with another congregation at the time of the erection of this chapel, and that they had never received certificates of disjunction. Now, this is satisfactory evidence that they are not members in the sense of Lord Corehouse's judgment; and it was explained by the heads of the church, that signing the call could not make them members. The only other point which remains is this, did these defenders lead this pursuer to believe that it was to them he was to look for payment? On turning to the law again of Lord Corehouse, which the pursuer acquiesced in, we find that it was only the members of committee of management, from the period of fitting up the temporary meeting-house, or who became members of the committee between that period and the time when the new chapel was taken possession of, who were to be liable. There may be some latitude as to the time when the members took possession of the chapel; but it is an error to say, that they took possession of it when Wallace allowed them to have service performed in it before it was finished. This offer was made before they took possession of it. No doubt it was a very handsome offer; but I do not apprehend that possession was taken till the opening of the chapel was regularly advertised. We have not been informed who were the committee, nor have we had any proof of the persons who empowered that committee to act. If Mr Robertson or the Misses Davidson had been of those who elected the committee, no doubt they would have been answerable as its constituents. We have had no evidence led as to the persons composing this committee; and for aught I know, they may have been acting without power from any person—self-elected merely. I am sorry to say, that, in point of law, the pursuer has not made out his case against the defenders, as I do not consider there is any evidence to shew that they led him to believe that they were to pay him, and he has not proved them to be members by the law of the church, which alone we can look to. Their being hearers or communicants in the chapel will not do, according to Lord Corehouse's judgment; neither will their having signed the call to Arneill; because, in neither of these views, were they members. It is admitted by Arneill that they should have had certificates of disjunction, and that he took it for granted that they had them, as Drs Brown and Jameson had been satisfied on that point; but this could not have the effect of bestowing on them the certificate, which they never obtained from the minister of the congregation, of which they were still members.

The counsel for the pursuer intimated an exception to the direction of the Lord President, that persons not proved to be members of the associate body, according to the ecclesiastical law of the Se-

cession Church, could not be held as members under the interlocutor of Lord Corehouse. 17 Mar. 1836.

The Jury returned a verdict in favour of the defenders.

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Others.

Judge at Trial, Lord President, (*Hope*.)

Ferrie & Jameson, W. S. Agents.

for Robertson and the Davidsons.

J. S. More for Dickson, Kedzlie, &c.

Jury Clerks.

Act. *P. Robertson*, *G. G. Bell*.

Alt. Dean of Fac. (*Hope*), *R. Thomson*,

Hotchkiss & Meiklejohn, W. S. Agents.

W. A. G. & R. Ellis, W. S. Agents.

C. R.

SECOND DIVISION.

No. VII.

18th March 1836.

HENRY SWAYNE AND MANDATARY

against

THE FIFE BANKING COMPANY.

REPARATION.—ARRESTMENT.—Sequel of the case in F. C., vol. Narrative. x. p. 774. The issue in this case was adjusted in terms of the opinion of the Lords of the Second Division. The preamble set forth the proceedings taken by the Bank against the pursuer, as in *meditatione fugæ*,—the issue being, ‘whether, in the said proceedings, or any of them, the defenders acted wrongfully, injuriously and oppressively, to the loss and damage of the pursuer.’

It appeared from the evidence at the trial, and the admissions on record, that the diligence was formal, and regularly executed; there was no evidence of oppression; and the Lord Justice-Clerk held, that the circumstances did not afford evidence of want of probable cause for adopting the proceedings. A verdict was accordingly returned for the defenders.

Lord Ordinary, *Jeffrey*.

Judge at Trial, Lord Justice-Clerk.

Act. Dean of Fac.

(*Hope*), and *Marshall*.

Alt. *P. Robertson*, *H. J. Robertson*, and *Shand*.

Andrew Scott, W. S. and *John Shand*, W. S. Agents. *Mr Russell*, Clerk.

R.

SECOND DIVISION.

No. VIII.

19th March 1836.

JOHN RUTHERFOORD
against
 WILLIAM BOAK.

(BEFORE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

MASTER AND SERVANT. — REPARATION. — *Action of damages for loss of service of workman alleged to have been enticed away. Verdict for defender.*

PROCESS. — (TRIAL.) — PROOF. — *Incompetent, when pleading to the amount of damages, to refer to decided cases, to shew what damages were therein found.*

Narrative.

THIS was an action of damages against the defender, for having, either by himself, or through the intervention of others employed by him, enticed away from the pursuer's service a workman, Charles Bryan, who was under contract to serve him for a year, whereby he had been deprived of his services from 26th May till 11th September 1834; and for having bribed or induced Bryan to reveal the secrets of the pursuer's trade and business of leather-japanner.

The defender denied the seducing away and bribery of Bryan, in order to reveal the alleged secrets of the pursuer's trade. Bryan was under no engagement to keep a particular secret; and although he might have talked to Nisbet, one of the defender's workmen, about the process of mixing and boiling the leather-japanning composition, there was no breach of confidence or contract. The deprivation of service was the pursuer's act of keeping Bryan in jail for the period in question.

Issue.

The following was the issue: 'Whether one Charles Bryan was engaged by the pursuer for a year, from 5th April 1834 until the 5th April 1835, to assist the pursuer in his trade as a leather-japanner; and whether, on or about the month of May 1834, the defender, being in the knowledge of the said engagement, by himself or another, or others, wrongfully seduced the said Charles Bryan from his said service, and caused him to desert the same; whereby the pursuer was deprived of the service of the said Charles Bryan from the 26th day of May 1834 until the 11th day of

' September 1834, or during any part of the said period, to the 10 Mar. 1836;
 ' loss, injury and damage of the pursuer?
 ' Damages laid at L.1000.'

Rutherford v.
 Boak.

G. Bell, for pursuer.—When a workman deserts his service, the master is entitled to have him brought before the Justices, and detained till he find caution to serve out the period of engagement. This had been done here, and rendered necessary by the conduct of the defender and his workman Nisbet. The pursuer was not bound to state that any particular secret had been divulged, as he did not allege that he had a patent, or had furnished the requisite specifications for any particular mode of composition of japanning materials, or that Bryan was under contract not to divulge any such secret. He therefore could not ask damages for a specific secret communicated. But having taken the general issue of enticing away, he was entitled to the direct and consequential damages arising from the loss of service.

Pursuer's
 Pleas.

It appeared from the pursuer's witnesses that Nisbet had prevailed on Bryan, whom he had formerly known in London, to shew him how he mixed the materials; that Nisbet had never been told by the defender to entice away Bryan; that Bryan was absent a whole day from the pursuer's work drunk; that during that day he was seen in the defender's work-yard, looking on while the materials were mixing and boiling; and that he was afterwards detained in prison for four months, at the instance of the pursuer; that Bryan was a valuable workman to the pursuer, who had then large orders on hand for japanned baize and other stuffs, of which he was reckoned the best maker in Scotland.

Evidence.

Rutherford, for the defender, maintained that there was no proof of enticing away, and that the loss of service had been the pursuer's own act. He led no evidence.

Lord Justice-Clerk.—Although there had been much statement as to alleged secrets in the mode of preparing this japanning composition, no issue had been taken as to an engagement to keep any particular secret of trade, or that it had been wormed out of Bryan by any improper proceeding on the part of the defender. Before you can find for the pursuer, you must be satisfied that the defender himself, or through the agency of others, made this man desert his service. His Lordship then went over the evidence, and said, I cannot discover that the issue put is proved. If you should think there was seduction, the amount of damages would remain for consideration. One would have thought from the issue that the detention of Bryan had been the act of the defender all the time.

Judge's
 Charge.

19 Mar. 1836. But, instead of that, it appears he was thrown into jail by the pursuer. Suppose it had been made out that Bryan had been seduced away for a few days, you could not have given damages for more than for a few days' service.

Rutherford v. Boak.
Judge's Charge.

G. Bell, in opening, was about to refer to certain English cases as shewing the amount of damages found in cases of seduction of workmen from service, when Rutherford objected. The Lord Justice-Clerk said, he cannot refer to those cases. He may state generally, that there were cases in which high or low damages were found.

Verdict.

The Jury (without retiring) found for the defender.

Lord Ordinary, Jeffrey. Judge at Trial, Lord Justice-Clerk, (Boyle.) Act. Sol.-Gen. (Cunninghame,) and G. G. Bell. Alt. Rutherford and Ja. Anderson. M. & J. Lothian, S.S.C. and Thos. Landale, S.S.C. Agents. Mr Russell, Clerk.

R.

SECOND DIVISION.

No. IX.

19th March 1836.

DAVID OGILVIE

against

PETER SCOTT.

(BEFORE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

REPARATION.—WRITTEN SLANDER.—*Action of damages for writing and sending a letter containing expressions injurious to the pursuer's character. Justification, on the ground that the defender had given sufficient cause therefor. Verdict for defender.*

PROCESS.—*Circumstances in which found that the defender was not bound to take an issue in justification.*

Issue.

IN this cause the following issue was sent to trial: 'Whether, on ' or about the 6th day of February 1835, the defender did write ' and transmit, or cause to be written and transmitted to the pursuer, a letter containing the following words, or words to the following effect, viz. ' *Edinburgh, February 6. 1835. Disgusting ' brute, washed and anointed as you have been in the jaw-hole of ' my house, it is for your parents' sake alone I now call upon you*

“ to remember *you have committed a crime, which the laws of so-* 19 Mar. 1838.
ciety reward with the gallows. Your neck has made a very nar-
row escape. Repent; make your peace with heaven, and beware Ogilvie v.
lest your vice draw you down to eternal perdition with a rope Scott.
around your neck. With the utmost detestation, I am, P. S.’
 ‘ And whether the whole or any part of the said words are of and
 ‘ concerning the pursuer, and are false and calumnious, and to the
 ‘ injury and damage of the pursuer?
 ‘ Damages laid at L.1000.’

Issue.

The pursuer called certain witnesses to character.

The defender, in justifying, stated that the pursuer had called at his house, in the absence of himself and sister, who lived with him, and had committed an indecent assault upon his servant maid, which caused him to write and send the letter founded on. Defence.

The defender then proposed to call the servant maid to prove the assault. This was objected to by the pursuer, on the ground that this might be indirectly proving a criminal offence; that there was no issue in justification, and no statement on record that the defender was going to prove provocation short of justification.

The *Lord Justice-Clerk* held that the evidence must be admitted. There was no attempt to prove a capital offence, but merely facts in palliation of the injury supposed to be inflicted. There was a statement in defence, explanatory of the facts leading to the writing of the letter, and the defender was clearly entitled to give evidence in justification, without having required any issue to that effect.

The maid servant then proved that an indecent attempt had been made upon her, but her evidence did not go beyond the attempt. Her evidence was partially corroborated by other witnesses.

The *Lord Justice-Clerk*, in charging the Jury, dwelt particularly on the gross impropriety of the pursuer's conduct, and stated, that although nothing could justify the terms of the letter, yet, on the other hand, he did not think, when they considered the conduct of the pursuer, they would be warranted in giving him damages.

Verdict for defender.

Verdict.

Lord Ordinary, Moncreiff. Judge at Trial, Lord Justice-Clerk, (Boyle.) Act.
 Rutherford and Robertson. Alt. Dean of Fac. (Hope,) and Maitland.
 Carphin & Smith, S.S.C. and Thomas Ranken, S.S.C. Agents. Mr Russell,
 Clerk.

R.

SECOND DIVISION.

No. X.

21st March 1886.

JAMES HENRY AND OTHERS
against
 MRS ANNE BORROWMAN OR MILLER,

(BEFORE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

TESTAMENT.—FRAUD.—FACILITY AND CIRCUMVENTION.—*Action of reduction of a testament on the ground of facility, fraud and circumvention, Verdict for pursuers.*

Narrative.

THE pursuers were brothers and sister by the half blood of the testatrix, Agnes Henry, who was the only child of her father by his first marriage. By the contract of marriage between the father of the testatrix and his first wife, a sum of L.1200 was secured to the issue of the marriage, and the interest of the testatrix in the sum so secured formed the subject of bequest in the testament under reduction. The pursuers raised the present action in the lifetime of their father, as the heirs-at-law of the testatrix. The grounds of reduction set forth in the summons were, that the said Agnes Henry was of a weak mind and a facile disposition, and easily imposed upon, and had been decrepit and deformed, and laboured under some congenital or original mental imbecility; and notwithstanding the most sedulous attention to her instruction, remained, up to her death at the age of sixteen, of a childish, silly and imbecile mind, having neither powers of judgment nor discrimination, and being totally unfit to exercise a sound reason upon any subject brought before her; and the said Agnes Henry having been placed under the charge of the said Mrs Anne Borrowman or Miller, the said defender, by fraud, circumvention and misrepresentation, and taking advantage of the facility and of the weakness of the said Agnes Henry's mind and disposition, and by practising upon the same by gross deceit, impetrate from her, in this state of imbecility, the said settlement, whereby she gratuitously conveyed all she might die possessed of, being then a very considerable sum, amounting to about L. 1200, in favour of the said Anne Borrowman or Miller, the said defender employing, in the preparation of the said deed, a young man, a lodger in her house, unknown to the said Agnes Henry, and without the knowledge of any of her friends, whereby the said deed was obtained by fraud and circumvention from the said Agnes

Henry, then a person of weak and facile mind, easily imposed upon, and who was accordingly imposed upon by the fraudulent conduct of the said defender, to her lesion and injury.

In defence it was denied that the testatrix was mentally defective in any respect; and it was also denied that the defender had used any influence whatever to obtain the settlement in her favour. The cause of the settlement was set forth at length, and was in substance to the effect, that after the death of the mother of the testatrix, her father had married a person who had been her nurse, and with whom he had previously held improper intercourse: That the testatrix, who lived with her father, after his second marriage, till her death, at the age of seventeen, had been harshly used by her stepmother, who had also estranged her father's affections from her: That, in these circumstances, the testatrix, who had become acquainted with the defender, formed a strong attachment to her, and was in the habit of visiting her: That she had a desire to leave her father's house and live with the defender; but that the defender dissuaded her from this, and advised her to follow such a line of conduct as the defender had hoped might mitigate the malignity of her stepmother, and regain the alienated affections of her father: That the execution of the settlement in her favour was the voluntary act of the testatrix.

The following was the issue: 'Whether, on or about the 7th day of December 1831, the date of the deed sought to be reduced, the late Agnes Henry was a person of a weak and facile disposition, and easily imposed on; and whether the defender, taking advantage of the said facility and weakness, did, by fraud or circumvention, wrongfully obtain or procure the said deed, of which No. 4. of process is an extract, or cause her to execute the same, to the lesion of the said Agnes Henry?'

The pursuers called a variety of witnesses, who concurred in stating that the testatrix was a person of a weak and facile disposition. These witnesses had been servants in the family, school masters and mistresses, under whose charge the testatrix had been placed, and other persons, particularly certain near relatives of the testatrix's mother, who had intercourse with the family; and they further concurred in stating, that the testatrix had always been treated with kindness by her stepmother. The following evidence was given as to the preparation and execution of the deed:

Charles Anderson was clerk in Mr Fisher's office in 1831. Knows that Alexander Leighton lived in Mrs Miller's in Broughton Street. Drew out a deed, at Leighton's request, for a Miss Henry. It was executed the same day as drawn out. Had not seen the lady before deed was prepared. Got his instructions from Leighton. Had no idea of the amount of testatrix's fortune. Knew

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Evidence.

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Evidence.

from deed she was the daughter of a builder. Instructions were received same day as deed prepared and executed. No scroll made. Deed written on stamp in common form. Heard nothing of the matter before. Deed executed in his presence in Mrs Miller's house, between ten and twelve forenoon. Leighton told him to go. Leighton and Mr De Maria, the other instrumentary witness, and witness went. Saw Miss Henry and Mrs Miller. In preparing the deed got verbal instructions from Leighton, also memorandum of names of parties. Was not agent for Mr Henry. His impression was, he was alive. Leighton, he thought, stated as his reason for asking him to do it, delicacy, as being a lodger in Mrs Miller's. Opened no account with Henry, or Mrs Miller, or Leighton. Never was paid, nor made a charge. Settlement was read over to Miss Henry by Leighton. Not certain if Mrs Miller was in the room at time of reading. She was coming and going. From Miss Henry's willingness to sign, satisfied she was conscious of the import of the deed. When read over to her, he believed it was stated it was just the ordinary form of such deed. Did not ask what her fortune was, or whether her relations knew of the deed. Did not understand Mrs Miller to be a relation. On deed being executed came away. Was not there more than ten or fifteen minutes. Had no conversation with Miss Henry on any subject. When he got instructions, looked upon it as a regular piece of business of the office, Leighton giving his instructions publicly in the office. In filling up the testing clause there was a difficulty as to witness' designation, whether it should be, 'clerk to Daniel Fisher,' or 'writer in Edinburgh.' Witness suggested the latter, as Mr Fisher not present at the execution of the deed. Fisher knew nothing about the matter. After it was signed, they took it with them to fill up testing clause, which was done immediately. Dined with Leighton one day. Mrs Miller dined in the room.

Louis De Maria, apprentice to Mr Fisher in 1831, witness to Miss Henry's deed. Went at Leighton's request. Never saw her before. Deed already written out when asked to go. Aware, or rather thought it not a deed of Fisher's. Leighton then the general writer of deeds in the office. Had not seen and did not know name of testatrix before going to the house. Heard her name first when deed read to her by Leighton. Some explanation given by Leighton to Miss Henry during reading of deed. She appeared a good deal agitated and embarrassed. Cannot say he heard her open her mouth. Thought the embarrassment arose from the number of people present. Never saw Mrs Miller before or since that occasion. Was not aware Miss Henry had relations. Did not know Mrs Miller was not a relation.

Alexander Leighton, some time ago clerk in Fisher's office. Am 21 Mar. 1836.
 not now in business as a writer. Have a literary engagement. Have lived since 1831 in Mrs Miller's. Her husband died when I went there. Knew Miss Henry only a few days before execution of settlement. Had seen her going up and down stairs before. Think I gave Anderson instructions to prepare the deed the day after I first saw her. I think two days before its execution. Did not know when the deed was to be ready, or when it was wanted. Did not give him instructions to be ready by any particular time. On the day the deed executed, had a message by Mrs Miller's servant to go down and speak to Miss Henry. First became acquainted with Miss Henry about two days before that. Mrs Miller's servant came into my room one day, and said a young lady wanted to see me. I went, and saw the lady in a room occupied by another lodger. Mrs Miller had a parlour. Miss Henry was alone. She told me she had come to speak to me about executing a settlement. Think she told me her name. Looking to her age and apparent health, I asked her her reason for making a settlement. She appeared to be from seventeen to thirty. She told me she had been cruelly treated by her stepmother. On hearing her name knew she had been repeatedly at Mrs Miller's. She added, she thought her stepmother would be her death, to get her property to divide among her children. I asked her how that idea came into her head, and she narrated to me various acts of ill usage, (which the witness repeated.) She told me, at beginning of our conversation, she meant to make a settlement in favour of Mrs Miller, calling her her best friend. I told her I could not prepare the settlement, as I lodged in the house of the defender. I told her to come up to Mr Fisher's and have it done. She said she could not do that, as she was watched by her stepmother. I presumed she was there without leave. She then asked me if I could assist her in having the deed executed in the house. I said I would try. She said she wanted to leave every thing to Mrs Miller. She told me she wanted a will made in favour of Mrs Miller, or she wanted to leave all her property to Mrs Miller. I think she used the word 'will.' I asked what she had to leave. I think that was after asking her reasons. She said she had a right to some property through her mother. She did not describe the property. I think I did not ask the amount. Scarcely think I had heard of Mr Henry the builder before that. Think nothing else passed betwixt Miss Henry and me. I had some conversation with her about literature. She seemed to have read a great many novels. I daresay I began the topic. Had a long conversation about Der Freischutz. I sent her that opera. The day the deed was executed went down about half past ten. Do not recol-

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Evidence.

lect if Mrs Miller was there. I think Miss Henry told me she wished to sign the deed or will that day. I then went up to the office, and inquired for Mr Fisher; he was not in the way. Deed had been prepared in the interval. I did not then read it over. I am clear I had seen the deed as extended before that morning. Anderson had shewn it to me. I then read it. Went down to Mrs Miller's. I found Miss Henry and Mrs Miller in the house. Saw Miss Henry first. She was in Mrs Miller's parlour. Mrs Miller came in after me. I told Miss Henry the gentlemen had come with the settlement she had wished to sign. I read it to her. She objected to the clause taking her executrix bound to bury her. She said her father might at least do that. I told her it was in the usual style. She spoke in an under tone. I spoke not in an under tone. The other gentlemen did not, I think, hear this. Deed executed. We might have been in the room about ten minutes. Saw her twice after that. When testing clause filled up, some discussion as to its form. Agreed not to introduce Fisher's name. I never was paid for this deed. I made no charge. Anderson gave me the deed, which I gave to Mrs Miller. I got it from Mrs Miller after Miss Henry died, and I put it on record for Mr Fisher, because Mrs Miller then employed Fisher. I was the means of communication. Fisher has not been agent in this process. On first occasion I saw her after execution of deed, had some conversation with her about the opera, which she returned. On second occasion met her in passage of Mrs Miller's house; a few words in passing. Fisher was in town when deed executed. I did not speak to him; because it did not come in course. I did not speak to him on morning of execution, as Miss Henry was waiting for me. I did not appear as writer or witness to deed. Did you consider yourself responsible to Miss Henry for this being a proper deed? Certainly not; but that Anderson was. She did not see the testing clause. Don't know if she knew the deed was written by me or not. I did not see any other deed before ordering preparation of this. Only saw her mother's marriage-contract in Fisher's hands after Miss Henry's death. Miss Henry did not tell me the amount of her property. She used the word property. I did not ask her whether it was in houses or money. Have no doubt I did not. It was through her mother she said she was to succeed. Fisher continued to act for Mrs Miller, till told deed was to be reduced. Miss Henry told me her age at first meeting. She said about sixteen. I was not prepared for her being so young. What did you mean by asking her age, when looking to her appearance she seemed from seventeen to thirty? I think thirty young for making a settlement. When told she was sixteen, I was satisfied she had power of testing. She was agitated when stating her reasons.

I believed her. After deed executed I had several conversations with Mrs Miller; but none before. Miss Henry was distinct and coherent. Thought her mind and manner precocious. By precocity of manner, I mean the manner of a woman older than she was; by precocity of mind, more intelligent than young women generally are. Left Fisher's about nine months ago. Had not been in business for myself. Never prepared any other deed without mentioning it to Fisher. I thought there was no cause for mentioning deed to Fisher, as I was not aware it was to be called for so soon. I certainly did intend to tell him. I would have asked him to go and see it executed, if he had been in the house at the time, as his deed; but I did not consider it his deed before.

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Evidence.

Cross-examined.—I have no doubt Miss Henry understood the effect of this deed.

The defender led no evidence, but rested the case upon a mass of letters written by the testatrix at different periods, and contended, that these letters, which were admitted to be holograph of the testatrix, proved incontestably that she was not only of a sound, disposing mind, but a person possessing a superior degree of intellect; (see letters in Session papers); and farther contended, that these letters in themselves proved the settlement to be the voluntary act of the testatrix, and completely rebutted the evidence on the other side.

The *Lord Justice-Clerk*, in charging the Jury, held that the letters which were admitted to have been written by Miss Henry were material, as unquestionably shewing progress in her education, although there certainly was parole evidence as to her deficiency in many branches, and her general childishness of conduct. There was, *first*, the question of facility; and, *secondly*, that of fraud and circumvention; upon which last his Lordship held, that the law was properly stated in the following passage in Erskine, iv. 1. 27: 'But though a deed under challenge should appear hurtful to the granter, and irrational for one in his situation, if it do not carry in its bosom plain marks of oppression, it is not reducible without an actual proof of dole, even though the granter should appear to be of a facile temper, i. e. apt to be imposed upon. For, let one be ever so subject to imposition, yet, if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought that they have been drawn or extorted from him by unfair practices. Yet, where lesion in the deed and

Judge's
Charge.

21 Mar. 1836. ‘facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside.’ There must be something more than suspicion. There must be proof of getting round the testator. His Lordship then went over the evidence, particularly as to the way and manner of the execution of the deed,—the solicitation used to get Miss Henry to come and live with Mrs Miller,—the great intimacy betwixt these parties, and the improbability of the cause assigned for it,—the general kind treatment of Mr and Mrs Henry, as proved chiefly by the girl’s relatives by the mother’s side, and the unusual childishness and backwardness in education as proved by the teachers.

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Judge’s
Charge.

Verdict.

The Jury found for the pursuers.

Lord Ordinary, Cockburn. Judge at Trial, Lord Justice-Clerk, (Boyle.) Act.
Dean of Fac. (Hope,) and M’Neill. Alt. Rutherford and Monteith. E. &
A. M’Millan, W. S. and Smith, Neil & Hutchison, S.S.C. Agents. Mr Bus-
sell, Clerk.

R.

SECOND DIVISION.

No. XI.

22d March 1836.

HENDERSON

against

CAMPBELL OF MONZIE AND OTHERS.

(BEFORE THE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

IMPLIED CONTRACT.—*Action by a land-surveyor for £.612 : 19 : 5½, being the price of work done in the execution of a survey and plan of an estate. Defence, that pursuer had exceeded his instructions. Verdict for pursuer, Damages, £.497 : 9 : 5½.*

Narrative.

THE late General Campbell of Monzie, contemplating a sale of a part of his estate of Inverawe, in Argyleshire, and being desirous to ascertain what parts of the estate might be most advantageously sold, the pursuer was employed by the General’s agents to make a survey for that purpose. The pursuer accordingly proceeded to make a complete survey of the estate; and after communicating to the defender’s agents his plans, surveys, measurements and reports in scroll, he presented the same in a finished state, and then ren-

dered an account, shewing a balance due to him, after deducting partial payments, of L.392 : 7 : 0½. The defender's agents having declined payment, the pursuer raised an action against the trustees of General Campbell and the present proprietor, during whose possession part of the work was performed. In this action the pursuer claimed L.612 : 19 : 5½, being, as he alleged, under deduction of partial payments, what, by the rules of the profession, he was lawfully entitled to charge. In defence the original instructions * were produced, which, it was contended, were sufficient to bar the pursuer from making a minute survey of every part of the estate; and the increased charge now made was also founded on, as shewing a want of bona fides in making it, and as sufficient evidence of its being exorbitant.

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Others.

Narrative.

The following was the issue :

' Whether, during the years 1831, 1832 and 1833, the pursuer

Issue.

* Memorandum to Mr And. Henderson, for a survey of the estate of Inverawe, belonging to General Campbell of Monzie.' That paper is very important to the present question. It is of the following tenor :

' The object of the present survey is to ascertain the price which the proprietor may reasonably expect for the estate if brought to sale. For this purpose, the rental of the estate is referred to, and the surveyor is requested to make his report upon each farm. He will notice the general nature of the pasture and of the arable ground, and their capacities of improvement, so far as this may fairly be considered as affecting the price to be expected from a purchaser.

' He will also report his opinion on the rental, and whether the farms are high or low let, according to the present state of markets and of the Highlands. If any more advisable or profitable way of laying out or letting the farms should occur to the surveyor, he is requested to state it. *It is not wished that a minute plan of the estate should be made.* It would be proper to measure accurately the arable, and some parts, or the whole of the wood, and any portions of the pasture which are plainly susceptible of improvement by tillage or otherwise. *But with regard to the grazings generally, it will be sufficient to lay them down on the plan, as nearly in their proportions as can be attained by the eye, or by perambulating them.*

' The surveyor will also report on the nature, condition, and value of the woods, and how far the same appear hitherto to have been properly managed. He will also report on the fishings, and the mode practised in the river Awe. He will also report generally on the state of farm and other buildings, state of fences on the inclosed grounds, condition of roads, and generally upon all the several points which usually enter into the consideration of an intending purchaser.

' The amenities of the estate will also enter into view, with its local advantages as a residence, arising from beauty of situation, wood, &c.

' Upon the preceding and such other data as occur to the surveyor, he will report his opinion of the price that may reasonably be expected from a purchaser, buying with the expectation of a profitable investment, and of a beautiful residence.

' The surveyor will also consider whether the estate may profitably be sold in lots; and he will point out the mode of lotting which he considers most advisable, and the separate value which each lot may be expected to fetch.'

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Issue.

‘ executed, for behoof of, and furnished to the defenders, or any of them, a certain survey, or certain surveys, plan or plans, and report or reports, relative to the estates of Inverawe and others, in Argyleshire, the property of the late General Campbell of Monzie; and whether the defenders, or any of them, are or is indebted and resting and owing to the pursuer in the sum of L.612: 19: 5½ sterling, or any part thereof, with interest thereon, as the balance of the price of the said surveys, plans and reports, or any of them, charged for in the account.’

The pursuer called various land-surveyors and valuers, who concurred in stating, that it was impossible to make a plan for any useful purpose without actual survey. They also concurred in approving of the pursuer’s plan and report, and that his charges were moderate.

Judge’s
Charge.

The *Lord Justice-Clerk*, in charging the Jury, stated, that there were two questions for them to try; (1.) Whether the pursuer was authorised in making the survey? and, (2.) Supposing him authorised, what was the sum now due him? In determining the first question, they would consider whether the instructions tended in any way to bar him from making a complete survey; and they would, at the same time, consider the import of the evidence led by him. In regard to the second question, his Lordship considered it of importance for them to consider the fact of the pursuer having so greatly increased his original demand on bringing his action. It was no doubt competent for a party, when driven to an action, to increase his original demand to what he considered he was in strictness entitled to; but when the matter was put in the hands of a Jury, who were called on to assess the amount according to their conscience, it was an important element for their consideration, that a party had originally required a much smaller remuneration for his services: it was at least evidence of his own estimation of these services. It would therefore be for them to say, if they should consider the pursuer was authorised to proceed as he had done in making the survey, whether a sum between the original demand and that now made would not be the most fair in the circumstances.

Verdict.

Verdict for the pursuer. Sum found due, L.497: 9: 5½, besides interest as libelled.

Lord Ordinary, *Moncreiff*.Judge at Trial, *Lord Justice-Clerk*, (*Boyle*.)

Act.

Dean of Fac. (*Hope*), *G. Bell*.Alt. *Keay*, *D. M'Neill*.*Thomas**Ranken*, S. S. C. and *Davidsons & Syme*, W. S. Agents.*Mr Russell*.

Clerk.

R.

SECOND DIVISION.

No. XII.

13th July 1836.

THOMAS WALKER
against
 JAMES RITCHIE.

BEFORE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.

REPARATION.—ASSAULT.—*Action of damages for an assault, or injury done by a blow with a scythe. Verdict for defender.*

PROOF.—(NOTES MADE EX POST FACTO.)—*A medical man, a witness, not allowed to refer to a report or notes made from memory, four months after the occurrence in question.*

PROOF.—(METUS PERJURII.)—*Not competent to adduce evidence to contradict what a witness has stated on oath, by proof of what he had said when not on oath.*

THOMAS WALKER brought an action before the Sheriff of Clackmannan, for damages for an assault alleged to have been committed on him by the defender, Ritchie, by means of the blade of a scythe. The parties had met at the Whins toll-house, near Alloa, one evening in June 1834, the defender being seated on a pony at the toll-house door. The pursuer's statement was, that entertaining no suspicion of malice or ill-will, he asked the defender, who had a new scythe blade in his hand, if he was going home with him; to which he replied, he would wish to go in better company. To this the pursuer made no reply; but on passing the pony on which the defender was seated, he gently put his hand on its hip or tail, when the defender, as if to fasten a quarrel on the complainer, most cruelly, maliciously and wantonly aimed a blow at him with the back of the scythe, which struck and made an indentation in the pursuer's hat, and very nearly injured his head. The defender, also without retaliation or provocation from the pursuer, in the like cruel, barbarous and wanton manner, aimed a second blow at the pursuer with the face of the scythe, with which he violently struck him on the right arm, and made a deep or frightful wound on the back part of it, somewhat nearer to the top of the shoulder than the elbow, the said wound measuring about two and a half inches in length and two in depth, by which the muscle that gives extension to the forearm was thereby completely severed and

Pursuer's
 Statement.

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cut across, along with a number of the smaller arteries; that after proceeding some distance homeward, surgical aid was procured and the wound closed; that in consequence of the wound, the pursuer, who was previously a stout, active person about thirty, capable of great exertion, has ever since been deprived of the use of his right arm, which has been rendered useless and powerless, and will continue so, notwithstanding the best medical aid.

Defender's
Statement.

The defender stated, that he was returning home from Alloa, carrying under his arm the blade of a scythe, which was nearly all wrapped up in paper. He was riding on his small pony, and when near the Whins toll, stopped to speak to the toll-keeper, his son-in-law. Greig, innkeeper, Tillyculnry, was also present. The pursuer, who is a man of intemperate habits and quarrelsome disposition, came running out of the toll-house a good deal the worse of liquor, and put his hand on the forepart of the pony. He then laid hold of one of the hind legs of the pony, which he pulled to him, and raised it so high that the pony staggered, and was so unsteady as to alarm the defender and persons present. The defender, in his alarm, brought round the blade of the scythe which was under his elbow. He did so with no intent to use it offensively. It is possible, at this moment, when the defender was greatly agitated, the pursuer may have come in contact with the scythe. The defender denies having aimed a blow at the pursuer. If he had done so, he had acted from the impulse of the moment, and under a sense of danger, which, whether right or wrong, was caused by the outrageous conduct of the pursuer. The pursuer was so little sensible of having received the injury as complained of, that he actually asked the defender if he was going home, that he might accompany him. The defender denies that the injury is permanent; and any disability to use the arm has arisen from improper treatment.

The cause was advocated on section 40. of 6. Geo. IV. c. 120, the record having been made up in the inferior court, and the parties went to trial upon the following issue:

Issue.

‘ Whether, at or near the Whins toll-house, on the road from
‘ Alloa to Tillyculnry, on or about the 24th day of June 1834,
‘ the defender assaulted, and wrongfully struck or cut and wounded
‘ the pursuer with a scythe, to the loss, injury and damage of the
‘ pursuer?’ Damages laid at L.500.

The evidence adduced on the trial was quite contradictory. The pursuer, on the one hand, established the unprovoked nature of the repeated blow by the defender, while, on the other hand, the de-

defender's evidence left it in doubt whether the pursuer's witnesses could have seen the assault at all, and proved that it took place under strong excitement or apprehension on the part of the defender, while the pursuer, in a half drunk state, was annoying him, by seizing his pony by the hind leg, and so jostling the old man on its back; that the blow might have been, and really appeared to be, purely accidental, and wholly unpremeditated by the defender. From the medical evidence, it appeared that the triceps extensor in the back part of the arm had been cut through, and that the pursuer, by trade a weaver, had been permanently disabled from using it as heretofore; that the treatment at the time had been so far improper, that instead of keeping the arm all night in a sling, it should have been tied back so as to have let the parts unite more readily; and though this might have retarded the cure, it could not be considered as the cause of permanent disablement.

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Walker v.
Ritchie.

The *Lord Justice-Clerk* charged the Jury.—The issue is, (reads Judge's Charge.) and the damages are laid at L.500. It is obvious that the case on both sides is opposite and contradictory. You are to decide whether you are to believe the evidence of the pursuer's witnesses, that he was cut wrongfully. If conviction be brought to your mind in spite of the evidence on the other side, you are to consider what damages should be found. I cannot reconcile the truth of the opposite statements. The case is just brought to this, that there must be false evidence on one side or other. After hearing the pursuer's witnesses' account of what they saw, you had the defender's evidence, that it was impossible that what you first heard could have been true. It is for you to decide on these contradictions as to facts. It is not necessary that there should be proof of an actual malicious purpose; but if the defender acted so carelessly, and with such disregard to the safety of persons about him, as to give the wound, he acted wrongfully. (His Lordship here went over the evidence as to the infliction of the injury.) As to the medical evidence, it was clear that the use of a sling after the wound was dressed, and in the progress of healing, was improper; but it did not appear to have been the cause of the permanent disablement. The use of the sling might have retarded the cure; but we had no evidence that it had retarded the cure, for that was rapid. This is the whole of the evidence. Now, return to the evidence on the principal part of the case: You have to consider, whether, upon a fair, impartial and candid view of it, you believe the pursuer's evidence; for if you do, you must find that the pursuer was wilfully hurt. But if you believe the account of the matter given by the defender's witnesses, there is important evidence as

13 July 1836.

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Ritchie.

to the blow having been given, not in such a way as to warrant a finding of its having been wrongfully done. If you think the pursuer was wilfully assaulted, give fair, reasonable and moderate damages, adequate to the nature of the offence, keeping in view, too, the permanent disability, and also taking into consideration, whether the mistreatment was sufficient to occasion this permanent injury; but I think there is no evidence of that.

Verdict.

Verdict for the defender.

A medical man, who dressed the wound and attended the patient, was examined as to the extent of the injury, and was asked to read a report which he admitted he had made up in October, the accident having happened in June. On initial examination by the *Dean of Faculty*, whether he had made notes at the time, and the witness having stated that he had not, the *Lord Justice-Clerk* did not think the document could be read. *Robertson* withdrew the witness.

A witness was adduced on the part of the defender, to prove that M'Farlane, a witness for the pursuer, had said he would swear any way for a sum of money, though on the trial he had now said he never had used such words. The *Dean*, in support of the offer of proof, referred to the procedure in the Dundonell case, (M'Kenzie v. Roy,) as to M'Kenzie of Millbank, a witness. *Robertson* objected that the point was quite settled the other way. The *Lord Justice-Clerk* rejected the evidence tendered. It was incompetent to contradict what a witness had said on oath, by offer of proof of which he had stated when not on oath.

Lord Ordinary, *Moncreiff*. Judge at Trial, *Lord Justice-Clerk*, (*Boyle*.) Act.
P. Robertson and Patton. Alt. *Dean of Fac.* (*Hope*.) and *Ja. Anderson.*
Ritchie & Hill, W.S. and *Mackintosh & Gemmell*, S.S.C. Agents. Mr
Russell, Clerk.

R.

SECOND DIVISION.

No. XIII.

15th July 1836.

ADAM ANDERSON

against

WILLIAM BROWN, PROVOST OF SANQUHAR.

ASSAULT.—REPARATION.—*Action of damages for assault on a party making certain operations on property of defender, in virtue of sentence of Dean of Guild of a burgh, not duly intimated to the defender.—Verdict for pursuer.—Damages £.10.*

THIS was an action for damages, in which it was set forth, ‘ That, Narrative.
 ‘ upon the 22d day of October last, (1834,) or about that time, the
 ‘ pursuer, Anderson, alongst with James Hair, tenant of Corse
 ‘ Park, presented a petition to the Dean of Guild of Sanquhar,
 ‘ setting forth, that William Broom of Carco Mains, then and now
 ‘ provost of Sanquhar, was proprietor of certain subjects situated
 ‘ on the north side of the burgh, and that Hair was tenant, and
 ‘ the pursuer proprietor, of houses adjoining, and lying immediately
 ‘ below, the property of Broom : That, in the course of some of his
 ‘ operations, Broom had thought proper to divert the course of the
 ‘ water, so as to occasion thereby serious injury to the pursuer, and
 ‘ praying that the Dean of Guild would, according to the im-
 ‘ morial usage of the burgh, call a court of discreet, honest and re-
 ‘ spectable burgesses, to visit the premises ; and upon inspection of
 ‘ the water-course, and taking proof of the averments of parties, to
 ‘ find that Broom was not entitled to divert the course of the water
 ‘ from its former channel, and cause it to flow upon the house oc-
 ‘ cupied by Hair, and belonging to the pursuer ; and that Broom
 ‘ ought to be ordained to direct the course of the water into its
 ‘ former course ; or otherwise to grant warrant, and authorise Hair
 ‘ and Anderson to take such steps as might be deemed necessary
 ‘ for that purpose : That the Dean of Guild, on the 23d of Octo-
 ‘ ber 1834, appointed the petition to be intimated to the defender,
 ‘ and answers to be lodged within eight days : That the petition
 ‘ was accordingly duly intimated ; and the defender having failed
 ‘ to lodge answers, after various steps of procedure, the Dean of
 ‘ Guild found, 15th November 1834, that the defender, Broom, was
 ‘ not entitled to divert the course of the water in dispute, so as to
 ‘ cause it flow upon and injure the property of the pursuer, and or-

15 July 1836. *dained the defender to direct the water in dispute into its former course, within four days after intimation : That upon the 17th day of November 1834, the said judgment of the Dean of Guild was duly intimated to the defender by Robert Thompson, Dean of Guild officer ; but the defender having failed to implement or give obedience to the said decreet, and the Dean of Guild having been again applied to, this judgment was pronounced : ‘ Sanquhar, 1st December 1834.—Having again considered this process, In respect the defender, Broom, has failed to comply with the interlocutor of 15th November last, grants warrant to and authorises the pursuers to take the necessary steps for directing the water in dispute into its former course by the back meadows, and into the town-foot burn, and for clearing said course of all obstructions to the progress of the water therein, and otherwise putting it into its original state and condition : Finds the defender liable to the pursuers in the expense to be necessarily incurred by them in making the operation requisite for these purposes.’ (Signed) ‘ JAMES M’CRONE, D. G.’ That, on or about the 4th day of December last, (1834,) whilst the pursuer was on the ground, within the said burgh of Sanquhar, superintending the operations of the men whom he had employed to cut and clear the drain, so as to divert the course of the water into its former channel, in terms of the warrant of the said Guild court, he was violently attacked and assaulted by the defender, who seized him by the neckcloth, and nearly choked him : That, being relieved from the grasp of the defender, the pursuer ordered the Dean of Guild’s authority and warrant to be read aloud, which was done by the officer of court, and in the hearing of the defender.’*

Defender’s
Pleas.

The defender stated the proceedings somewhat differently, denied the assault to the extent stated, and *pleaded*—1. That the defender had an undoubted right, as a burgess and freeman inhabiting the burgh of Sanquhar, as a conterminous heritor, and as assignee to the lease of the coal and minerals in the common belonging to the burgh, to clear the water-courses along the Cow Wynd, leading from the burgh to the said common, in order to prevent the road-way from being flooded ; and that, in so doing, he did nothing illegal in itself, or injurious to the property of the pursuer. 2. That the whole procedure touching this matter in the Dean of Guild court was incompetent and inept, in respect that court had no jurisdiction in such a case, and no power either to ordain the defender to take any steps for regulating the course of the water in dispute, or to authorise such steps to be taken by the pursuer at the defender’s expense ; *Donaldson v. Pattison and others, 14th*

Nov. 1834. 3. That the decret of the Dean of Guild, even 15 July 1834.
 supposing it to have been inter vires of that judge, contained no
 warrant authorising the pursuer to encroach, or perform any operation
 whatever upon the defender's private property, for the purpose of restoring the water in dispute to its original course; and
 that all the pursuer was, in any view, entitled to do, in respect of
 the said decret, was to fill up the water-courses along the Cow
 Wynd. 4. That the pursuer, on the occasion libelled, was, both
 by himself and others in his employment, illegally interfering with,
 and trespassing upon the defender's private property; and having
 refused to leave the premises, when civilly required so to do, the
 defender was, by law, entitled forcibly to remove him. 5. That,
 in removing the pursuer, the defender did not assault or injure him,
 but used the minimum of force necessary to attain the object of
 putting an end to his illegal trespass, and that, by so acting, the
 defender has not incurred liability for damage to the pursuer. The
 defender farther stated a plea on record, that this action ought to
 be sisted, till another action depending in this Court betwixt the
 parties, as to the legality of the proceedings before the Dean of
 Guild court, be determined.

Anderson v.
Brown.

Defender's
Pleas.

The parties, however, went to trial on the following issue:
 'Whether, on or about the 4th day of December 1834, at or near Issue.
 'Sanquhar, the defender did assault and maltreat, or inflict bodily
 'injury on the pursuer, to the loss, injury and damage of the pur-
 'suer? Damages laid at L.500.'

At the trial, the *Lord Justice-Clerk* said, the reduction of the
 proceedings before the Dean of Guild court ought first to have
 been brought to a decision; at the same time, he was bound to try
 the issue now put. The pursuer led evidence as to the practice of
 the Dean of Guild court of Sanquhar, and as to the circumstances
 attending the assault.

Lord Justice-Clerk.—This is a most insignificant case. If the object Judge's
 was, by this issue, to have the opinion of the Court as to the legality of the Charge.
 proceeding before the Dean of Guild, the pursuer has adopted an irregular
 and unjustifiable course. There is, in the Court of Session, a suit for trying
 that: there is a plea, craving that this case should be sisted till the other be
 determined; but that course the pursuer has not adopted, but taken this
 issue. As to the evidence laid before you, of what took place on the field
 or road, it amounts to this, that the defender did lay hold of the pursuer by
 the neck or coat—they were separated—then came again into hands, and
 the defender laid hold of the pursuer by the neckcloth, who appeared to
 suffer a certain change of colour in the face, when they again separated.

15 July 1836.

Anderson v.
Brown.Judge's
Charge.

They again came together, when a witness did see an attempt to kick, but there is no evidence of any kick. It is in evidence that a blow was aimed, but no proof that it was seen to take effect. What, then, is the foundation of the claim? Under what circumstances did the assault take place? No doubt, even in a trivial assault, a Jury must give damages. Here there is evidence of assault, but consider under what circumstances. It is admitted by the pursuer, in opening, that he is not serious, and that it is not his object to get damages, but to get an opinion of the Court on the legality of the Dean of Guild's procedure. Now, I beg to say, in law, I do not think it necessary to give my opinion on the legality of the practice. If the Court were called on to decide the abstract question, it would do so; but here I am not so called on, whatever doubts I may entertain as to the legality of the practice. In all the previous steps due intimation was given to Broom. He did not comply with the intimations. But it is in evidence that the proceedings, particularly the verdict of 15th November, was intimated to him; but warrant of 1st December 1834 was not intimated; at least there is no proof of certification. (His Lordship here read finding of Dean of Guild.) I am of opinion that Broom was entitled to know this before the pursuer proceeded. There is no proof that what Anderson took from his pocket was the real sentence of the Dean of Guild. In so far as the case is said to rest on a legal warrant, I am not of opinion that there was a legal warrant; therefore, it was not a case of resistance of a legal warrant. You are not, in this case, to presume any thing: the pursuer is bound to prove the legal warrant. The case then just comes to this, Under what circumstances did the assault take place? The field belonged to the defender: he remonstrated in the morning: the pursuer re-assembles the workmen: the defender challenges the workmen: then a scuffle ensues. There is no evidence that the regular instrument or extract of the real warrant of the Dean of Guild was exhibited; and that is to be taken into consideration, along with the want of evidence of intimation. In cases of intrusion, a man cutting a ditch is an exasperating proceeding; and though the law won't allow violence, it makes allowance for proceedings under provocation of the moment. There seems to have been no other object than to remove the pursuer from the premises, and stop the work. The scuffle was the result of the pursuer continuing, instead of taking Thomson's advice, and holding himself deforced, and walking off. If you should be inclined to find for the pursuer, it must be very small damages.

Rutherford excepted to the charge, that want of evidence of intimation of the warrant is to be taken into consideration, along with the want of evidence of production, by the officer, of the real warrant.

A Juryman asked the Court, if the defender had it in his power to get the action sisted till the question in the other action for trying the legality of the procedure was determined.

Lord Justice-Clerk.—I think, if the defender had brought a re-

claiming note against the order for trial, it is likely he might have got the action stopped. 15 July 1836.

The Jury retired. Verdict for pursuer. Damages L.10.

Anderson v.
Brown.

Lord Ordinary, *Mcneireff.*
Rutherford, Whigham.

Judge at Trial, *Lord Justice-Clerk, (Boyle.)*
Alt. Dean of Euc. (Hope,) Maitland.

Act. Verdict.

David

Whigham, W.S. and Thomas Ranken, S.S.C. Agents. Mr Russell, Clerk.

R.

SECOND DIVISION.

No. XIV.

15th July 1836.

JOHN INCH

against

JAMES THOMSON AND OTHERS.

WRONGOUS APPREHENSION.—REPARATION.—*Damages claimed for wrongous apprehension and detention, upon a caption following upon an incorrect charge of horning.—Verdict for pursuer. Damages one shilling.*

THE pursuer, a flesher, had been charged by the defender, as on a Narrative. bill for L.44 : 4 : 4, under deduction of L.12 paid to account, instead of a truly existing bill for L.40 : 4 : 4, due under the same deduction. The return of the execution set forth the bill accurately. A caption followed on this charge; and the pursuer was, as he said, in custody of a messenger, on a Saturday, from eleven to four, till he found caution for part of the debt, and was allowed to depart. He brought an action of reduction of the execution, and for damages. After getting decree of reduction, the pursuer went to trial with the defender on the following issue :

‘ Whether, on or about the 13th October 1832, in the pursuer’s Issue.
‘ shop in Edinburgh, the defenders wrongfully apprehended and
‘ detained the pursuer, or wrongfully caused him to be apprehended
‘ and detained, to the loss, injury and damage of the pursuer?’

The defenders *pleaded*—That there was mala fides in the pursuer allowing Brown (messenger) to go on with diligence, knowing the error in charge. More indulgence had been given than the pursuer was entitled to. The procedure by the messenger did not amount to proof of apprehension: there was merely holding the caption Defenders’
Pleas.

15 July 1836. over his head, and urging him to pay some part of the debt. Besides, no injury arose from the few hours communing or detention on the subject. Actions of this sort are not encouraged. See charge by Adam, L. C. C., in *Ranken v. M'Laren*.

Inch v. Thomson & Others.

Judge's Charge.

Lord Justice-Clerk.—There can be no doubt, in law, there was an error in the charge on the bill; the diligence being irregular, and execution of caption following thereon was irregular. It is to be inquired, then, 1. Whether there was apprehension and detention? and, 2. Was it done to the loss, injury and damage of the pursuer? There can be no doubt in law, that the parties and the messenger are liable for the accuracy of the diligence. There must, however, be actual apprehension and detention, in virtue of illegal diligence. The evidence is somewhat equivocal. (His Lordship then went over the evidence.) Now, as to the apprehension, you are to judge; but I suspect, that notwithstanding the evidence of the assistant messenger, there had such a communication taken place as placed Inch in custody. There is not proof of the actual using of the blazon, but there was such a case of constructive apprehension as placed him in custody. But if you are of opinion there was apprehension, you will probably think that it was about as delicate a case of interference as could be: no intimation to give distress: a mere stopping of him to make arrangement for obtaining payment. If so, has it been to the loss, injury and damage of the pursuer? The conduct of the parties shews there was no intention to oppress: there was bona fides on the messenger, and no evidence of suspicion of error. But still there was an irregularity, though, in the question of what damages, it is the bounden duty of a Jury to look to the whole circumstances. These parties having no intention to injure and oppress, but merely to recover the debt, and having allowed the pursuer to go home when he found security for only a part of the debt, it is for you to say what is the proper solatium to a party who never indicated the error till some time after the apprehension. But if there was apprehension and detention, even for a short time, it is for you to say what should be the damages. I must add, that I completely agree with the Lord Chief-Commissioner in Ranken's case.

Verdict.

Verdict for pursuer. Damages one shilling.

Lord Ordinary, Cockburn.

P. Robertson, Wm. Bell.

Hill and James Bannet, W.S. Agents.

Judge at Trial, Lord Justice-Clerk, (Boyle.)

Alt. Dean of Fac. (Hope,) and Neaves.

Mr Russell, Clerk.

Act.

Gr.

R.

SECOND DIVISION.

No. XV.

15th July 1836.

PETER DEWAR

against

WILLIAM MACKAY AND OTHERS.

(BEFORE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

FRAUD.—FACILITY AND CIRCUMVENTION.—TESTAMENT.—*Disposition and settlement and contract of agreement reduced on the ground of fraud, facility and circumvention.*

PETER DEWAR, carter in Leith, as heir-at-law of the late Peter Narrative. Dewar, residing in Haddington, brought a reduction of a trust-disposition and settlement, and of a contract of agreement, as being executed by the said deceased Peter Dewar to his lesion, on the ground chiefly, as set forth in the summons, that ‘ the said disposition
‘ and settlement, and contract of agreement, bearing to be subscribed
‘ by the said Peter Dewar, are not his true and genuine deeds. At
‘ the time when they are alleged to have been executed, he was
‘ about seventy-seven years of age; and both at their respective
‘ alleged dates, and for a considerable time previously, he had, from
‘ old age and disease, been so much debilitated and impaired, both
‘ in mind and body, as to be totally incapable of attending to or of
‘ managing his affairs, or of giving any rational directions with re-
‘ gard either to the management or disposal of them. He was in-
‘ capable of understanding the nature and terms of the disposition
‘ and settlement, and contract of agreement, now called for, or of
‘ giving any instructions for the preparation of these deeds, or either
‘ of them, of reading them himself, or of understanding their na-
‘ ture or provisions if they had been read over to him. He neither
‘ knew the objects nor effect of the said deeds, nor was he of a
‘ sound and disposing mind at the time they, or either of them, are
‘ alleged to have been executed by him; more particularly, such
‘ was the said Peter Dewar’s total incapacity to manage his affairs,
‘ and the facility with which he was imposed upon, and his property
‘ embezzled by designing persons, that so far back as November
‘ 1831, nearly twelve months before the date of the pretended dis-
‘ position and settlement called for, the present defender, William
‘ Mackay, who then affected to be his friend, and the friend of the

15 July 1836.

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Mackay and
Others.

Narrative.

‘ pursuer, as his heir-at-law, drew up with his own hand, and got
 ‘ the said Peter Dewar (who was incapable to dictate it) to sub-
 ‘ scribe the following letter or mandate to Mr John Younger, writer
 ‘ in Haddington, authorising him to take the management of Peter
 ‘ Dewar’s affairs : ‘ *Leith, 8th November 1831.*—SIR, By due
 ‘ consideration, and advice of my friends, I hereby authorise you
 ‘ to collect the several rents of my property in Haddington and
 ‘ Gifford due me at Martinmas first, and to prevent any other per-
 ‘ son to interfere in that respect but yourself, and to use every
 ‘ means to prevent me of being defrauded of my property, as I
 ‘ have been very much imposed on of late, and this order cannot
 ‘ be recalled without consulting the Reverend Dr Lorimer and
 ‘ Magistrates; and I hereby inclose you a list of tenants and rents,
 ‘ so that my funds may not be embezzled, but may go to my own
 ‘ interest, and the benefit of my relations afterwards.’ (Signed)
 ‘ PETER DEWAR.’ The defender, William Mackay, at the same
 ‘ time got the pursuer to sign this letter, by way of strengthening
 ‘ it, in consequence of the pursuer being the said Peter Dewar’s
 ‘ heir-at-law, and the person chiefly interested in his property.
 ‘ Mr Younger continued to act under this mandate for a short time,
 ‘ collecting the rents and interests belonging to the said Peter
 ‘ Dewar, very advantageously for him, till the defender, William
 ‘ Mackay, began to interfere with the rents, and had prevailed on
 ‘ the said Peter Dewar to borrow a sum of money, for which he
 ‘ had no occasion whatever, when Mr Younger declined to con-
 ‘ tinue to act as factor, or to have any farther concern with the said
 ‘ Peter Dewar’s affairs. From this time Peter Dewar was under
 ‘ the defender, William Mackay’s, exclusive control and manage-
 ‘ ment, and the defender did as he chose with his person and pro-
 ‘ perty. He removed Dewar from his own house to his, (the de-
 ‘ fender,) William Mackay’s house; and when the defender, William
 ‘ Mackay himself, went out, he was in the habit of locking Peter
 ‘ Dewar in, to prevent him from wandering about in a state of un-
 ‘ consciousness. On the 10th of April 1832, being the next day
 ‘ after Mr Younger intimated that he ceased any longer to act for
 ‘ Peter Dewar, the defender William Mackay got a friend of his
 ‘ of the name of Swanson, a writer in Haddington, to prepare a
 ‘ deed of commission and factory by the said Peter Dewar, in fa-
 ‘ vour of himself, the said William Mackay. By this deed he was
 ‘ authorised to collect rents, grant discharges, &c. and it contains
 ‘ this clause : ‘ And declaring this factory to continue for the space
 ‘ of three years from the date hereof; and in order that the said
 ‘ William Mackay may not be interrupted or impeded in execu-
 ‘ ting the functions of his office of manager or factor for me, from

“any thing to be done by me, so long as he holds that office, I 15 July 1836.
 “hereby bind and oblige myself to do nothing whatever that may
 “have a tendency to interrupt or impede him in the execution of
 “his said office of manager and factor, and in particular, not to
 “grant or sign any bills or letters of security to or for any per-
 “son whatever, nor to make any private bargain, or sale of my
 “heritable or moveable property, without the personal presence,
 “approbation and consent of the said William Mackay.’ Not-
 “withstanding the declared and notorious incapacity of the said
 ‘Peter Dewar, the defender, whilst pretending to act for him
 ‘under the factory above mentioned, and while having the exclu-
 ‘sive control of his person and affairs, got the said Peter Dewar
 ‘to subscribe the disposition and settlement called for, bearing date
 ‘2d October 1832. This deed was prepared by the same friend
 ‘of the defender William Mackay, Mr Swanson; and for this good
 ‘turn, there was left in it a legacy of L.40 to a son of the writer;
 ‘who, though then a minor, was constituted joint executor with
 ‘the defender. Not satisfied with having impetrated this disposi-
 ‘tion in his own favour, the defender, William Mackay, afterwards,
 ‘on 17th January 1833, by fraudulent means, and because of the
 ‘utter incapacity of the said Peter Dewar, made him to subscribe
 ‘the pretended contract of agreement above mentioned, which;
 ‘while it shews the imbecility of the said Peter Dewar, contained
 ‘the most unjust and unequal stipulations. And still more lately,
 ‘in pursuance of the fraudulent design formed by the defender,
 ‘William Mackay, by every means to secure to himself the whole
 ‘of his property, the defender got the said Peter Dewar to sub-
 ‘scribe another disposition and settlement of his whole property,
 ‘heritable and moveable, in his the said William Mackay’s own
 ‘favour exclusively, bearing date the 19th day of October 1833;
 ‘which last-mentioned disposition and settlement is under reduc-
 ‘tion in the original process at the pursuer’s instance against the
 ‘said William Mackay, to which this is supplementary, and with
 ‘which the present summons of reduction will fall to be conjoined.
 ‘It was in course of the said process of reduction of the last-men-
 ‘tioned disposition and settlement that the prior disposition and
 ‘settlement and contract of agreement now called for were brought
 ‘to light, and the said disposition judicially founded on by the de-
 ‘fender, William Mackay, in order to exclude the title and interest
 ‘of the pursuer from following forth the original process of reduc-
 ‘tion of the deed alleged to have been executed by the deceased
 ‘Peter Dewar in favour of the said William Mackay, on 19th Oc-
 ‘tober 1833. The state of the said Peter Dewar’s faculties gene-
 ‘rally, and in particular his want of memory, was such, that in 1833,

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 Mackay and
 Others.

Narrative.

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—
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‘ (though without knowing any thing then of the existence of the disposition and settlement and contract of agreement now called for, and even before the date of the last-mentioned disposition and settlement in October of that year,) it was deemed absolutely necessary no longer to delay taking judicial measures to check the frauds which were practised upon him, and advantages taken because of his imbecility, by various interested and designing individuals; and therefore, with a view to an application to our said Lords for the appointment of a curator bonis to him, the following certificate was obtained of the state of the said Peter Dewar’s faculties, in August 1833, from Dr Combe of Leith: ‘ *Leith, 20th August 1833.* This certifies that I visited, on the 14th instant, at his house in Haddington, Mr Peter Dewar, and am of opinion, that his mental faculties, especially his memory, are impaired to such a degree, as wholly to unfit him for the transaction of any business. His weakness of mind appears the result of advanced age, and not of derangement.’ (Signed) ‘ J. S. COMBE, M. D., F. R. C. S.’ And on the 8th of November in the same year, another certificate was obtained from Mr Smiles, surgeon in Haddington, who had visited the said Peter Dewar along with Dr Combe on the occasion above mentioned, and had frequent opportunities of seeing and visiting him, in the following terms: ‘ *Haddington, 8th November 1833.* I do hereby certify, upon my soul and conscience, that through infirmities consequent upon old age, which have reduced his mind to a state of complete fatuity, Peter Dewar is totally incompetent for the management of his own affairs.’ (Signed) ‘ SAMUEL SMILES, Surgeon.’ On occasion of Dr Combe and Mr Smiles visiting the said Peter Dewar in August 1833, as above mentioned, the defender, William Mackay, was present during the whole interview, and was aware at the time that the object of the visitation was preparatory to the taking of judicial measures for the protection of the said Peter Dewar and his property. The disposition and settlement under reduction in the original action above mentioned, is, nevertheless, alleged to have been subscribed by the said Peter Dewar on the 19th of October thereafter. On the 23d of November 1833, the pursuer, as heir-at-law to the said Peter Dewar, presented a petition to our said Lords, setting forth, that he, the said Peter Dewar, ‘ has been, for some time past, and is now, in such a state of bodily, and especially of mental infirmity, as to be incapable of managing his affairs, as is instructed by certificates under the hands of Dr Combe of Leith, and Mr Samuel Smiles, surgeon in Haddington, herewith produced, and copies of which are hereto annexed,’ (the certificates before recited); and the petition there-

fore prayed our said Lords to appoint a curator bonis to the said Peter Dewar, with the usual powers. Answers were lodged in the name of the said Peter Dewar, in which it is stated, that he and his friends are quite sensible that it is necessary for him to have some individual to take charge of his property; that so sensible was the respondent of the propriety of naming a factor, that he sometime ago executed a commission and factory in favour of William Mackay in Haddington, (defender,) a person who is not certainly a man of business, but he has been so serviceable and useful to the respondent, (as his bodily infirmities require the constant attendance of one of his own sex,) that the respondent preferred him to any one else.' On advising the petition and answers, our said Lords remitted to the Sheriff-substitute of East Lothian, 'to inquire as to the facts and circumstances alleged by the parties, and report, whether, in his opinion, it is necessary or expedient, for the protection of the respondent, to appoint a judicial factor or factors, curator or curators bonis, with the usual powers.' The Sheriff-substitute having made particular inquiries concerning the state of mind of the said Peter Dewar, and having personally communicated with that individual, reported, on 9th January 1834, to our said Lords as follows: 'Peter Dewar, as appears from an old family bible in his possession, was born on the 19th April 1756, and is consequently in the 78th year of his age. His memory is very much impaired, although occasionally, and in relation to particular events, especially such as occurred long ago, his recollection is tolerably good. His state of mind, which seems at times to approach that of imbecility, is such as to render him liable to imposition or undue influence; and it is likely, that as he advances in years, his mental powers will be more and more impaired. It is quite apparent that his mental weakness and infirm state of body are the result of old age, and a gradually breaking-down constitution. In these circumstances, the reporter begs, with all submission, to give it as his opinion, that the respondent is incompetent to the management of his own affairs; and it is expedient for his protection that a curator bonis should be appointed by the Court, with the usual powers. For this office, in obedience to your Lordships' remit, he has to suggest a most respectable individual, Mr William Hunter, baker, and one of the bailies of Haddington; and he has reason to believe that his nomination will be agreeable to all parties concerned.' In terms of this recommendation, our said Lords appointed the said William Hunter curator bonis to the deceased, with the usual powers of management: That the said Peter Dewar died on the day of September 1834, and it was not till after

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‘ the funeral of Peter Dewar that the pursuer knew of the existence of the said disposition and settlement, dated in October preceding, 1833; and the prior disposition and settlement, and pretended contract of agreement now called for, were still kept latent, and only came out in the course of the said original process of reduction. *Tertio*, The words ‘ second,’ and ‘ October,’ in the testing clause of the disposition and settlement called for, are written in a different hand, and at a different period, from the rest of the deed, without the testing clause bearing the name and designation of the writer of these two words. *Quarto*, Even on the supposition that, on the 2d October 1832, and on the 17th January 1833, the said Peter Dewar was capable of understanding a deed of settlement or a contract of agreement, or in such a state of mind as to be capable of disposing of his property and effects, and entering into a valid and effectual agreement, the disposition and settlement, and contract of agreement, now called for, are, nevertheless, not the true and genuine deeds of the said Peter Dewar, in respect that the same were without any true, just, or necessary cause, imputed and obtained through fraud and circumvention on the part of the said defender, William Mackay, and through imbecility on the part of the said Peter Dewar.’

Defenders’
Statement.

The statement in defence was, that ‘ the whole of the statements in the reasons of reduction are denied, except that the deceased was a person in advanced age when he executed the deeds libelled on, and that, some time posterior to the execution of these deeds, a judicial factor was appointed by the Court of Session to take charge of his affairs. This appointment was made with his own consent, and in the hope that he would be protected from the fraudulent designs of the pursuer, who had given him great cause of offence on various occasions, and whom he had therefore determined to exclude from any benefit in his succession. At the time of executing the deeds challenged, the late Peter Dewar was perfectly competent to the execution of such deeds, which are of a simple character, and intended to befriended an individual, towards whom he conceived that he was under great obligations. Generally, therefore, the statements in the libel are denied, in so far as these statements import incapacity on the part of the granter to execute the deeds libelled on, or impropriety of any kind on the part of the grantee. And it is averred, on the contrary, that the deeds were, in all respects, the free and competent act of the granter, not tainted with any fraud on the part of the grantee.’

The parties went to trial on the following issues:

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I. Whether the disposition and deed of settlement, No. 14. of process, sought to be reduced, bearing date the 2d October 1832, is not the deed of the late Peter Dewar, residing in Haddington?

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II. Whether, on or prior to the said 2d day of October 1832, the said Peter Dewar was a person of a weak and facile mind, and easily imposed on; and whether the defender, taking advantage of the said weakness and facility, did, by fraud or circumvention, wrongfully obtain or procure the said deed, to the lesion of the said Peter Dewar?

Issues.

III. Whether the contract and agreement, No. 23. of process, sought to be reduced, bearing date the 17th January 1833, is not the deed of the said Peter Dewar?

IV. Whether, on or prior to the said 17th day of January 1833, the said Peter Dewar was a person of a weak and facile mind, and easily imposed on; and whether the defender, taking advantage of his said weakness and facility, did, by fraud or circumvention, wrongfully obtain or procure the deed last aforesaid, to the lesion of the said Peter Dewar?

V. Whether the disposition and deed of settlement, of which No. 7. of process is an extract, sought to be reduced, bearing date 19th October 1833, is not the deed of the said Peter Dewar?

VI. Whether, on or prior to the said 19th of October 1833, the said Peter Dewar was a person of a weak and facile mind, and easily imposed on; and whether the defender, taking advantage of his said weakness and facility, did, by fraud or circumvention, wrongfully obtain or procure the deed last aforesaid, to the lesion of the said Peter Dewar?

Both parties led evidence as to the capacity of the granter, and the circumstances attending the preparation and execution of the deeds.

The *Lord Justice-Clerk* charged the Jury.

There are two sets of deeds under reduction. (His Lordship explained Judge's them.) The issues lay on the pursuer the burden of making out that these Charge. were not the deeds of Peter Dewar, and necessarily leads to the inquiry, whether he was of such capacity as to understand a deed. The law requires less capacity in making a deed of settlement than a contract. A greater degree of competency is required for the latter than the former. The law says, it is incumbent on the party to shew that there was not a mind capable of understanding a complicated deed. In regard to the first issues, the pursuer is bound to shew that Dewar had not that degree of intellect which enabled him to make the deed. As to the other issues, admitting that he could make the deed, yet it remains for consideration if he was facile, and the deed

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was executed to his lesion. You are not to mix up the two sets of issues. You must make up your minds on each, and consider whether you are satisfied that this testator, from age and infirmity, was reduced to imbecility, and incapable of making the deed. If, notwithstanding the evidence, you think sufficient mind remained, yet it is to be considered if there was facility and weakness, and the defender did, by fraud and circumvention, obtain the execution of the deed. I would make one general remark. It is quite competent and necessary to look to the whole transaction, to look to the origin of the deeds, and their execution. The pursuer's title is good; and there is no vestige of relationship betwixt Dewar and Mackay. Attend to the evidence of direct interference, to Dewar's condition, and the way in which the defender took the management. There is real evidence arising from the transaction. This part of the case makes a strong impression; for if you believe the pursuer's evidence, there was a double game played by the defender. The object was to remove Dewar from the influence of Reid, with whom he had formerly lived. There is much contrariety on the evidence on both sides, yet there is strong body of evidence of incapacity. It is also to be remarked, that the notoriety of the proceedings adopted judicially for watching over Dewar in the management of his affairs ought to have made Richardson pause in making the deed. His Lordship then said, he was unwilling to go through the evidence unless the Jury wished it; and the Jury acquiescing in this view, without retiring, found for the pursuer.

Verdict.

The Jury, without retiring, found a verdict for the pursuer on the 2d, 4th, and 6th issues.

Lord Ordinary, Cockburn.
Rutherford, Whigham.
Macandrew, S.S.C. and
Clerk.

Judge at Trial, Lord Justice-Clerk. (Boyle.)
Alt. Dean of Fac. (Hope,) and A. M'Neill.
Graham & Anderson, W.S. Agents.

Act.
John

Mr Russell,

R.

SECOND DIVISION.

No. XVI.

26th July 1836.

HERCULES INSURANCE COMPANY, AND ROBERT
SALMOND, THEIR AGENT,
against
JOHN HUNTER.

(BEFORE LORD MONCREIFF AND A COMMON JURY.)

INSURANCE.—ARBITRATION.—*Decreet-arbitral, by which a party insured was found entitled to the amount at which certain machinery,*

destroyed by fire, had been insured, brought under reduction on the following grounds : (1.) That the party insured had destroyed the machinery, or caused it to be destroyed, for the purpose of defrauding the insurers ; and, (2.) That the insurance was effected upon a fraudulent over-valuation of the machinery, with the intention of destroying the same by fire.—Verdict, finding that there had been a fraudulent over-valuation of the machinery, but not with an intention of destroying the same by fire, and finding for the party insured on the first ground.

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Observed on the Bench.—Insurance is not of the nature of a wager, but is a contract of the strictest equity, and productive of indemnity only ; and it is contrary to strict equity and fair dealing if a party insured put a value on his property for insurable purposes, which the true worth of that property does not warrant.

PROOF.—(METUS PERJURII.)—Not competent to contradict what a witness had stated on oath, by evidence of what he had stated previously while not on oath.

Question raised, but not decided, as to the competency of examining as a witness, a party, in favour of whose character the defender adducing him had led evidence throughout the trial, while the pursuers, not expecting the examination of the proposed witness,—viewing him rather as a party in the cause,—had not brought evidence to impugn his character.

Mr SALMOND, agent at Glasgow for the Hercules Insurance Company, insured certain machinery, the property of John Hunter, merchant in Johnstone, against damage by fire, for the period from 8th October 1831 to Martinmas 1832. The said machinery was, on the 22d October 1831, destroyed by fire. In virtue of a clause in the policy, the parties submitted to Claud Girdwood, engineer, and Hector Grant, merchant in Glasgow, the claim arising from the damage done by the fire ; and on the 3d and 4th April 1832, the arbitrators pronounced a decree, finding, inter alia, ‘ the value of the machinery at the date of the fire to be L.1450, 16s., as claimed by the said John Hunter :’ finding the said company and their agent ‘ liable to the claimant in the said sum of L.1450, 16s., with interest from the 22d October last, being the date of the said fire, at the rate of 4 per cent.,’ and L.18, 10s. to the clerk to the submission ; and finding the company and agent entitled to any of the materials or machinery which may be still on the ground at the mill, or elsewhere.

Some time after, the insurance company and their agent suspended a charge for payment of the above sums, and brought a reduction of the decret-arbitral, in which Mr Girdwood was also

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Reasons of
Reduction.

called as a defender. The grounds of reduction at first relied on, were the informality of the procedure,—its inconsistency with justice,—and as leading to a decret ultra fines of the submission. The pursuers, in an amended summons, afterwards stated more specifically the following grounds of reduction: ‘*Quinto*, The said submission was entered into in the belief, that the said insurance had been effected for the bona fide purpose of protecting the defender’s property from fire, and that the fire which had occurred was an accidental or innocent one, so far as he was concerned; but the pursuers have recently discovered that they were deceived in this respect, and from facts which have come to light, they are enabled to aver, that the insurance of the mill machinery in question was the result of a deliberate fraud on the part of the defender, Hunter, with the view of having the machinery consumed by fire, and obtaining an exorbitant and excessive sum for the same from the insurance office; the true value of the said machinery, though insured at L.1450 sterling, not having exceeded L.350. *Sexto*, The pursuers have also recently discovered that this fraudulent scheme was carried into effect, in so far as, within a few days after the insurance was effected, and on or about Saturday, the 22d of October 1831, the mill and machinery were wilfully set fire to and burnt by the defender, Hunter, or by William Montgomery, then tenant or occupant of the said mill, or by some other person, to the pursuer unknown, acting in concert with the defender, Hunter, and under his orders, by leaving a lighted candle in the garret of the mill, among a quantity of shavings or waste, at the time when the mill was being shut, or in some other way to the pursuer unknown. On a charge of this kind, the defender, Hunter, and Montgomery, were lately apprehended and fully committed for trial at the instance of the public prosecutor, though they have since been set at liberty.’

Defences.

The defender met these two last grounds by this statement in the defences: ‘Upon this’ (the 5th) ‘ground of reduction, it may be remarked, in the *first* place, That, even supposing it to be true, it is no ground for reducing the submission, because that was just one of the objections to payment, which the pursuers might have pleaded in the submission; but with the exception of the allegation of over-insurance, which was pleaded and repelled, they did not choose to do so, though full opportunity was given them there of stating every thing they chose. Indeed, their pleas in the submission were quite inconsistent with the allegation now brought forward. But, in the *second* place, If this be a ground for reducing any thing, it is a ground for reducing the policy of insurance,

‘ for it imports, not that the submission was brought about by fraud, 26 July 1836.
 ‘ but that the insurance was the result of a fraudulent scheme, yet
 ‘ the pursuers have brought no reduction of the policy of insurance.
 ‘ *Finally*, The allegation is wholly untrue. It is precisely in the
 ‘ same predicament with the allegation of bribery formerly made,
 ‘ and now abandoned.

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 ———
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‘ The other new reason of reduction is a sort of sequel to the
 ‘ one now noticed. It sets forth, that the pursuers have recently
 ‘ discovered that the defender did actually, by himself, or by others
 ‘ employed by him, set fire to the machinery; and that, upon an
 ‘ allegation of that kind, he was apprehended and committed for
 ‘ trial at the instance of the public prosecutor, though afterwards
 ‘ set at liberty. The allegation of the defender having set fire to
 ‘ the machinery, or having been accessory to such an act, is false
 ‘ and calumnious. The allegation, that the pursuers have recently
 ‘ discovered that the alleged fraudulent scheme was carried into ef-
 ‘ fect, is also false and calumnious. The pursuers have made no
 ‘ recent discovery of any kind; and they never have discovered,
 ‘ and never can discover, those things which they pretend to have
 ‘ discovered, for they truly had no existence; but it is true that
 ‘ the pursuers have industriously circulated such reports, just as
 ‘ they did the report of Mr Girdwood’s bribery, and that they have,
 ‘ in regard to both, used the most base engines, which will be fully
 ‘ exposed in due time. It is also true that the defender was appre-
 ‘ hended at the instance of the public prosecutor; and it will by
 ‘ and by be seen how that step came to be taken. It is also true
 ‘ that the defender, upon being apprehended, immediately availed
 ‘ himself of the provisions of the act 1701, to force on his trial;
 ‘ but the public prosecutor, after full investigation, declined to in-
 ‘ sist on the prosecution, and the defender was liberated.’ The de-
 ‘ fender also, among other pleas, stated the following: At all events,
 a submission or decreet-arbitral cannot be reduced, on the ground
 that pleas which might have been effectually urged under the sub-
 mission, by the party now pursuing the reduction, are not so urged.

The case as against Mr Girdwood was abandoned. A record
 having been made up, issues were prepared, and submitted to the
 approval of the Court, 12th December 1835, (see *F. C.* vol. xi.
 p. 121); and thereafter the following were sent to trial:

‘ It being admitted that certain machinery, the property of the Issues,
 ‘ defender, Hunter, was insured by the pursuers, against damage
 ‘ by fire, for the period from 8th October 1831 to Martinmas 1832,
 ‘ and that the said machinery was, on the 22d of October 1831,
 ‘ destroyed by fire:

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‘ It being also admitted, that the said parties submitted to the amicable decision of Claud Girdwood, engineer, and Hector Grant, merchant in Glasgow, the claims arising for the damage done by the said fire, and that on the 3d and 4th days of April 1832, the said arbitrators pronounced the decree, of which No. 4. of process is an extract :

‘ 1. Whether the defender destroyed the said machinery, or caused the same to be destroyed as aforesaid, for the purpose of defrauding the pursuers of the said sum, insured as aforesaid ?

‘ 2. Whether the said insurance was effected by the defender, upon a fraudulent over-valuation of the said machinery, with the intention of destroying the same by fire ?

Robertson, in opening for the pursuers, and the *Dean of Faculty*, in reply to the defender's case.—The fraudulent over-valuation would be proved by documentary evidence, shewing that the machinery was purchased for a trifle, by John Hunter from Duncan Macdongall ; that Hunter gave it over to William Montgomery upon a promise to pay for it L.565 ; that an account by Hunter of the expenditure upon the machinery in 1831, after which he valued it at L.1022 : 4 : 11½, was false and fictitious, as the account is made up of charges for William Montgomery's time in superintending the repairs, his own travelling expenses in searching for and seeking machinery, and looking after repairs, and other charges which could not add to the intrinsic value of the machinery, the true value of which he could alone recover from the insurers. The circumstances connected with the fire were partly to be proved by parole proof ; but, like every case of latent fraud, depended on suspicion, and the presumptions arising from the fact of insuring at an over-valuation. There must have been not only a motive, but an intent to make the project effectual, by a speedy and clandestine destruction of the property by fire.

M'Neill, in opening the defence *.—The sums actually paid for the machinery as old and useless materials, could be no test of its value when placed in the mill, after considerable outlay and large additions. Its value to the proprietor, as useful machinery, depended on its being brought into good working order. After these outlays, additions, and time and trouble,—in other words, labour, which

* The trial was adjourned at 9 o'clock on the evening of the 26th, till 9 o'clock in the morning of the 27th July,—the Jury being enjoined from the Bench to hold no communication with other persons, or with each other on the subject of the trial. The same took place in *Dewar v. Mackay*, during these sittings.

is equivalent to money,—expended in bringing it to a state of perfection, as available and capable of making good yarn as newer machinery, the proprietor was entitled to insure it at its value to him in that state. As to fraud, the presumptions were against it. Manufactories are doubly hazardous in point of risk, and therefore accidents by fire are more presumable. The fire occurred in a stormy night, by the sparks from the furnace flying up and lodging in the garret; the extinction of the fire being impossible, though Montgomery, the tenant and alleged partizan, was soon on the spot, and giving every assistance in vain.

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Lord Moncreiff charged the Jury.—This case is certainly one of a very peculiar character, and one which is attended with considerable difficulty; and in consequence of some things that have occurred in the course of the investigation, I think it right to make a few observations on the nature of the contract of insurance which has formed the subject of these proceedings.

This cause arises out of a contract of insurance, with the legal character of which you should be acquainted. Insurance is an equitable contract, by which, in consideration of certain periodical payments of premium received, one party becomes bound, in a certain emergency, to indemnify the other for the loss sustained. It is not of the nature of a wager. If a party insures property as worth L.1000, and sustains actual loss to the extent of L.500, it is only this last sum he recovers. It is a contract which produces indemnity, and that only: it is of the strictest equity; and whether it relates to sea insurance, or house property, or insurance on life, the most rigid good faith is required. Fraud, concealment, misrepresentation, every thing unfair or not consistent with right dealing, will vitiate the contract. This works so deeply into the essence of the contract,—as it is well understood in England, and also now in Scotland,—that it signifies not how the deviation from that good faith has taken place; yet if there has been concealment, misrepresentation, or unfair dealing, the insurance falls, however the event may have happened.

I would farther observe, that it is a contract productive of vast benefit and advantage to the public,—to those who have much property embarked in shipping, or in hazardous enterprises generally. It is of great importance that such institutions as insurance companies should exist, so that instead of ruin, those fairly transacting with such companies shall be indemnified. In this country, when a loss occurs within the fair limits of the contract, it is of importance that the party losing should recover without difficulty. On the other hand, when a case occurs in which strong facts come out, involving unfair dealing, strict scrutiny is required, else the whole system of insurance would be uprooted; and those relying on the good faith of parties with whom they contract would find it impossible to continue the business. If individuals conspired to insure property not existing,—if they entered into the contract, intending from the beginning to destroy what forms the subject of it,—insurance could not exist, and the law applicable to this contract would become inoperative.

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Now, directing your attention to the issues, you will see that they are peculiar. There are two special issues proceeding on a certain narrative. The substance of them is—in the first issue, Whether the defender destroyed, or caused to be destroyed, this machinery fraudulently? And the second issue goes back to the root of the insurance; for it is, Whether the defender effected the insurance upon a fraudulent over-valuation with intent to destroy? There is no general issue put upon which you can give a deliverance, or determine the right of the defender to recover. The Dean said, that general question is involved, but that such an issue could not be taken in this action. If the question had stood clear of certain previous proceedings, which formed the subject of a submission, and about which you have heard a great deal, the form of the action would have been different. Mr Hunter would have stood as pursuer, and would, in shewing that the sum was resting owing by the company, have had to prove the loss sustained by fire. If the company had, in such an action, stated in defence what they have now stated in support of their grounds of reduction, it would have been incumbent on them to prove that defence. The narrative prefixed explains the shape the issues have now taken. An insurance took place,—the machinery was destroyed,—the parties submitted the loss to arbitration,—a decree was pronounced on what the arbitrators considered sufficient evidence that the loss was £.1450, 16s. Afterwards certain facts, hitherto undiscovered, came to the knowledge of the company. It was impossible, then, for the company coming to a knowledge of the new facts, to get at these without a reduction of the decret-arbitral.

The pursuers resist a settlement under the decret-arbitral, and say that it ought to be reduced on two grounds; by offering to prove, 1. that the fire was not accidental, but a wilful act; 2. that there was no insurance, because, in the essence of it, there was a fundamental flaw in the contract, in as much as Hunter's object in insuring had been to protect himself, not against accidental fire, but against a fire he himself was to raise.

You will give an answer on each issue. You may suppose the Court held the averments relevant, if proved, to warrant the reduction of the decret-arbitral. But with the consequences of the answers to be given upon these issues you have nothing to do. The questions are entirely questions of fact. (His Lordship then adverted to the special terms of the issues.)

These being special issues, and you being warned of the nature of them, I would next observe, that each of them is to be judged of by you, upon a consideration of the whole facts reasonably combined. For instance, the question, whether there was a fraudulent over-valuation, is part of the case: it is not the whole case. The pursuers must satisfy you that the defender destroyed the machinery by fire wilfully; or that he made a fraudulent over-valuation, with intent so to destroy it.

This is a case above all others which may be proved by circumstantial, as well as by direct evidence. Your attention is not to be confined to isolated facts, but you must take in the whole, in order to determine whether, on a combined view of the facts, you hold that the machinery was destroyed by fire, to which this defender was privy. Then, as to the over-valuation, you must judge for yourselves upon the evidence adduced. The defender has

put in, as evidence in his behalf, a decret-arbital, finding the value of the machinery destroyed by the fire in question to have been L.1450, 16s., and it was competent for him to do so. But, then, I must tell you, that that deed being the very thing under reduction, it cannot of itself prove the fact. The pursuers must be entitled, as against any finding in the decret-arbital, to prove over-valuation.

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We need not go farther into the grounds of the decret-arbital. In the earlier proceedings in the present action, it seems an ill-advised attack had been made upon the motives of one of the arbitrators. It certainly was not to the credit of this company, that it should have been so intent in overturning the decret-arbital, as to resort to so cumbrous a statement. But that has been withdrawn; and laying that aside, the arbitrators might be deceived,—they might mistake the law,—or facts might transpire which give an entirely different complexion to the case. If facts have come out tending to shew that the fire was wilful, or that the insurance was made with intent to destroy, that will bear back upon the question of over-valuation, because it goes upon a combined view of the whole circumstances. One other remark: We have nothing to do with the public prosecutor refusing to go on with the criminal investigation about the cause of this fire. We cannot know the reasons, or the difficulties, or the considerations which may have influenced his Majesty's Advocate in abandoning the case.

In drawing your attention to the questions now put, allow me to observe, that there is a strong presumption in favour of the defender. The case must be proved, and that beyond a reasonable doubt: it is a severe charge, and must be made good by evidence, leaving no reasonable doubt. The principle of such cases is well understood in the law of Scotland: there may not have been a question upon insurance of mills of this sort; but the principle is the same; only that such property is more than usually exposed to the hazard of fire: so add that to the presumption in favour of the defender.

In the present case, I do not think you need be surprised that, from the first, suspicions existed in the minds of the company, when we look to the broad facts. The whole sum paid by Hunter, as at 19th February 1831, for the machinery, without deductions, was L.190. (See offer by Hunter to Macdougall, No. 153. process.) This same machinery, with some additions, was ultimately insured, in the office of the pursuers, for L.1450, 16s. Then, in October 1831, it is consumed by fire, on the evening of the very day upon which the agent gave notice to the party insured of the completion of the insurance. This was sufficient to warrant inquiry.

The case of the pursuers rests partly on documentary, and partly on parole evidence. It will be impossible for me to go through now all the documents; but I may draw your attention to many parts of them. Then, upon the parole evidence, the first fact for the pursuers is in the evidence of Robert Davidson. It is for you to make up your minds how far you believe him; but I must read his evidence. (Evidence read. The portion of Davidson's evidence chiefly remarked on, was his account of a conversation he had with Hunter, as to buying machinery. In substance, Hunter said, 'If the mill were filled with machinery, bought cheap, it might pay well. I

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‘ said, How pay well ? He said, If it were burned, there might be a profit
‘ I said, I would have nothing to do with it. I think it was before I said I
‘ had no funds, he talked of purchasing and insuring machinery. He had
‘ reason to suppose I had experience in mills.’ On cross-examination, witness
said, ‘ I did not know whether Hunter made the observation in jest or ear-
‘ nest. I never said it would be a good thing to burn the mill. I did not say
‘ I would work a horn in his side. Any thing I said was in the heat of pas-
‘ sion.’) It has been said that this witness was in a state of agitation when
giving his testimony. It is for you to judge of that, and from what came;
but I have seen nothing to authorise me to tell you that his evidence is not
deserving of the utmost consideration. The next fact is in the evidence of
Peter Pollock, for the circumstance he details is awkward. (Evidence
read.) Pollock mentioned to Hunter, that he thought the company was
only bound to pay the actual loss. You have the fact that Hunter had this
very strange notion of the nature of insurance, that the company would be
bound to pay more than the actual value of the articles consumed. This
could never exist, insurance not being a wager, but a contract to secure in-
demnity. But this idea in Hunter’s mind is certainly important, taken in
connection with the other facts.

The purchase of the machinery was effected for L.110, as it stood in the
mill, and to continue there ; the L.190 paid by Hunter, including payment
of L.80, the rent of the mill up to Whitsunday 1832, as in lease, by Macdoug-
gall to Robert Fyfe, Hunter having got right to the mill and machinery. The
next thing ascertained is, that without any evidence of the smallest addition
to the machinery,—Hunter, in fact, admitting, in his declaration before the
Sheriff, that it was before any repairs were put upon the mill,—there is an
agreement betwixt Hunter and Montgomery, on 21st February 1831, enu-
merating all the articles in the inventory or valuation, No. 151. of process,
upon which Hunter had purchased from Macdougall. The transaction be-
twixt Hunter and Montgomery was for L.565. In the printed documents
produced and founded on, entitled, Letters, &c. ‘ connected with the alleged
‘ purchase of the machinery in Wyndford mill, by William Montgomery
‘ from John Hunter,’ there is a letter (No. 108. of process) from Mont-
gomery to Hunter, dated 21st February 1831, bearing, ‘ I hereby make
‘ offer to you of L.565 sterling, for the whole of the small machinery, per
‘ inventory handed to me, and at present standing in Wyndford mill, to be
‘ paid by instalments of 10 per cent. each, and every term of Martinmas and
‘ Whitsunday, in the name of rent, to be held of you in name of lease, until
‘ I pay you the last instalment, or when you are paid the machinery only
‘ becomes mine ; and I leave to your option, whether you charge me bank
‘ interest on deposits or on discounts, that is, 2½ or 4 per cent. on the un-
‘ redeemed capital,’ &c. In reality, what took place betwixt these parties
is not consistent with any real transaction having taken place. Then comes
Hunter’s letter to Salmond, (No. 99.) dated 20th April 1831, to effect an
insurance, to the amount of L.600, on machinery in lease to W. Montgomery
—the machinery being represented as the property of Hunter, but let on a
lease to Montgomery, and as ‘ in good working order,’ (with the exception
of 1200 mule spindles,) ‘ with all articles necessary in working them.’ The

statement, that the property was let on lease to Montgomery, was calculated to lead the company to go more readily into the transaction; and they did go into a policy for L.600, on what was purchased for L.110, and nothing added to it. It is said by Hunter that this lease was not acted on, but that, after certain additions were made, a new agreement was entered into.

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Then comes the second lease by Hunter to Montgomery, of date 27th September 1831, and I am obliged to say, that the facts connected with it are of a very singular nature. This second agreement is contained in a letter from Montgomery to Hunter, of that date, (No. 34. of process,) and you will find it is in these terms: 'DEAR SIR,—I am fully satisfied that you have done me great justice in putting in and repairing the machinery fully to my mind. Now, I make offer to you thirteen shillings per spindle, at equal instalments of 5 per cent., each term of Whitsunday and Martinmas, to be all paid within the space of ten years; the said instalments to be paid in name of rent, and the machinery only becomes mine when I pay the last instalment; and if you, at any time, require security, I will provide you satisfactory security that the machinery will be kept in good order, at my expense, from this date, under a penalty of L.100 sterling. If you accept of the above, signify the same by letter, and oblige, yours sincerely,' (Signed) 'WILLIAM MONTGOMERY.' Hunter gives a different account of the correspondence with Montgomery in the declaration, (p. 2. D to G); but that is inconsistent with the defences, which stand part of the process. Farther, there are two letters, which, though said to have been made at the counting-house at Johnstone, have wafers, as if they had been sent. These letters are No. 41. and 124. of process, and run thus: 'DEAR SIR,—I have received your offer of the 27th instant, per William Macpherson, which I have examined, and I agree to it, with this provision, that you pay the one-half of the expense of extending it upon stamped paper when required by me, that you find me security to keep the machinery in repair, besides paying me bank interest, as charged on discounts. Yours respectfully,' (Signed) 'JOHN HUNTER. Johnstone, 27th September 1831. Meet me in Glasgow on first Wednesday.'

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Charge.

'DEAR SIR,—I have received your offer of the 27th instant, per William Macpherson, which I have examined, and agrees to it, with this provision, that you find me security to keep the machinery in repair, and that you pay the one-half of the expense of extending on stamped paper when required by me, besides bank interest. Yours respectfully,' (Signed) 'JOHN HUNTER. Johnstone 27th September 1831.

'Meet me in Glasgow, first Wednesday, to-morrow. You will understand by bank interest, to be interest charged on discount.' (Signed) 'J. HUNTER.'

The pursuers have not proved that Macpherson did not carry any letter. If the defender meant to prove the statement in his letter, he should have called Macpherson. The point in this is, that it indicates disguise. You are inevitably forced to see that the letters were got up to shew a real transaction. In all cases, especially in a circumstantial proof of fraud, prepared disguise, having a purpose we cannot see, enters deeply into the charge. Why make the disguise? Why put the matter in this awkward shape? If a

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real transaction for L.1450, why so put it? It certainly leads to the idea, that it was to be shewn as an inducement to the company. Again, two receipts, in these terms, were found in Hunter's custody, Nos. 101. and 102. of process.

' L.6 : 3 : 3.

Johnstone, 22d November 1831.

' Received from William Montgomery, late cotton-spinner at Wyndford, the sum of six pounds three shillings and threepence sterling, being rent of Wyndford mill, sublet to him, as possessed by me of the landlord, Mr Duncan Macdougall, at the rent of eighty pounds, besides paying the insurance on twelve hundred pounds per annum.'

(Signed) ' JOHN HUNTER.'

' Rent from 27th September till the 22d }

' October, being 25 days, is L.6 : 3 : 3.'

' L.2 : 9 : 8.

Johnstone, 22d November 1831.

' Received from Mr William Montgomery, cotton-spinner, lately at Wyndford, interest at two and a-half per cent., on L.1450, 16s. sterling, being price fixed upon 2232 spindles, with the whole preparations, and valued at 13s. per spindle, upon 27th September last, being two pounds nine shillings and eightpence sterling, up till 22d October 1831.'

(Signed) ' JOHN HUNTER.'

The finding of the receipts in the defender's hands is a fact that cannot be so easily explained, nor the charges of interest upon the supposed day of the transaction. It is distinctly proved that that particular receipt was found in the possession of Hunter, after his apprehension, though it ought to have been found in Montgomery's. The other receipt was also found in Hunter's, though it should have been in Montgomery's possession.

Then, as to the evidence of over-valuation. There is to be considered, 1st, The fact of over-valuation; and, 2d, The intent. 1. The valuation by Miller makes it L.152, deducting L.19: on that the insurance took place for L.600. The question is, What additions were made before the insurance sought to be recovered was completed? This is pretty well ascertained. Hunter says great additions; and he produced an account made up by himself, in which he professes to state all the additions by which he makes up the amount to upwards of L.1000, not to L.1450; but that is not of importance, as, if he could have made it up to L.1000, much of the defender's evidence might tell, perhaps successfully. (Here his Lordship read Hunter's account of the valuation at L.1000, No. 155. of process.) There is no evidence of many of the payments to Montgomery. (His Lordship then commented on the different items.) Now, if you strike out these charges and payments for time, trouble, &c. I cannot make out the true amount to be any thing like the sum stated. There is no reasonable proof to shew, that, upon the most lax reckoning, it could come to much more than L.400. I do not make it out so much.

On that property an insurance was effected for L.1450, 16s. If you go again to the accounts and books, there is nothing entered there which is not in the account I have mentioned;—no account shewing a charge for

balance of repairs. Thus you have the case bare of any evidence shewing a value above L.400, upon which L.1450, 16s. were insured. In addition to this proof by the pursuers, there is the evidence of Miller, Macdougall, Maclaren, Green, Morrison, Macausland and Johnston. (Evidence read.) This is all the direct evidence of the pursuer upon the valuation. If you believe these witnesses, it was of very moderate value. At the same time, Miller, Maclaren and others say the machinery was put into good working condition. You have next to attend to the anxiety about completing the insurance, the receipt of Salmond's letter on the 22d October, and the fire the same night. I refer you to the following letters, Nos. 195. and 196. of process:

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Excerpt LETTER, Hunter to Salmond.

' October 19. 1831. '

' I went to see Wyndford mill last night ; it was all lighted and working very nicely. I could not help accusing myself for not having it covered. I hereby hand you L.7, 6s., about the amount of premium and duty, and that you forward to me, to-morrow at farthest, the receipt, policy, &c. '

Hunter to Salmond.

' Backed by Mr Salmond, } ' Johnstone, Saturday Morning,
' 22d October 1831. } ' 8 o'clock, A. M. '

' SIR,—I have sent the bearer to see if you have got the policy from Edinburgh. If you have, and the money any thing more than I have calculated, pay it for me, and I will pay you on Tuesday first.

' If not come, please to give me your receipt, and acknowledge my property covered in the same way as any other agent. My mind is quite uneasy, and my family does not see how my property is insured, when I hold no document. Yours, &c. &c. (Signed) ' JOHN HUNTER. '

Salmon to Hunter.

' Union Bank, 22d October 1831. '

' DEAR SIR,—I am exceedingly sorry that the office have not yet replied to your letter, which was sent with your policy. I shall write again to-night ; meantime, hold yourself quite easy, and shall give you your policy when in town on Wednesday. I have received from you L.7, 6s. '

(Signed) ' ROBT. SALMOND. '

N. B.—The above letter is backed in the handwriting of Hunter, Letter from Mr R. Salmond, acknowledging payment of L.7, 6s. handed him on 18th October 1831.—*Glaso., 22d Octr. 1831.* And appended to a copy of the same letter, as contained in a copy correspondence produced by Hunter in the submission, and forming No. 29. of process, all of which is also holograph of Hunter, there is a note in the following terms: ' The L.7, 6s., premium and duty on L.850, 16s. for one year, referred to above, was paid on Tuesday, the 18th October 1831. '

(Signed) ' JOHN HUNTER. '

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The facts as to the fire are contained in the evidence of Doherty, Mrs Murray and the fireman. (Reads evidence.) The two women and fireman thus go to this, that all fire was prevented as far as possible; that there was perfect darkness for some time after the mill was shut: then the fireman swears to leaving the furnace as usual, the damper being down. So far as their evidence can go, they swear to all being right. From Mrs Murray it would seem that Montgomery was very active, and that nothing was omitted to be done by him that could be attempted. This is the pursuer's evidence about the fire. Take that of the defender along with it, particularly John Miller's, W. Gunn's, Ann Reid, and the other witnesses, including the girl of eighteen years now, having been thirteen at the time of the fire. (Read their evidence.) This is all the evidence about the fire. Undoubtedly it does not correspond with the account of the fire first given. The letters written on the occasion shew that Montgomery first said in his letter to Hunter he did not know how it had been caused. 'I can give no particular reason 'how it took place.' Now, it would seem as if it must have been from the furnace, and the sparks flying up to the roof of the mill, and that this was observed at the time. If this was the way, it is singular that Montgomery did not mention it in writing to Hunter, (which, by the way, he did not do till the 23d, the day after.) If you think the fire is proved to have been the result of accident, and to have been caused by sparks from the furnace, then you will be relieved of farther difficulty on that point. But if, from the letters, you judge of it as a fire of which no account could be given, then you will have to take that along with the account now given, of what must have been known at the time; and it will be for you to consider, whether there is sufficient to create an irresistible inference, that the fire was the premeditated act of the defender, or of another. So much for the first issue.

Then, as to the second issue. You have the defender's account of the purchase, the repairs, the lease, the operations on the machinery, the insurance, and the fire. But then comes the strength and basis of his case: that it was a fair insurance on property fairly valued, and that he is entitled to recover the value, it having been destroyed by accident. Apply what was stated by the defender's counsel, and connect that with the evidence on value given by his witnesses. He says the value put upon it was fair to the utmost amount. He says you ought to take the value not at what the articles cost. He says, admitted it was old machinery, still, from the repairs made upon it, I have made it of more proportional value than what would correspond with the sum I have expended upon it. From the proper working condition into which I have put it, from a certain expenditure of capital and labour, I have made it worth to me, and worth to any one who looked at it as it stood on the day of the insurance, a sum equal to the amount insured. He undertakes to prove that the articles were thus of that intrinsic value. Much of the evidence on this point of the case relates to the theory of value generally. It is in the evidence of Snodgrass, Graham, Shaw, Grant, Wright, Murray, Johnston, Davidson and Fife. (His Lordship read their evidence. The substance of this part of the evidence was, (Snodgrass.) 'The machinery was worth 18s. per spindle. I would consider it as good 'as new machinery: though got cheap, it would be worth as much to me

‘as new machinery: might get new machinery to do work more cheaply, 26 July 1836.
 ‘but this equally good work.’—*Bench.* ‘Is the old machinery of Mr
 ‘Houston as good or valuable as new?’—A. ‘Yes, it is as valuable at the
 ‘time, and while it works, as valuable as new; but cannot say it is actually
 ‘worth as much, or would bring as much if sold. New machinery would do
 ‘work cheaper.’ (Wright.) ‘Have forty years’ old machinery, worth 12s.
 ‘per spindle: am taking out some of it and replacing it with new: will-
 ‘ing to take 2s. 6d. per spindle for old.’—*Bench.* ‘For what purpose do
 ‘you value it at 12s.?’—A. ‘It is worth that to us, while going: it is our
 ‘interest to keep it up by means of new machinery, or we could not com-
 ‘pete with others.’—*Bench.* ‘Suppose you were winding up affairs of com-
 ‘pany, other partners retiring, you continuing the business, Would you think
 ‘that a fair value in taking the stock, and take it at that price?’—A. ‘Yes,
 ‘I would not think I was either taking or taken advantage of, in giving or
 ‘getting it at that value.’—*Bench.* ‘That is a distinct answer.’)

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This is the whole evidence on this part of the case. Upon this I would make a few observations. The evidence given as to the value of the machinery, as it stood, is undoubtedly strong evidence of an opinion founded upon a particular theory, and shews that that opinion is strongly entertained by persons of respectability. If you were to receive it literally, you would find there was no over-valuation. But if I were trying this as a common case of insurance, I should have difficulty in saying that it afforded the proper estimate of value. It goes much on the idea, that there is one way of valuing machinery for purposes of insurance; for one cannot rightly see how old machinery should be called equal to new. Tear and wear must depreciate it, make it less effective, diminish its speed, and the same quantity of work must be done at a greater expense of time and labour than with new. Besides the greater intrinsic value of new machinery, it can go on without repairs. This cannot, in a question of insurance, be called the true value, or test its value by what it would bring in the market; no doubt a witness, upon my interrogatory, said, that according to his notion of value, if a copartnership, to which he belonged, was winding up business, he, as a partner continuing the business, would not think it hard to be obliged to take the machinery as stock at that value. But I leave that evidence to you. I say again, there could be no more dangerous rule, than to put a value on property for insurable purposes, which the true worth of that property does not warrant. The party insured must prove his loss at least: he must shew what he truly lost, and claim and obtain indemnity only.

It is my duty to state another view of considerable importance. Suppose that such an idea of the mode of valuing machinery were general; then, the question arises, What shall be the effect of such a principle of valuation in proving this case? This is not a case of over-valuation merely. What effect then has this supposed general notion about value upon, (1.) The question of wilful fire-raising; and, (2.) What effect has it on the second issue, as to over-valuation, with intent, &c.? If this error existed in other minds, it might naturally enough exist in Hunter's or in Montgomery's mind. Against this, however, you have the document recovered from the defender, to shew how he made up the value to bring it up to L.1022, 4s.

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11 $\frac{1}{2}$ d., I mean the 'account of Mr Hunter's expenditure upon machinery 'burned at Wyndford Mill, 1831,' (No. 155. of process.) He does not there adopt the principle of these witnesses, but makes up the value, by putting in charges for trouble, travelling expenses, and the like; although it is very true (his Lordship's attention was here directed to the document by the defender's counsel,) there is a note at the end of the document, shewing it is the working value of the machinery which Hunter says he claims, and that the statement only shews the cost price. The note is, '*Note*.—Although the above statement shews the cost price of the machinery to Mr Hunter, it does not shew what was the actual value of it in a working state. It is the working value which Mr Hunter claims.' But in so far as that account is made up of charges for time and trouble, it is difficult to think he could claim for these things against an insurance company.

As to the fire, you must look to the whole circumstances, and see if the proof enables you to discover fraud from the commencement—if there was fraudulent preparation, and if the fire be unaccounted for, Montgomery being last on the premises. If you look simply to the circumstances at the fire, then there is not sufficient evidence to bring it home to any individual; but no case of fire-raising can be so dealt with. Upon that, and upon all the points, you must give Mr Hunter the benefit of any doubt, particularly on the first issue; and upon the second issue also, you must give him the benefit of any doubt, and for two reasons; (1.) The machinery might have been insured for the purpose of being destroyed, yet have been burned by accident, and you therefore might not be satisfied it was done on purpose; and, (2.) It is possible you may not be convinced it was done otherwise than by accident, yet it might be, that there might be abundance of evidence of a fraudulent over-valuation, with intent to destroy it.

I would just add, that the evidence as to Hunter's character is also to be attended to.

Verdict.

The Jury retired. Verdict.—Find for the defender on the *first* issue. On the *second* issue, Find that the said insurance was effected by the defender upon a fraudulent over-valuation of the said machinery, but not with the intention of destroying the same by fire.

McNeill, for defender, called a witness, and proposed to prove that Robert Davidson, one of the pursuers' witnesses examined on this trial, did suggest and state to the proposed witness that it would be a good plan to insure the machinery high, and let it go, *i. e.* be burned. He offered to prove this as a thing in Davidson's mind, and that he, a witness of the pursuers, would be likely to do such a thing. Davidson had denied this on oath.

Dean of Faculty objected. What a witness says while not on oath cannot be proved; and he referred to a point decided, *Rogers v. Innes*, 7th July 1835, (*F. C. x.* p. 827,) where a woman, a wit-

ness, said she was married. The other party afterwards offered to prove that she was not married, and inferred perjury. The Court held, You could not, in a trial of one case, enter into another matter affecting the character and credit of a witness. He farther referred to *Ritchie v. Walker*, tried during the present sittings.

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Lord Moncreiff.—I must sustain the objection. His Lordship took a note of it.

Robertson, in opening for the pursuers, had made statements prejudicial to the character and conduct of William Montgomery, so deeply concerned in the above transactions, but called no evidence to support his averments of bad character. *M'Neill*, in opening for the defenders, stated, that Montgomery held as good a character as any gentleman who could traduce him, or who could instruct a better gentleman to do so; and, in leading evidence in the cause, asked several of the witnesses as to Montgomery's general character, and behaviour during the fire,—who all declared it to be unimpeachable.

M'Neill, at the close of the defender's evidence, called William Montgomery as a witness. The proposed witness, at the request of the pursuers' counsel, withdrew. *Dean of Fac.*—It was never mentioned to us that the defender's counsel meant to call Montgomery. They have been leading evidence as to his character, while we did not, as we had no idea of this. They should have opened as if Montgomery were to be examined; whereas they have been treating him as a party, and he has been dealt with on both sides in that character. The evidence of character is irrevocable. No matter what persons said of his character; he goes into the box on his oath with a good character. *Lord Moncreiff*.—The evidence of character cannot be obliterated.

Dean of Fac.—That may afford a good objection against the defender using him as a witness on this trial.

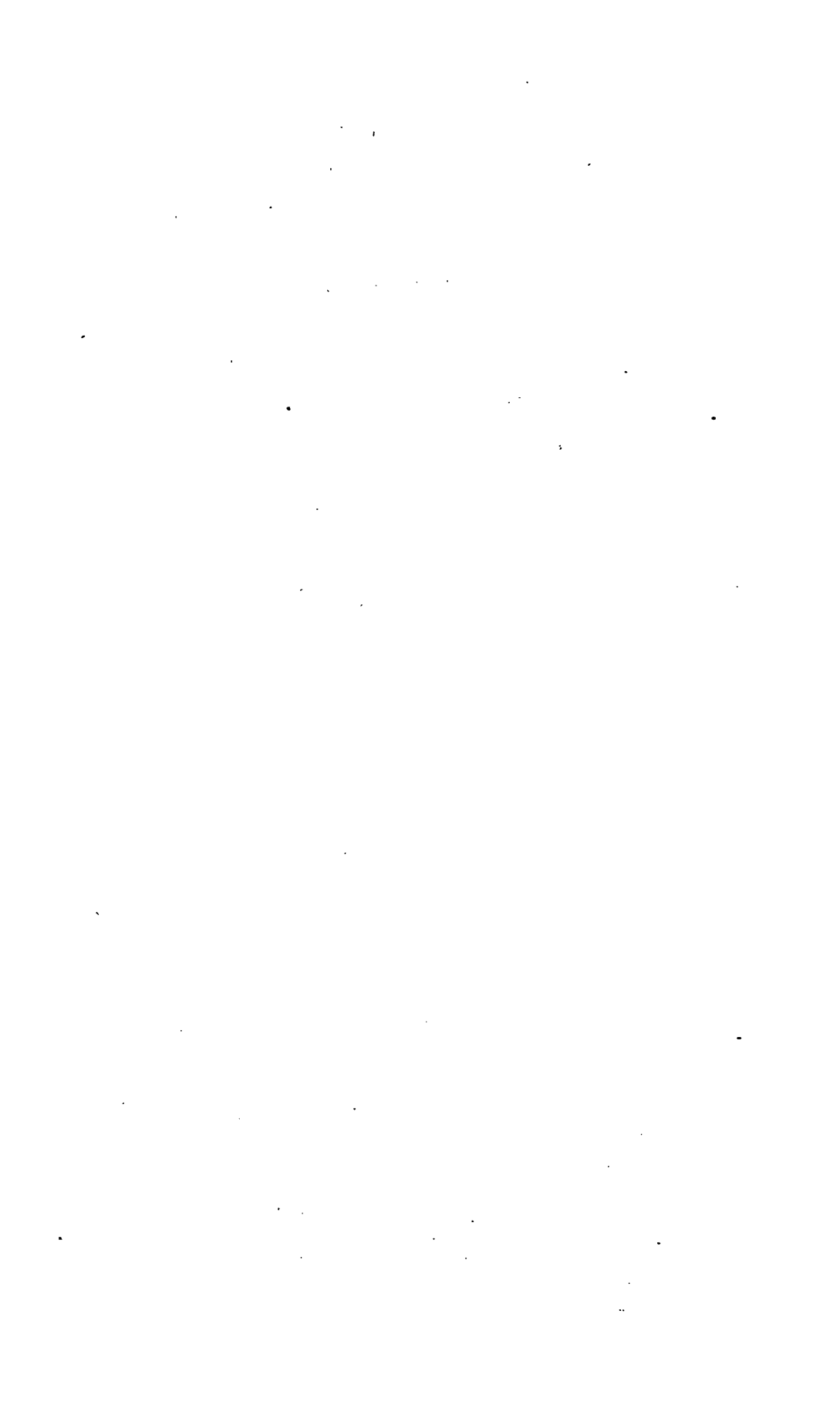
Lord Moncreiff.—The evidence of character was objectionable, as the pursuers have had no opportunity of impeaching his evidence. Still there is perplexity, as I do not see any legal ground for rejecting the witness.

M'Neill.—Is your Lordship of opinion that evidence as to Montgomery's character was not admissible, if we meant to call him as a witness?

Lord Moncreiff.—Yes.

M'Neill.—Then I'll not call him.

Lords Ordinary, *Moncreiff* and *Cockburn*. Judge at Trial, *Moncreiff*. Act. *Dean of Fac. (Hope,)* *P. Robertson* and *Neaves*. Alt. *M'Neill* and *A. Anderson*.
G. & W. Napier, W.S. and *James Wright*, W.S. Agents. *Mr Russell*, Clerk.



DECISIONS
OF THE
HIGH COURT OF JUSTICIARY.

No. I.

16th November 1835.

LORD ADVOCATE
against
JAMES MARTIN.

PROCESS-CRIMINAL. — STATUTE 5. GEO. IV. c. 84, § 22. —
JURISDICTION.—TRANSPORTATION.—*A party previously sentenced to transportation returning, and being found at large before the expiration of the term, may be tried either in the Circuit Court of the district where he or she was apprehended, or in that from whence he or she was ordered to be transported.*

THIS cause was certified by Lords Gillies and Meadowbank from Narrative.
the Circuit Court at Glasgow. The prisoner had been tried at the Circuit Court at Inverary, and sentenced to transportation. He returned within the term, and was apprehended in the county of Dumbarton. It was objected, in bar of trial, that the terms of the 27th section of the 5. Geo. IV. c. 84, precluded his being tried at the Glasgow Circuit. They are as follows: ‘ And be it further
‘ enacted, that if any offender who shall have been, or shall be so
‘ sentenced or ordered to be transported or banished, &c. either for
‘ life, or any number of years, under the provisions of this or any
‘ former act, shall be afterwards at large within any part of his Ma-
‘ jesty’s dominions, without some lawful cause, before the expiration
‘ of the term for which such offender shall have been sentenced or
‘ ordered to be transported or banished, &c. every such offender so

16 Dec. 1835. 'being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished *.'

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A. S. Logan, in support of the objection, *contended*, That the word 'may,' taken in connection with the words 'county or place,' rendered it imperative that the party should be tried either at Inverary, or in the county where he was apprehended. The words, 'shall and may be lawful to try,' &c. had in many cases been held imperative, and in this instance they plainly amounted in substance to a specific limitation. Words merely permissive, in common signification, become imperative in respect of the source from whence they proceed, and the way and manner in which they are used on the one hand, and, on the other, of the subject-matter to which they are applied. A stricter interpretation was required in this case than in those which would be referred to on the other side of the bar; inasmuch as, in the latter, there was a competition betwixt the Court of Justiciary and a new jurisdiction, created by special statutes for the trial of new offences; whereas, in the present, the jurisdiction of that high court was expressly and alone recognised, its power to try the crime of returning from transportation not being denied, the only limitation contended for being as to the place of trial.

The *Lord Advocate* and *Innes*, Advocate-Depute, *answered*—That the above statute was a mere re-enactment of the 6. Geo. I. c. 23, § 7, and that the section referred to was plainly permissive. They quoted the case of *Alexander v. Seymour*, 7. Sh. p. 117, and *Chitty's Criminal Law*, i. 196. The latter statute was the first English statute making a definite regulation in regard to return within the term after transportation. The section now referred to plainly related exclusively to English practice, where the justices in assize acted in each county by special commission; whereas in this country

* The above statute is repealed by 4. and 5. Will. IV. c. 67, in so far as regards capital punishment. The terms of the latter statute are as follows: 'That so much of the recited act as inflicts the punishment of death upon persons convicted of any offence therein and herein before specified shall be and the same is hereby repealed; and that from and after the passing of this act, every person convicted of any offence above specified in the said act of the fifth year of the reign of his late Majesty, King George the Fourth, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common Gaol, House of Correction, Prison or Penitentiary, for any term not exceeding four years.'

the Circuit Court was a mere deputation from the Court of Justiciary. The statute plainly applied to the whole of Great Britain ; but although certain sections of it applied to England alone, that was no reason why the statute should not be interpreted so as its general provisions might receive effect. If the words of this section were to be held as applicable to Scotland, according to the construction proposed on the other side, it was manifest that the general provisions of the statute could not be enforced here, in a great variety of instances, there being no courts held in many of the counties in Scotland which could competently carry these provisions into effect. Hume, ii. 38, mentions two cases infinitely stronger than the present. They also quoted Dwaris, ii. 724, 755.

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Lord Advocate
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The Court having called the attention of the Lord Advocate to the 21st section of the above statute, as supporting his Lordship's argument, the following opinions were delivered :

Lord Gillies.—I am not sorry that I took this case to report. At the same time I must own my opinion was at the time, as it is still, that we had jurisdiction. I conceive it to be a general rule of law, that offences are only to be tried in the county, or place where they are committed, by the Court having jurisdiction. Is there any thing in this enactment to infringe on that rule in the slightest degree ? The offence in the statute is that of a person, who has been transported, being afterwards found at large. The offence, as regards this country, consists in his being found or apprehended in any part of Scotland ; and being so found, he may be tried in the Court of Justiciary, and also in the Circuit Court of the district where he is found. Thus, a person found in Perth may be tried in the Circuit Court of the district, or a person found in Selkirk may be tried at the assizes at Jedburgh, or in Edinburgh. This is the general and universal rule both as regards the High Court and the Circuit Court. Is there any thing in this act to take away the jurisdiction ? The very first clause in the act establishes the jurisdiction where the party is apprehended, that is, in the county where he is found. The locus delicti is the place in which he is found. He could not be tried in Dumbarton. Why ? because there is no court there competent to try him. Where then is he to be tried ? plainly either in Edinburgh, or at the Circuit Court in Glasgow, the place where he is found being within the jurisdiction of that court. It is said this act was not intended to apply to Scotland. There is no doubt it was so intended, though it may be doubtful if the nature of the procedure in Scotland was sufficiently considered.

Opinion of
Court.

Lord Mackenzie.—I am of the same opinion. I am inclined to think that this act must necessarily be presumed to have been intended

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Opinion of
Court.

to apply to Scotland, though in its construction the peculiarities in our procedure have not been attended to. The offence consists in a person who has been transported from any part of England or Scotland returning and being found at large in any part of England or Scotland: The offence is his being found at large. Now, then, suppose there had been no clause of this kind at all, how would the law have stood without any such clause? He would have been tried where he committed the offence—where he was apprehended. There was a reason for making this special provision. Though the statute would otherwise have warranted his being tried in the jurisdiction within which he was apprehended, yet there was a great convenience in trying him in the place where he had been previously sentenced, because that is the place where he would be best known; besides it would be in the same court, having the books containing the sentence. The purport of the act is, that he may be tried in the jurisdiction, not only where he committed the offence, but from whence he was transported. In order to make this provision, words are used which do not require any strict interpretation: the provision is in the very essence of it permissive. If this special clause had not been inserted, the trial would have been where he was apprehended; but the Parliament also gives the power of trying him where he was previously sentenced. The words used apply to England and Scotland; and the meaning is, that the words county and place should apply to the jurisdiction: they can have no other rational interpretation. Suppose you take it in any other way, and limit the word place to the particular county, see how it would apply to Scotland. There are many counties in Scotland in which there would be no means of trying him. If the words were limited to their geographical, and were not to receive their legal meaning, the act would be in many instances altogether inoperative. Therefore we are bound to put the interpretation upon the act, that the party is to be tried according to the jurisdiction which exists where he has been apprehended, or by the Court which previously tried him, whichever is most convenient.

Lord Moncreiff.—I certainly concur in the opinion given. There is no doubt the Lord Advocate has stated truly the source of the ambiguity. The act was generally intended to apply to England and Scotland; but still the persons who framed it appear to have been thinking only of the law of England. That is the source of the ambiguity; and although it evidently is so, yet I think, for the reasons assigned by Lord Mackenzie, that we must hold the object of the act to be, to give power to try the offence in the place where the sentence was pronounced. It was an extension of the competency of trial in England, and not without reason. Therefore we

must hold that it was intended to make a similar extension in Scotland. There may have been a doubt as to the locus delicti in the case of returning from transportation. However that may be, there is a manifest convenience in trying in the place where the sentence was pronounced. Suppose a party transported from Scotland is found at large in England, he could not have been tried in Scotland; and thus the previous sentence would have fallen to be judged of in England. If we come to the question, whether the ordinary jurisdiction of the Justiciary Court was taken away, I never could imagine that the jurisdiction of the High Court or Circuit Court was excluded; and then the question is confined to this, whether we are compellable to try where the sentence was pronounced. This was plainly not the intention of the act, which was an extension of the power of trial, for greater convenience. The clause is obviously permissive, and never can have the effect of limiting the power of trial to the place of sentence. The fair meaning is, that the party may be tried in the ordinary jurisdiction where he was apprehended; but if more convenient, he may be tried at the place where he received the former sentence. The cases in Hume, of which I entertain no doubt, are much stronger than this.

Lord Medwyn.—As I concur entirely in what has been stated; my observations will be extremely short. It is the rule of law, in respect to trials in Scotland, that every crime may be tried in the Court of Justiciary; but, for greater convenience, they may be tried at Circuit. With regard to the enactment in question, I do think it is applicable to Scotland, though the expressions used may not appear precisely to tally with the rule of law which I have stated. The enactment is permissive, and is also extensive, because it goes beyond the rule of the common law. The offence is that of returning after transportation; and if the party is found at large in any county, there is no doubt the offence is cognisable by the court of that jurisdiction—that is the proper forum; but the intention of the act is to give to the court where he was tried before, a power also of trying him. This party then might have been tried at Inverary, but that in no respect excludes the power of the court which has jurisdiction over the county where the offence was committed. The offence was committed in the county of Dumbarton; and the court which has jurisdiction to try offences committed in that county is entitled to try him, and at the ordinary place where the trial of such offences takes place, viz. at the Circuit Court at Glasgow.

Lord Justice-Clerk.—It is not necessary, concurring as I do in what has been stated, that I should enlarge upon this matter. I approve of the course which has been taken, because it gives us an opportunity of setting at rest all doubt upon the subject. I am not

16 Nov. 1835.


 Lord Advocate
v. Martin.

 Opinion of
Court.

16 Nov. 1835. for laying it down as a proposition that this act was merely permissive. I think it is not only permissive, but declaratory. I cannot conceive that there is the slightest ground for the inference, that the jurisdiction of the Circuit Court was taken away: it would require much more distinct and emphatic words than are used here to have that effect.

Lord Advocate
v. Martin.

Opinion of
Court.

Judgment.

The Court, therefore, *repelled* the objection.

Act. Advocatus, (J. A. Murray,) James. Alt. A. S. Logan. Mr Neaves, Clerk.
R.

No. II.

23d November 1835.

LORD ADVOCATE
against
WILLIAM WRIGHT.

PROCESS-CRIMINAL.—(DECLARATION.)—(SERVICE COPY INDICTMENT.)

ON the trial of William Wright, for murder, when, after the Jury was sworn, the public prosecutor proceeded to prove the prisoner's declaration, it was *objected*, that the declaration produced was dated 16th October 1835, while the one libelled on in the service copy of indictment was dated 16th October 1835, and therefore a deviation from the terms of the Act of Adjournal 1821.

Judgment.

The Court repelled the objection, on the ground that it could not be stated after the Jury was sworn.

PROOF.—MALICE.—The prisoner having stated, in his defence, that no previous malice existed, the public prosecutor, in order to negative this, was allowed to go into a proof of previous threats, and ill will shewn.

For Crown, Advocatus, (Murray,) Shew Stewart.

For Pannel, J. Crawford.
R.

No. III.

15th February 1836.

JOHN ANDERSON

against

JAMES STUART, (SUPERINTENDENT OF POLICE.)

JURISDICTION.—LOCAL STATUTE, 7. GEO. IV. c. 115.—*Found,*

(1.) *That in a charge of breach of trust to an amount above £.10, the police court has no jurisdiction :* (2.) *That it must be set forth in the complaint, and the conviction must bear, that the value of the subject of the charge did not exceed £.10.*

By sect. 66, 3. Geo. IV. c. 78, the jurisdiction of the Edinburgh Narrative. Police Court was extended to any criminal act committed within the bounds of police. By sect. 8. of 7. Geo. IV. c. 115, there are excepted from that jurisdiction the four pleas of the Crown, stouthrief, theft by housebreaking, housebreaking with intent to steal, simple theft to an amount exceeding L.10, theft by opening lockfast places, theft aggravated by being habit and repute a common thief, or by three previous convictions, reset of theft to an amount exceeding L.10, reset of theft aggravated by three previous convictions, falsehood, fraud, and wilful imposition to an amount exceeding L.10, and various other offences.

By sect. 11. of 7. Geo. IV. c. 115, it is enacted, ‘ That in all cases ‘ of theft, or of reset of theft, or of falsehood, fraud and wilful im- ‘ position, which shall be tried in the said police court, the com- ‘ plaint and the conviction following thereon shall bear, that the sum ‘ of money, or the value of the article or articles stolen, resetted or ‘ obtained by falsehood, fraud and wilful imposition, did not exceed ‘ L.10 sterling.’

Anderson, gold and silver smith, was cited before the police court, upon a complaint at the instance of the Police Superintendent, ‘ for breach of trust, in so far as, upon the 8th September last, or ‘ one or other of the days of that month, or about the latter end of ‘ August last, or in the beginning of the month of October last, ‘ Mrs Harriet Furlong or Caddie having, within the shop in West ‘ Register Street foresaid, then and now occupied by the said John ‘ Anderson, delivered to the said John Anderson a topaz stone, for ‘ the purpose of his setting the same, along with other stones, in ‘ a broach ; the said John Anderson did, time and place foresaid, ‘ wickedly and feloniously, and in breach of the trust reposed in him, ‘ sell, or otherwise dispose of the said topaz stone, and did apply the

15 Feb. 1836.

Anderson v.
Stuart.

—
Narrative.

‘ same for his own use, and did substitute in place thereof, in said broach, a piece of glass or composition resembling a topaz stone.’ The police court pronounced this sentence: ‘ The Judge finds the complaint proved against the defender by the witnesses before named and designed, and therefore sentences and adjudges the said defender to pay a fine of L.10 sterling, and grants warrant to commit him to the tolbooth of Edinburgh until said sum be paid; the period of confinement not to exceed twenty days.’

Anderson brought the sentence by suspension before the Court of Justiciary, founding upon sect. 11. of the Police Act, 7 Geo. IV. c. 115, and that neither the complaint nor the sentence bore that the value of the topaz did not exceed L.10. The police court had not jurisdiction in cases of breach of trust to an unlimited amount. Breach of trust must be included under ‘ falsehood, fraud and wilful imposition,’ the jurisdiction as to which is restricted by sect. 8. of the act.

The superintendent *answered*—(1.) Sect. 8. does not apply to breach of trust, which is a distinct nomen juris, regarding which the jurisdiction of the police court continues, as declared by 3. Geo. IV. c. 78, § 66. (2.) Supposing it to fall under falsehood, fraud, breach of trust, the value of the topaz was proved under L.10.

Opinion of
Court.

Lord Gillies.—The distinction betwixt breach of trust and theft is now clearly settled; but not so the distinction between breach of trust and fraud. If breach of trust be not included under the cases provided for by sect. 8, then we must hold that there is no restriction as to the amount to which this offence may be tried in the police court. Again, if breach of trust be not included under ‘ falsehood, fraud and wilful imposition,’ it is not cognisable in the police court at all. But if it be so included, then, according to sect. 11, the complaint should bear, and so should the conviction, that the value of the article does not exceed L.10. This has not been complied with, and I am for suspending the judgment.

The other *Judges* were clear that breach of trust was included under falsehood, fraud and wilful imposition,—*Lord Moncreiff* adding, that he could not concur in the respondent’s doctrine, that every crime not excluded by the statute was cognisable in the police court.

The *Court* unanimously *suspended* the conviction, and found expenses.

Judgment.

Act. Dean of Fac. (Hope,) M’Neill. Alt. Rutherford, Maitland.
andrew, S.S.C. and M’Kenzie & M’Farlan, W.S. Agents.

John Mac-

R.

No. IV.

15th February 1836.

JOHN BONNAR

against

ERSKINE BEVERIDGE AND OTHERS, (MAGISTRATES OF DUNFERMLINE,) AND JAMES SIMPSON, (SUPERINTENDENT OF POLICE.)

NOBILE OFFICIUM.—PROOF.—(OATH.)—*Magistrates may commit a witness refusing to take the usual oath.*

BONNAR having been cited verbally, more burgi, to attend as a witness in a cause in the police court, Dunfermline, and having attended and refused to take the usual oath as a witness, was committed to jail for twenty-four hours by warrant of two of the Magistrates. He applied for suspension and liberation, on the ground of the informality of citation, and the non-dependence of any cause in which the interference of the Superintendent of Police was required.

The Court were of opinion, that a witness who appears in court, and after the Magistrates had sustained the competency of the cause, and who, as in this instance, did not state at the time the above objection, cannot refuse to take the usual oath. The Magistrates might compel him to do so, by exercising their power of commitment.

The Court refused the suspension, and found expenses.

Judgment.

Act. McNeill, Jo. Wilson.

Alt. Dean of Fac. (Hope,) Deas.

Ad. Wilson,

S.S.C. and Douglas & Graham, W. S. Agents.

R.

No. V.

29th February 1836.

LORD ADVOCATE

against

SWANSTON, HERKES, WAGSTAFF & FAIRGRIEVE.

NIGHT POACHING.—STAT. 9. GEO. IV. c. 69.—ASSAULT.—PARTICEPS CRIMINIS.—*Circumstances sufficient to constitute participation in the crime of assault.*

29 Feb. 1836.

Lord Advocate
v. Swanston
and Others.

SWANSTON and others were indicted, (1.) under the 9th section of the 9. Geo. IV. c. 69, 'An Act for the more effectual prevention of persons going armed by night, for the destruction of game;' and, (2.) for assault, aggravated by serious injury of person and effusion of blood. At the trial it was contended for the three last-named parties, that as there was no direct evidence of assault against them, mere presence at the commission of the crime will not constitute participation in guilt. Such would not be the case in a trial for mobbing and rioting, where the crime of one is more decidedly the crime of the whole than in a case like this; 1. *Alison*, 524. The declaration of Swanston could not be evidence against the others.

Opinion of
Court.

Lord Justice-Clerk held that each declaration could only be evidence against the party by whom it was emitted; that concert among the pannels was proved, by their having gone with the unlawful intention of poaching, and having so far aided and assisted one another; that they all warned the party assaulted, when he came up, to stand back; all were present when the first violence was committed, and when one was seized the others came back to his assistance, and all are apprehended together. The case of mobbing and rioting affords no analogy. This was not, as may occur in a mob, an offence committed by one party, in which the others who happened to be present have no concern. It was the case of an assault committed in the prosecution of an unlawful purpose, in which all were engaged, and therefore all guilty, though the Jury might say whether they were so in an equal degree.

Verdict.

The Jury unanimously found the prisoners guilty of the first charge as libelled; and Swanston guilty of the second charge as libelled, and the other three persons guilty art and part of the second charge as libelled.

Judgment.

Swanston seven years' transportation. The three others imprisonment in Bridewell for eighteen months.

Act. *Shaw Stewart, Handyside.*

Att. *Shand, D. Mure.*

R.

No. VI.

12th March 1836.

CHARLES DAVILIN

against

WILLIAM JEFFREY, (MAGISTRATE OF PAISLEY.)

PROCESS-CRIMINAL.—(ILLEGAL SENTENCE AND COMMITMENT.)

By section 90. of the Paisley Police Act, (1806,) it is enacted, That
 ‘ it shall and may be lawful to the said Bailies within the burgh,
 ‘ and to the Justices within the suburbs, to commit idlers, vaga-
 ‘ bonds, public and sturdy beggars, and all persons who have no
 ‘ settled place of residence, or follow no lawful employment, to the
 ‘ said bridewell or workhouse, to be kept at hard labour for a period
 ‘ not exceeding three months for every offence.’

Davilin was apprehended by the police of Paisley, and brought
 before Mr Jeffrey, one of the Magistrates of Paisley, who granted a
 warrant of the following tenor: ‘ By William Jeffrey, Esq. one of
 ‘ the Magistrates of Paisley.’—‘ Whereas it has been proved to
 ‘ my satisfaction, that Charles Davilin, present prisoner in the po-
 ‘ lice office of the burgh of Paisley, was brought to the office upon
 ‘ the evening of Thursday, the 25th June current, charged with
 ‘ being found prowling about the quay under suspicious circum-
 ‘ stances; and farther, that he is habit and repute a loose charac-
 ‘ ter, and an associate of such within the town of Paisley, and fol-
 ‘ lows no lawful employment :

‘ Herefore, I do hereby sentence and adjudge the said Charles
 ‘ Davilin to be imprisoned in the bridewell or correction-house
 ‘ of Paisley, there to be detained for the space of thirty days from
 ‘ and after this date, and to be kept at hard labour, subject to the
 ‘ rules and regulations of the house; and grant warrant to officers
 ‘ of court, and their assistants, and others whom it may concern,
 ‘ for apprehending, committing and detaining the said Charles
 ‘ Davilin accordingly, and decern. Given under my hand, at
 ‘ Paisley, this 26th day of June 1835.’ (Signed) ‘ WILLIAM
 ‘ JEFFREY.’

Davilin *suspended*, and craved liberation. P. Robertson *pleaded*
 —That it did not appear that there had been any prosecutor, or re-
 cord of any trial, or conviction for any offence, except of being
 charged with being found prowling, &c. A mere allegation of
 proof of a charge of an undefined offence would not do. It might
 be said of the Lord Lieutenant, equally as of Davilin, that he had

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*Davlin v.
Jeffrey.*

sometimes no settled place of residence, or followed no lawful employment, yet they were alike entitled to a formal complaint, trial, proof and conviction of the offence charged.

Solicitor-General.—There was, at all events, the charge and offence of being habit and repute a loose character, which was ‘proved;’ and this shewed there had been a trial, and justified the sentence so far.

Opinion of
Court.

Lord Gillies.—The warrant is grossly illegal. It can never be allowed that a sentence of thirty days’ imprisonment is to be pronounced against a party, because it was proved that he was brought to the police office charged with something.

Lord Mackenzie, in reference to the argument of the Solicitor-General, thought, that the words, ‘that he is habit and repute,’ &c. should be connected with the word ‘charged,’ and not with the word ‘proved.’

The other Judges concurred.

Act. *P. Robertson, Ja. Anderson.* Alt. Sol.-Gen. (*Cuninghame*,) *Shaw Stewart.*
C. Fisher, S.S.C. and James Adam, W.S. Agents.

R.

No. VII.

12th March 1836.

LORD PROVOST AND MAGISTRATES OF PERTH
against
LORD ADVOCATE AND MAGISTRATES OF
DUNFERMLINE.

BURGH ROYAL.—(FUNCTIONS OF MAGISTRATES.)—PRISONER.—
(1.) *The Court, without determining the question of right, allowed a chief magistrate to continue his wonted style and title of ‘Lord Provost.’* (2.) *Justiciary Court may authorise criminal prisoners,—a burgh jail being insecure,—to be transmitted to another jail in a different sheriffdom.*

THE Magistrates of Perth suspended a warrant of the Justiciary Court appointing the criminal prisoners in the jail of Dunfermline, at the time insecure, to be transmitted to the jail of Perth,—on the ground of informality of the intimation to the ‘Provost of the burgh, and as representing the Magistrates of the said burgh of ‘Perth,’ and the incompetency in the procedure—the difference of

sheriffdom—the want of requisite accommodation in Perth jail— and the more suitable accommodation in the neighbouring jails of Kirkcaldy, &c.

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Perth v. Lord
Advocate and
Magistrates of
Dunfermline.

Answers were lodged for the Lord Advocate and Magistrates of Dunfermline.

At the moving of the bill and answers, the Court adverted to the bill being in name of the ‘ Lord Provost of Perth,’ &c.

Patton, in support of the designation, *pleaded*—That the burgh of Perth is one of the most ancient in Scotland, and at a very early period enjoyed distinguished privileges, as the residence of the Scottish monarchs, the seat of the court,—of the parliament,—and of the national councils of the clergy. The earliest charter in favour of the burgh, extant, was granted in 1210 by William the Lion, who held his court and residence there. This charter, *verbatim* narrated in a subsequent charter granted by Robert III. in 1399, itself narrates a prior grant in favour of the burgh, by King David, the grandfather of William, who died in 1153, dated 10th of April, in the 36th year of his reign. A cotemporary writer testifies to its importance and opulence at that early period, and describes it as a main support of the kingdom; *Cambden, Brit.* p. 708; *Cant's History of Perth*, p. 24. It was the seat of the court of Malcolm the Fourth, who, in a charter addressed to the monks of Scone, describes Perth as the principal seat of his kingdom. It was the favourite residence of other monarchs, and received charters, containing additional grants of land and of immunities, from various kings; *Chart. Scot. v. Caledonia*, p. 776, 777; *Tytler's Scot.* vol. ii.; *Jamieson's Scottish Palaces*, p. 55.

Perth enjoyed this pre-eminence until the middle of the fifteenth century, at which time Edinburgh became the capital. Of the thirteen Parliaments held in the reign of James the First, eleven were held at Perth, one at Stirling, and one at Edinburgh. The National Councils of the Scottish Clergy were held there uniformly till 1459; *Maitland's Hist. of Edin.* p. 6; *Gough's Cambden's Brit. voce Perthshire*; *Cant's Hist. of Perth*. Though it lost its pre-eminence by the selection of Edinburgh as a capital, Perth has uniformly and constantly maintained the second place in the order of burghs, and its right to do so has been repeatedly and solemnly acknowledged. Attempts were made to question its right by Dundee, which is the third in order, but these attempts uniformly failed.

On the 15th of April 1601, James the Sixth accepted the office of Chief Magistrate of Perth. His acceptance of the office is described in the Diary of Mr Dundee, a burghess of the town, and

12 Mar. 1836. an eye-witness of his induction. His Majesty was enrolled as a burgess and guild-brother, and he himself inscribed his name in the guildry register. Adamson, the author of the *Muses Threnodie*, also witnessed the King's induction into the office, and describes it in the poem bearing that name. The poem was published in 1638, and is dedicated 'To his native town of Perth, THE LORD PROVOST, Bailies and Council thereof, his worthy patrons.' Cant, who published an edition of the poem in 1774, with extensive notes, similarly dedicates his work to 'THE LORD PROVOST, SHERIFF and CORONER,' and to the other Magistrates of that day.

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The charters of the burgh gave a right to the burgesses to appoint a Sheriff, having, within the town, power and authority co-extensive with the Sheriff of the county. The office has been uniformly held by the chief magistrate, as is that of Coroner, and the appointment to those offices is annually made. The chief magistrate of Perth has exercised, in various instances, the power of trying crimes punishable by death, and sentences of death pronounced by him have been carried into execution.

For a very long period, a use and consuetude has existed of addressing the chief magistrate of Perth by the title of the Lord Provost. He has uniformly enjoyed the title in the burgh, and in correspondence on the affairs of the town. He has been called, under that designation, to attend the annual Convention of Burghs. He communicates with Secretaries of State, and other public officers, under that designation, and is so addressed by them in their communications to him. He holds various powers and functions conferred on him under that designation by various acts of Parliament, and was introduced to the King at Holyroodhouse, in 1822, by the Lord-Lieutenant of Perthshire, under that title, while the chief magistrates of Aberdeen, Dundee, &c. were presented as Provosts of those towns only. The Gazette of that time contains the address of the 'Lord Provost, Magistrates and Council of Perth,' which was presented to his Majesty, and which was acknowledged by the Secretary of State to have been received by the king in the usual form. Further, he has received the title and designation under a deed granted by the Crown, and bearing the sign-manual of his Majesty. In the precept for passing a warrant, under the Great Seal, for the incorporation of the Royal Lunatic Asylum at Perth, he is expressly directed and appointed a director, under the title of Lord Provost; and in the charter passed upon this precept or warrant, and passing the Great Seal, the designation is repeated.

In England, the title of Lord Mayor is assumed by the chief magistrates of London and of York. In neither case was it given by any express grant; *Northcote's Hist. of London*, b. i. c. iv. p. 70;

Drake's Hist. and Ant. of the City of York, b. i. c. 6, p. 181. In Edinburgh the title of Lord Provost, in like manner, does not stand upon any grant, but upon prescriptive usage and incidental recognition alone; *Maitland's Hist. of Edin.* p. 227, c. i.

12 Mar. 1838.

Magistrates of
Perth v. Lord
Advocate and
Magistrates of
Dunfermline.

Opinion of
Court.

The Lord Justice-Clerk, without deciding the question of right, held, that as the designation was allowed in a charter under the Great Seal, and as the Provost of Perth, in 1822, had been introduced to his late gracious Majesty as 'Lord Provost' of Perth, and this title had been recognised by the Home Secretary in answering an address to the King, they ought not to object to his now using the designation.

Lords Gillies, Mackenzie and Moncreiff concurred.

Lord Meadowbank thought, as the question was raised, they had power to decide it upon the evidence adduced. He was not satisfied with the authority founded on acts of Parliament, addresses or otherwise, where any designation was introduced *periculo petentis*. A party going to a levee is announced by the designation he gives in; and a gracious answer to a loyal address argues nothing in support of the right to a particular designation.

Lord Medwyn was inclined to agree with Lord Meadowbank, that the use of the designation in a private act of Parliament, or in a charter of incorporation of a company, was not sufficient to give a right to the designation.

The Court allowed the designation on the bill to stand.

The Court farther approved of the intimation to the Chief Magistrate, it being his duty to intimate the notice to the other magistrates. Their Lordships, also, (Lords Meadowbank and Medwyn dissenting,) approved of their warrant on the merits, proceeding upon the authority of the cases of Dumbarton, 25th June 1824, (*Sh. J. C.* 118,) and Nairn, the criminals in the jail of which were appointed to be transported to Forres. *Lord Medwyn* doubted the authority of the cases referred to. Nairn, at all events, was within the same sheriffdom as Forres, which latter town did not object.

The Court, in respect it would be competent for the suspenders to complain of the proceedings of the Magistrates of Dunfermline in the event of any abuse of the power given them to transport criminal prisoners to the jail of Perth, refused the bill.

Act. Patton. Alt. Sol.-Gen. (*Cuninghame*,) and *Shaw Stewart*.
Murray, W. S. and *D. Cleghorn*, W. S. Agents.

William

R.

No. VIII.

12th March 1836.

DAVID AYTON

against

WILLIAM HAIG, (PROCURATOR-FISCAL, GLASGOW.)

LOCAL STATUTE.—(GLASGOW POLICE ACT.)—This was a suspension and liberation of a sentence by one of the Magistrates of Glasgow, sitting in the police court, in which the High Court, upon a construction of the Police Act for that city, particularly of § 121, which ‘requires that a record be preserved of the charge and of the judgment pronounced,’ found that the act had been sufficiently complied with, by the preservation of the schedule given to the jailer as the warrant of commitment.

Act. Dean of Fac. (*Hope*), and Jas. Anderson. Alt. Sol.-Gen. (*Cunninghame*),
and Handyside. Jo. Cullen, W. S. and D. Cleghorn, W. S. Agents.

R.

No. IX.

12th March 1836.

LORD ADVOCATE

against

JAMES M'NEILL OR MATHIESON.

PROCESS-CRIMINAL.—(*Prisoner returning from transportation.*)

IN the petition of the Lord Advocate for warrant to detain M'Neill, who had been sentenced to death, but which sentence had been remitted, on condition of his being transported for life, and who, as alleged, had returned from transportation, and praying their Lordships to ordain him to be sisted before them, ‘in order that his identity may be established, and the conditions of the foresaid remission carried into execution,’ the Court, upon the authority of the cases of Young, March 1788, Plunkett, Dec. 1791, 2 *Hume*, 145, found it competent to take proof of the prisoner's identity, and, on his own admission of the fact alleged, ordained him to be detained in the tolbooth of Edinburgh till removed for transportation.

Act. Sol.-Gen. (*Cunninghame*), Innes. Alt. A. Swinton.

R.

No. X.

12th March 1836.

LORD ADVOCATE
against
ARCHIBALD ROBERTSON.

RAPE.—*Found, that this crime is completed by forcible penetration, without emission.*

LORDS MACKENZIE and MEDWYN certified to the High Court, ‘to consider whether any and what sentence should follow,’ on a verdict pronounced against Archibald Robertson, tried at Glasgow, 6th January 1836, for rape; the verdict being, ‘The Jury unanimously find that the pannel had carnal connection, as libelled, with Christian Wright, forcibly, and against her will, by penetration of her private parts; but find that it is not proved that actual emission followed penetration; and in respect of the pannel’s former insanity and imbecility of mind, recommend him to mercy.’

The Court having heard counsel at great length, (see arguments in *Swinton’s Justiciary Reports*, part i. p. 94,) and having taken time to consider the case, pronounced the following opinions:

Lord Gillies.—I consider this a case of great importance, but it is one on which my opinion has never varied. By the terms of the verdict carnal knowledge was found proven forcibly and against the will of the woman, but emission was found not proven. Does penetration without emission amount to the crime of rape? Unquestionably it does. Is there any rational difference in the offence, in a case of emissio, and in that where there is penetratio only? The guilt of one party—the injury to the other—the outrage against decency—the offence against religion, is the same. There is no foundation in morals, in reason, or in religion, for holding that both are necessary to the completion of the crime. If the law were such; we should be compelled to obey it, however contrary to reason it might be; but I do not think it necessary to go over the cases which have been quoted, to shew that the weight of authority is the other way. In England, the opinion of a majority of the Twelve Judges was certainly given, to the effect that both circumstances were necessary; but the high authority of Hale is opposed to this doctrine; and, besides, the law of England has been rendered clear by a late Act of Parliament; and if we were to find that both

Opinion of
Court.

12 Mar. 1836.

Lord Advocate
v. Robertson.

Opinion of
Court.

emissio and penetratio were necessary to the completion of the crime, a similar act relative to Scotland would be immediately required; but there is no case in which it has been decided that emissio is necessary.

Lord Meadowbank.—I have uniformly entertained the same opinion. We do not find that a decision contrary to the opinion expressed by Lord Gillies has ever been pronounced in this Court. All the authorities will be found to arrive at the same conclusion. In the Roman law, all that is said is, that the crime must be completed. But what constitutes completion? In support of the doctrine maintained for the pannel, reference was made to Carpsovius. My recollection of the practice, as laid down by that commentator, is that reference was made to midwives. This proves that penetration was the point required to be proved. We have been told that there was nothing on this point to be found in the canon law. But in the ‘*Dictionnaire Historique et Critique*’ of Bayle, (Rotterdam, 1720,) voce *Quellenec*, (vol. iii. p. 2402,) we find a detail of the mode of deciding questions of divorce on the ground of impotency under that law, from which it is evident that intromissio, and not emissio, was regarded. It is well known, too, that a marriage between a eunuch and female was valid by the canon law. In our own law reference has been made to the case of *Montgomerie*. Besides Lord Gillies, there were present, on that trial, Lord Succoth, Lord Pitmilley and myself, and we all concurred in the opinion expressed by his Lordship. I may mention also, from the notes of the late Lord Meadowbank, that when he was at Jedburgh, as Advocate-depute, Lord Hailes told him he never looked upon emission as necessary; and that if there was evidence of it, he considered it a proof of a less extent of violence having been used, as the woman, in order to depone to emission, must have been, in some degree, collected when the crime was committed. On the whole, I am of opinion, that to constitute the crime of rape, it is sufficient that there be full penetration; though in grown women mere conatus is not sufficient, it is necessary that the penetration be complete.

Lord Mackenzie.—I entirely concur. What is the essence of the crime? Dishonour by violence, not the danger of pregnation, as to which no question is ever asked. Is a woman dishonoured or not by a forcible entry of her person? This has never been doubted in any country of Europe. Our law has always been consistent on the point. No statute or decision, and no writer down to Mr Burnett, ever required more than full penetration. I cannot see why there must be emission, if impregnation is not necessary. It adds nothing

to the wickedness, or to the injury. No indictment that I have seen specifies that emission took place; but had it been an essential circumstance, it must have been stated. In a great majority of the cases of rape which have occurred, actual emission has not been proved, and yet capital punishment has followed. It is argued in English cases that emissio may be presumed, as in adultery; but it is not emissio, but penetratio, that is presumed in adultery. And between it and rape there is this difference, that in adultery one party cannot be made a witness. The essentials of the crime must be proved, not presumed. In cases of rape, it would not be enough, as in adultery, to prove that the man was 'nudus cum nuda.' The completion of the crime must be proved by the woman's evidence, or when that is impossible, (as in the case of children, or of a woman who has died since the commission of the offence,) by proof as to the state of her person. Now, in a great number of cases there can be no proof of emissio. It is said, questions are put to the woman, as to whether the man had his will of her. But this is only done from a desire on the part of the prosecutor to exhaust the case; just as in a trial for murder, if the death had been followed by maiming and disfiguring the body, such treatment would be proved, to exhaust the case, though not an essence of the crime. But suppose that this question has hitherto been put, because the point of law was thought to be doubtful, it affords no proof of what the requisites of the crime are. If rape required emissio, then the dishonour of the woman, when no emissio took place, would be a crime of an inferior nature, not a plea of the Crown, and might be tried by the inferior courts; yet there is no indication of such an opinion in our law.

Lord Moncreiff.—The verdict may admit of two meanings. It finds carnal knowledge proved as libelled, forcibly, and against the woman's will, but finds emission not proved. If this means that this fact was not specifically proved, no one maintains that that is necessary. But the question is, what is the carnal knowledge libelled? I am persuaded that the whole weight of authority is in favour of complete penetration by violence being sufficient. The civil law contains nothing inconsistent with this. Mr Hume well defines the crime of rape, 'knowledge of a woman's person forcibly, and against her will.' When we look at the English law, there is no doubt that there was a period when a majority of the Judges gave a contrary decision; some of the ablest men that ever sat on the Bench dissenting; but when we look back to Coke and Hale, we see that the old law of England was different; and the new act restores it to what it was in their times. With us in Scot-

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Lord Medwyn.—Having assisted at the trial, I think it right to state, that I believe the Jury held that there was complete proof of penetration, but not of emission. Indeed, there was not evidence of emission. I concur in the opinions delivered. The principle which fully supports this opinion is well stated in a passage in East's Pleas of the Crown, (vol. i. p. 437,) where the reason why such should not be required to constitute the crime of rape is well explained. 'The quick sense of honour,' he says, 'the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete.' I have no doubt that the cause of the peculiarity which existed till lately in the law of England, (for, so far as I know, in this respect it was peculiar,) was the apprehension of false accusations in such a crime as this, and where one witness is sufficient to convict, and the consequent anxiety that there should be complete proof of the violence having been committed. But it was not, even before the statute 1828, necessary that there should be proof of emission. All that was required was a conviction on the minds of the Jury that it had taken place. In the text of the civil law, there is nothing to justify the remark of Carpsovius. And Müller, the Saxon lawyer, repudiates

his doctrine; as does Boehmer, in his *Elementa Jurisprudentiæ Germanicæ*, where, after describing in what the crime consists, as ‘*conjunctio membrorum genitalium violenta*,’ he adds, ‘*evidens est seminis immissionem hic frustra a Carpsovio requiri*.’ It is laid down by the most eminent of the Spanish canonists, Sanchez, in his Treatise *De ‘Sancto Matrimonii Sacramento,’* ‘*Quando vir potest coire non tamen seminare, validum esse matrimonium, jus tenebant doctores*.’ And it is well known that *castrati*, in the words of Valentini, (*Pandectæ Medico-Legales*, vol. i. p. 136,) *possunt deflorare quancunque mulierem, nullam tamen impregnare*. To this Juvenal alludes, in satirising the vices of the Roman women :

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Sunt quæ Eunuchi imbelles, ac mollia semper
Oscula delectant.

At first they were not forbidden to marry, and in Valentini there is a long chapter, ‘*De Conjugio Eunuchi*,’ and it was only forbidden by the canon law, by a rescript of Sixtus V. among the other vigorous attempts at reform by that able Pontiff, ‘*quia tamen ad coeundum, non ad generandum idonei*.’ It has been well said, that ‘it would be a strange state of the law, if a person capable of coition, and of contracting marriage, was held incapable of committing a rape, so that he may have perpetrated all the more atrocious parts of his crime, and yet, being interrupted in the least voluntary constituent of it, escape the well-merited vengeance of the law, while it is evident that the innocent victim has suffered in mind, body and reputation, as much as if the crime had been legally committed;’ (*Paris and Fonblanque’s Medical Jurisprudence*, vol. i. p. 434.) This alludes, of course, to the state of the law in England before the late change. In America, the English law on this subject, as settled by the courts, after considerable fluctuation, was generally adopted; but not in the state of Philadelphia. And in the new state of Illinois, that part of the law which required emission was formally repealed in 1819. As it does not appear ever to have been otherwise held in our practice, we can have less hesitation in supporting this view of the law, so consistent with the feelings of human nature, and the laws of morality, since such has been now adopted in the legislation of England.

Lord Justice-Clerk.—The very important point, raised by this verdict has never yet been solemnly decided. I have arrived at the same opinion as that expressed by your Lordships. I am not satisfied that there is any dictum in the civil law which warrants the opinion of Carpsovius. In our own law, Mackenzie gives no indication of opinion. Mr Hume leaves his opinion to be gathered

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from the cases; and when we examine these, we do not find, in the interlocutors of relevancy, or in the judgments pronounced, that the Court found the circumstance of emissio necessary. There is, indeed, the indication of a contrary opinion by Burnett, to which I pay the greatest respect, whenever he speaks from his own experience; but the case of Foulden affords no materials for the conclusion to which he comes. Then we have the express opinion of Mr Alison, who has given the profession a very valuable work on criminal law. We must decide this question according to the law of Scotland, of which there thus seems to be no doubt. As to the law of England, the opinion both of Coke and of Hale, in their most authoritative works, is to the same effect. Hawkins' opinion is very undecided, being qualified by the words, 'it is said,' or, 'it seems.' Then it is evident that doubts have been entertained in later times upon the point. But the great authorities in English law, (even before the recent statute,) are favourable to the doctrine of our law, which I hold to be, that there must be a full penetration, in short, a coitus, and that nothing more is necessary to constitute the crime. In the cases of this nature which I have had the misfortune to try, I have never stated the law as different from the opinion which I now entertain. Where the woman swore that the man had not his will of her, I have told the Jury that this was merely an attempt; but I never charged to the effect, that when there was full and complete penetratio, any thing further was necessary to constitute the crime of rape.

Judgment.

The Court accordingly found, that the verdict returned against the pannel establishes the crime of rape as libelled against him.

Mr Solicitor-General stated, that, under the circumstances of the case, he thought himself justified in restricting the libel.

In respect of the above judgment of the Court, and the restriction entered on the record, the pannel was sentenced to transportation beyond seas for life.

For the Crown, *Sol.-Gen. (Cunningham,)* and *Handyside.*For the Pannel, *Shand*
R.

APPENDIX.

JUDGMENTS OF THE HOUSE OF LORDS,

CONTINUED FROM 29TH MARCH 1834 TO 12TH SEPTEMBER 1835.

WILLIAM AINSLIE TURNER, *App.*
MRS LILLIAS BALLENDENE or M^cWHANNEL, *Resp.*
(3d March 1832, F. C.)

29th March 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

ARTHUR JOHN ROBERTSON, *App.*
MRS LETITIA ETTLES, *Resp.*
(15th Feb. 1833, F. C.)

5th April 1834.—Ordered and adjudged, That the interlocutors complained of be reversed.

ROBERT WEIR, *App.*
GAVIN GLENNIE, *Resp.*
(4th Feb. 1832, F. C.)

7th April 1834.—Ordered and adjudged, That the interlocutors complained of be reversed; and the Lords find it not proved that the occupiers of the lower mills had possessed a road or access to the damhead, or been in use to regulate the sluice there, for seven years previous to the commencement of this action; and that, on the contrary, it is proved that any possession by them does not reach back for nearly so long a period: The Lords also find, that as the respondents had no express grant of servitude, or decree of declarator to this effect, and as they have had no possession suffi-

cient to entitle them to a possessory judgment, the appellant, as proprietor of the ground, has right to prevent them or their servants from using the road in dispute, except in the case of obstruction in the water of the mill-lead in question, or of actual damage arising to their works; but in respect it is not proved that the respondents or their servants had done, or threatened to do, any thing inconsistent with the rights of the appellant, the Lords find, that the appellant was not entitled to such interdict; therefore refuse the same, but grant the interdict craved as to the use of the road to Tamaree mill, acquired by the appellant's predecessor by feu-contract from Archibald Napier, the respondents making no claim thereto; and the Lords farther find no expenses due to either party, in any part of the proceedings: And it is farther ordered, that, with the above findings, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be just and consistent with this judgment.

ALEXANDER SCOTT, *App.*

JAMES STEWART, *Resp.*

(23d Jan. 1829, F. C.)

7th April 1834.—Ordered and adjudged, That the interlocutors complained of be reversed; and it is declared, that the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take the office: And it is further ordered, that with this finding the cause be remitted back to the Court of Session, to proceed therein as shall be consistent with this judgment.

ANDREW MILLER, *App.*

EARL OF GLASGOW, *Resp.*

(1st Feb. 1831, F. C.)

7th April 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

ROBERT ALLAN AND SON, *App.*

ALEXANDER TURNBULL, *Resp.*

(1st March 1833, F. C.)

8th April 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

MAGISTRATES OF DINGWALL, *App.*

Mrs HAY MACKENZIE, *Resp.*

(11th July 1832, F. C.)

12th April 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

JOHN HUNTER, *App.*

JAMES GEORGE'S TRUSTEES, *Resp.*

(24th May 1832, F. C.)

13th May 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.200 costs.

JAMES STEWART, *App.*

WILLIAM KELLY, *Resp.*

(21st Jan. 1833, F. C.)

16th May 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.200 costs.

SIR C. A. LESLIE, *App.*

ALEXANDER SHEPHERD, *Resp.*

(22d Feb. 1833, F. C.)

30th May 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.178 : 13 : 6 costs.

WILLIAM PAUL, *App.*

ARCHIBALD GIBSON, *Resp.*

(13th Feb. 1834, F. C.)

14th June 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

CHARLES FERRIER, *App.*

WILLIAM MOWBRAY, *Resp.*

(6th July 1832, F. C.)

21st June 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.175 costs.

JUDGMENTS OF

JAMES HAMILTON, *App.*

Miss MARGARET LITTLEJOHN, *Resp.*

(15th Dec. 1832, F. C.)

8th July 1834.—Ordered and adjudged, That the interlocutors complained of be reversed.

WILLIAM FORBES, *App.*

JOHN LIVINGSTONE, *Resp.*

(16th Feb. 1832, F. C.)

8th July 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

JOHN LAWSON, *App.*

Mrs A. W. OGILVY, *Resp.*

(16th May 1832, F. C.)

8th July 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

Rev. JAMES CRAIG, *App.*

DUKE OF HAMILTON, *Resp.*

(26th May 1831, F. C.)

5th Aug. 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.119, 10s. costs.

HENRY ALEXANDER DOUGLAS AND OTHERS, *App.*

JAMES WILLIAMSON, *Resp.*

(12th Feb. 1832, F. C.)

7th Aug. 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.165 : 6 : 5 costs.

COLONEL ROBERT HENRY, *App.*

ALEXANDER MACEWAN, *Resp.*

(25th May 1832, F. C.)

9th Aug. 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.200 costs.

THOMAS MACMILLAN AND OTHERS, *App.*

CHARLES CAMPBELL, *Resp.*

(4th March 1831, F. C.)

14th Aug. 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.17.1 costs.

JAMES COX, *App.*

MISSSES M. AND M. STEAD, *Resp.*

(1st June 1833, F. C.)

15th Aug. 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.200 costs.

LORD ELIBANK AND OTHERS, *App.*

PATRICK MURRAY, *Resp.*

(2d July 1833, F. C.)

19th March 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with L.100 costs.

EARL OF STRATHMORE'S TRUSTEES, } *App.*
AND SIR JOHN MARJORIBANKS' TRUSTEES, }

PATRICK MURRAY, *Resp.*

(9th July 1833, F. C.)

19th March 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

WILLIAM MOREHEAD, *App.*

DR ROBERT MOREHEAD AND OTHERS, *Resp.*

(2d July 1833, F. C.)

31st March 1836.—Ordered and adjudged, That the interlocutor complained of be reversed.

MRS ANN HAMILTON, *App.*

ALEXANDER, DUKE OF HAMILTON, *Resp.*

(8th July 1828, F. C.)

31st March 1834.—Ordered and adjudged, That the interlocutors complained of be affirmed.

JOHN JACK, *App.*
 WILLIAM LYALL, *Resp.*
 (12th June 1833, F. C.)

1st April 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs, to be certified by the clerk assistant.

WILLIAM TAYLOR, *App.*
 JAMES KERR, *Resp.*
 (17th Jan. 1833, F. C.)

8th April 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

GEORGE JOHNSTON, *App.*
 EDINBURGH AND GLASGOW UNION CANAL
 COMPANY, *Resp.*
 (17th Jan. 1834, F. C.)

9th April 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

MAGISTRATES AND TOWN-COUNCIL OF DUNBAR,
App.
 MARY, DUCHESS DOWAGER OF ROXBURGHE, AND
 OTHERS, *Resp.*
 (4th July 1833, F. C.)

10th April 1835.—Ordered and adjudged, That the interlocutors complained of be reversed.

PROFESSOR WALKER'S TRUSTEES, *App.*
 THOMAS MANSFIELD, *Resp.*
 (28th June 1833, F. C.)

10th April 1835.—Ordered and adjudged, That the interlocutor complained of (in so far as it finds the defenders liable in expenses) be reversed; and that the said interlocutor in all other respects be affirmed.

LORD MACDONALD, *App.*

HON. ARCHIBALD MACDONALD, *Resp.*

(29th May 1832, F. C.)

13th April 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

JOHN NAPIER, *App.*

MISS XAVERIA GLENDONWYN AND OTHERS, *Resp.*

(12th June 1833, F. C.)

13th April 1835.—Ordered and adjudged, That the interlocutor complained of be affirmed, with costs.

RICHARD ALEXANDER OSWALD, *App.*

JAMES M'WHIRR, *Resp.*

(8th March 1833, F. C.)

13th April 1835.—It is declared, That it is the opinion of this House, that the statement of facts in the pleadings in this cause, mentioned as having been submitted to the Court, for their judgment thereon, does not furnish a sufficient ground for the judgment of the Court upon the question in this case, and that there ought to be a farther trial before a Jury upon another issue; and therefore it is ordered and adjudged, that the interlocutors in this case be reversed: And it is farther ordered, that the cause be remitted back to the Second Division of the Court of Session, in order that their Lordships may direct another trial before a Jury upon the following issue: That is to say, 'Whether the places in which, during the years 1822, 1824 and 1825, stake nets or other fixed machinery were placed and used for fishing salmon by Richard Alexander Oswald, and the other defenders, respectively, or their respective tenants, are within the water of Solway?' And it is farther ordered, that the defenders respectively, in the action in the Court below, be pursuers in the trial of the said issue: And it is farther ordered, that the before mentioned 'statement of facts' is not to be used or founded on by either party, as any evidence or admission of any fact therein alleged: And it is farther ordered, that the said Court of Session do and shall make such orders, and give such directions relative to the costs already paid, or ordered to be paid, by any of the said parties in this cause, as to such Court shall seem meet; and do farther proceed in the said cause in such manner as shall be just and consistent with this judgment.

JAMES FORRESTER, *App.*
JOHN CAMPBELL AND ANOTHER, *Resp.*
(28th June 1831, F. C.)

13th April 1835.—Ordered and adjudged, That the interlocutor complained of be affirmed.

SIR WINDHAM CARMICHAEL ANSTRUTHER, *App.*
Mrs MARION ANSTRUTHER AND HUSBAND, *Resp.*
(28th Nov. 1833, F. C.)

15th April 1835.—It is declared that this House, (by consent of parties,) forbears, *hoc statu*, to pronounce any judgment upon the matter of the said appeal; but it is ordered and adjudged, that the case be remitted back to the Second Division of the Court of Session, with an instruction to the Judges of that Division to order the matter of law in question to be heard before the whole Judges, including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole Judges.

**THOMAS, EARL OF ELGIN AND KINCARDINE, AND
 OTHERS, *App.***
SIR CHARLES HALKET, *Resp.*

ET E CONTRA.

(2d March 1833, and 9th Feb. 1831, F. C.)

16th April 1835.—Ordered and adjudged, That the interlocutor, in so far as complained of in the original appeal, be affirmed, with costs: And it is farther ordered, that the interlocutor of the Lords of the Second Division of 9th February 1831, complained of in the cross appeal, in so far as it finds the defenders entitled to expenses, since the date of the interlocutor therein mentioned, and remits to the Lord Ordinary to proceed accordingly, be reversed: And it is farther ordered, that if such expenses have been paid by the pursuer, the same shall be repaid to him by the defenders: And in regard to the interlocutors of the said Lords of the Second Division of 12th December 1832, it is declared, that the defenders are liable to the pursuer, as the consideration to be paid by them to him, from the commencement of the Pittfirran level, for working the coal fields in Clune and Balridge, in the sum of L.117, 10s. in addition to the sum of L.100, making together the sum of L.217, 10s. instead of the sum L.129 : 7 : 6, in the said interlocutor mentioned; and that the defenders are liable to the pursuer in the sum of L.425, as the full estimated expenses of clearing the Urquhart level, as

therein mentioned, instead of the L.212, in the said interlocutor mentioned, as the half of such expense: And it is farther ordered, that the interlocutors complained of in the said cross appeal, in so far as the same are not hereby altered and varied, be affirmed.

JOHN M'TAGGART, *App.*
WILLIAM WATSON, *Resp.*
(24th Jan. 1834, F. C.)

16th April 1835.—Ordered and adjudged, That the interlocutors complained of be reversed.

LIEUT.-GENERAL MATTHEW SHARPE, *App.*
CHARLES KIRKPATRICK SHARPE, *Resp.*
(3d July 1832, F. C.)

18th April 1835.—It is declared, That the disposition and deed of entail is not sufficient to prevent the said appellant, and the other heirs of entail, from selling, or otherwise disposing or burdening with debt the said estates, or from gratuitously alienating or disposing of the same: And it is therefore ordered and adjudged, that the several interlocutors complained of be reversed, and the cause remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment.

DONALD M'AULAY JUN. *App.*
JAMES ADAM AND DAVID BROWN, W. S. *Resp.*
(17th Feb. 1834, F. C.)

7th May 1835.—Ordered and adjudged, That the interlocutor complained of be affirmed, with this variation, that the appellant, in addition to the deduction of L.304 : 13 : 8, mentioned in the interlocutor of 15th (signed 18th) February 1834, is entitled to a farther deduction of the sum of L.200, paid by him on the 23d July 1832, under deduction of the interest due thereon, from the 17th November 1831, until the same was paid.

JAMES HUTTON SYME, *App.*
PETER BROWN, *Resp.*
(5th Feb. 1835, F. C.)

12th May 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

SAMUEL CATTERNS, *App.*

HUGH TENNENT, *Resp.*

(6th June 1834, F. C.)

12th May 1835.—Ordered and adjudged, That the interlocutors, in so far as complained of, be reversed: And it is farther ordered, that the said cause be remitted back to the said Court of Session, with instructions, first, to find and decern in terms of the interlocutor of the Lord Ordinary, of date 11th March 1834, excepting in so far as is hereby reversed, and that the right of the landlord's hypothec, claimed by the said Hugh Tennent, respondent, does not attach to the rent or price for the steam power and supply of water in question, but only to the separate rent for the buildings and grounds leased; and, second, to find that the said appellant is not liable in the expenses of the first and second advocations, nor of the reclaiming note to the Inner-House in the said appeal mentioned, and that he is not entitled to the expenses of such proceedings from the said respondent, but that the said appellant is entitled to the expenses from the respondents of such proceedings before the Sheriff-court of Lanarkshire, as, by the Lord Ordinary's interlocutor and remit in the first advocacy, was found ought to have terminated before the Sheriff in the appellant's, and that the said respondent is entitled, from the said appellant, to the expenses of such proceedings before the Sheriff, as were, according to the Lord Ordinary's said interlocutor and remit in the said first advocacy, considered to have terminated in the respondent's favour; and with instructions to the said Court of Session to remit to the Auditor to fix and allow such expenses before the Sheriff accordingly: And it is farther ordered, that the said Court of Session proceed farther in this cause as shall be just and consistent with this judgment.

JAMES CORBET PORTERFIELD, *App.*

ALEXANDER HOWDEN, *Resp.*

(17th June 1834, F. C.)

14th May 1835.—Ordered and adjudged, That the interlocutor complained of be affirmed, with costs.

WILLIAM JEFFREY, *App.*

HENRY PAUL, *Resp.*

(11th June 1834, F. C.)

15th May 1835.—Ordered and adjudged, That the interlocutor of 29th November 1831, (whereby the interlocutor of the Lord Ord-

nary of 8th March 1831 was recalled,) and the interlocutors of the 4th March and 11th June 1834 be affirmed, with this reservation and declaration, that the said appellant is entitled to, and ought to receive one-third part or share of the principal sum of L.400, contained in the said heritable bond by William Ewing, in the said proceedings mentioned, with a proportional part or share of such interest as may have been received, or may be due and payable therefrom, and also to a deduction or repayment of the sum of L.74, out of the costs found due to the said respondent in the said Court of Session.

FREDERICK GYE & CO. *App.*
SAMUEL JAMES HALLAM, *Resp.*
(18th Jan. 1834, F. C.)

15th May 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed; but the House thinks fit to declare, that this order is made upon consideration of all the peculiar circumstances of this particular case, and that it is not to be drawn into a precedent, as authorising the inference that a submission or arbitration, where the parties agreed that the arbiter shall order the losing party to pay the expenses, either leaves the question of expenses in his discretion, or leaves it to him to determine that any one is the losing party, other than the party against whom he makes his decreet-arbitral upon the merits of the case, to any amount.

JACOB YEATS, *App.*
MAGISTRATES OF GLASGOW, *Resp.*
(24th May 1832, F. C.)

5th June 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

ROBERT BALFOUR, *App.*
ARCHIBALD LYLE AND EBENEZER BAW, *Resp.*

ET E CONTRA.

(5th July 1833, F. C.)

12th June 1835.—Ordered and adjudged, That the interlocutors, so far as complained of, be affirmed.

FRANCIS GRAHAM, *App.*

STEWART JOLLY, *Resp.*

(24th June 1834, F. C.)

17th June 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

SIR WILLIAM BAILLIE AND OTHERS, CLYNE'S TRUSTEES,
App.

GAVIN SEWART, *Resp.*

(15th June 1833, F. C.)

17th June 1835.—Ordered and adjudged, That the interlocutor of 13th February 1833, adhered to by the interlocutor of 15th June 1833, be varied, by allowing to the appellants a deduction of the sum of L.45 from the principal sum of L.76, 19s. found due to the respondent: And it is farther ordered and adjudged, that the several interlocutors complained of in the said appeal, except in so far as the same are inconsistent with this variation, be affirmed, with costs: And it is farther ordered, that the cause be remitted back to the said Court of Session, to do as shall be just and consistent with this judgment.

JOHN SWAN AND OTHERS, *App.*

GOVERNOR AND COMPANY OF BANK OF SCOTLAND,
Resp.

(5th Feb. 1835, F. C.)

6th July 1835.—Ordered and adjudged, That the interlocutors complained of be reversed; and the Lords find and declare, that no obligation arises upon the bond, dated 28th September 1825, to pay any balance alleged to be due to the bank on William Martin's drafts, as far as such drafts were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time; and so far the Court of Session is directed to suspend the charge, and to find expenses due, according to the result of the inquiry touching the manner in which the balance is constituted; and with this finding and declaration, it is ordered that the cause be remitted back to the said Court of Session, to do therein as shall be just and consistent with this judgment.

ARTHUR JOHN ROBERTSON, *App.*

Mrs MARY SHEARER OR ROBERTSON, *Resp.*

(10th Feb. 1835, F. C.)

10th June 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

ARTHUR JOHN ROBERTSON.

Mrs MAY SHEARER OR ROBERTSON.

(11th Feb. 1835, F. C.)

10th July 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

SIR WILLIAM BAILLIE AND OTHERS, CLYNE'S TRUSTEES,
App.

EDINBURGH OIL GAS LIGHT COMPANY, *Resp.*

(21st, 28th and 29th June 1832, F. C.)

17th July 1835.—Ordered and adjudged, That the interlocutors complained of in said appeal be reversed; and it is found and declared, that in terms of the 52d section of the Act of Parliament, (mentioned in the proceedings in this case,) passed in the fifth year of the reign of his late Majesty, King George the Fourth, entitled, 'An Act for the better lighting of the City and Suburbs of Edinburgh 'by Oil Gas,' it was not competent to the company thereby incorporated to make two calls for money from the subscribers to and proprietors of the said undertaking at one and the same time; and it was by the said act enacted, that no such calls should be made, but at the distance of one calendar month at least from each other; and it is further declared, that instead of making two calls for L.130 each upon the shares held by the said David Clyne, upon 12th December 1825, it was not competent to the said company to make more than one of such calls at one time; and it is therefore ordered, that the said cause be remitted back to the First Division of the Court of Session, with instructions to the said Court to set aside the award of Mr Duncan M'Neill, mentioned in the said appeal, in terms of this judgment, finding and declaration, and to find the appellants liable in payment to the respondents of the first instalment or call on the said shares, with interest since the same became due, and proceed farther therein as may be just and consistent with this judgment.

Same judgment pronounced in another appeal betwixt the same parties.

ROBERT BROWN AND OTHERS, *App.*

MRS ELIZABETH SINCLAIR AND OTHERS, *Resp.*

(3d March 1835, F. C.)

17th July 1835.—Ordered and adjudged, That the cause be remitted back to the First Division of the Court of Session, with an instruction to the Judges of the said Court to order the matters in law in question in this case to be heard before the whole Judges, including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole Judges.

ALEXANDER WATSON, *App.*

ANN AND ISOBEL WATSON, *Resp.*

(2d July 1835, F. C.)

27th Aug. 1835.—Ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to recall the interlocutor complained of, and to direct one or more issue or issues to be framed, to try the propinquity of the parties respectively to the deceased Alexander Watson, town-clerk of Port Glasgow; and that such issue or issues be tried accordingly: And it is farther ordered, that the costs of both parties of the appeal, as the same shall be taxed and certified by the proper officer of this House, be paid out of the fund under the charge of the judicial factor on the estate of the said Alexander Watson deceased; and that the said Court of Session do grant warrant accordingly, for payment of the sums, to be taxed and certified as aforesaid, to the solicitors of the parties respectively: And it is farther ordered, that the said Court of Session do proceed farther in this cause as shall be just and consistent with this judgment.

HON. LADY WARRENDER, *App.*

RIGHT HON. SIR GEORGE WARRENDER, *Resp.*

(28th June 1834, F. C.)

27th Aug. 1835.—Ordered and adjudged, That the interlocutor complained of be affirmed.

COLLEGE OF GLASGOW, *App.*

FACULTY OF PHYSICIANS AND SURGEONS OF
GLASGOW, *Resp.*

(12th Nov. 1834, F. C.)

28th Aug. 1835.—Ordered and adjudged, That the cause be remitted back to the Second Division of the Court of Session in Scotland, with directions to the Judges of that Division to consider and take the opinions of the whole Judges of the Court of Session,

including the Lords Ordinary, whether the respondents, as the Faculty of Physicians and Surgeons in Glasgow, are a corporation, capable in law of possessing, and, in fact, clothed with the rights for which they now contend in this action; and to consider whether the right of interdict is taken away by the provision of a penalty made in the grant or letter of gift in the pleadings mentioned: And it is farther ordered, that the said Court do determine the question of the respondents' costs relating to this appeal, and that they have power to recall or alter the interlocutors appealed from.

JAMES JOHN FRASER, *App.*
COLONEL JOHN GORDON, *Resp.*
(15th Jan. 1835, F. C.)

31st August 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed, with costs.

WILLIAM DRUMMOND, *App.*
CHARLES HUNTER, *Resp.*
(22d May 1834, F. C.)

31st August 1835.—Ordered and adjudged, That the interlocutors, so far as complained of, be affirmed.

REV. JOHN MARTIN, *App.*
CHARLES HUNTER AND OTHERS, (THOMSON'S TRUSTEES,) *Resp.*
(22d May 1834, F. C.)

31st Aug. 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

JAMES THOMSON, *App.*
JOHN MOWBRAY AND OTHERS, *Resp.*
(11th March 1834, F. C.)

31st Aug. 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed; and it is farther ordered, that the costs attending the said appeal be paid out of the fund in said proceedings mentioned.

JOHN ANDERSON, *App.*
COLONEL JOHN GORDON, *Resp.*
(24th May 1833, F. C.)

31st Aug. 1835.—Ordered and adjudged, That the interlocutors complained of be affirmed.

HUGH ALLAN, *App.*
GLASGOW'S TRUSTEES, *Resp.*

(7th March 1832, F. C.)

12th Sept. 1835.—Ordered and adjudged, That the interlocutor complained of be reversed.

LADY RAMSAY OF BALMAIN, *App.*
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(11th July 1833, F. C.)

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SIR WILLIAM F. ELLIOT AND OTHERS, *App.*
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ET E CONTRA.

(18th Jan. 1833, F. C.)

8th Sept. 1835.—Ordered and adjudged, That the cause be remitted back to the First Division of the Court of Session, to review their interlocutor complained of in the original appeal, and to state to this House whether, in pronouncing the same, they have had regard to the eighth finding in the interlocutor of the Court of Session, dated 7th June 1823, in the action of reduction brought by the defender, Sir William Francis Elliot, which finds it proved, by the terms of his dispositions to the defenders in that action, that they were made aware that the Act of Parliament had not been followed out; and also to state to what extent, and under what form of diligence the present defender, Sir William Francis Elliot, as heir of entail in possession of the said estate, and the heirs of entail who shall succeed him in the right and possession thereof, as they shall respectively attain possession, may be compelled, according to the law of Scotland, to make payment to the pursuers of the several sums of money in the said interlocutor mentioned: And it is farther ordered, that the said First Division of the said Court, in reviewing their said interlocutor, do order the matter thereof to be heard before the whole Judges of the Court of Session, including the Lords Ordinary; and the House does not think fit to pronounce any judgment upon the said appeals, until after the said Court of Session shall have reviewed their said interlocutor, according to the directions of this order.

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- No. 118. APPEAL. Circumstances in which a petition for leave to appeal to the House of Lords was refused. *Sir James Boswell v. Matthew Montgomerie, 10th March 1836, p. 588.*

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- No. 87. — (JUDICIAL REFERENCE). The parties to an action having, on the day of trial, and in presence of the Court, by mutual minute signed by them, submitted 'the whole cause' to the determination of a third party; and the referee having decerned in the pursuer's favour for a certain sum, and also decerned generally for expenses, of which he appointed an account to be given in to the Auditor of Court, that he might report to the Court on the said expenses,—found, upon the objection of the defender, (1.) That this was a judicial reference of the whole cause, and that the Court was entitled to interpose its authority to the award of the referee. (2.) That the pursuer was entitled, under the reference and the award of the referee, confirmed by the Court, to the expenses of the reference, as well as those incurred previous to the date of the reference. *James Fairlie v. Daniel M'Gown, 13th Feb. 1836, p. 385.*

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BILL OF EXCHANGE *continued.*

mium for guaranteeing the solvency of the acceptors of the bill; found, that the onus of proving the cause of retention lay on the charger, and that the suspender was not bound to disprove the alleged cause of retention. *John Christie v. John Harley*, 12th Feb. 1836, p. 383.

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(ROYAL.)—(POWERS OF MAGISTRATES.) Circumstances in which an alleged conveyance of teinds by Magistrates of a burgh, there being no authority by the Town-Council, was found invalid. *David Blair v. Magistrates and Town-Council of Dunbar*, 10th June 1836, p. 766. No. 156.

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- No. 80. — (FOR ANNUAL RENT.) See *Bankrupt. No. 75.*
 — (NON-DISCUSSION OF PRINCIPAL.) A and B, the acceptors of a bill for the balance of a cash-account to a bank, having become insolvent before the bill fell due, and the bank having threatened one of the cautioners for the credit with diligence, he granted an obligation, by which he bound himself to guarantee any deficiency which might remain due on the bill, after the bank had ranked and drawn dividends from the respective estates of A and B, on condition of receiving up the bond of caution and diligence thereon. The bank accepted the obligation, and delivered up the bond and diligence. Thereafter the bank ranked and drew dividends from the estate of A, but used no means to recover payment from B, who had paid a composition under a private arrangement with his creditors,—found that the bank, by neglecting to discuss B, or to use proper means to make their debt effectual against him, had lost their recourse against the cautioner. Question, as to the effect of a letter written by the cautioner to the bank, offering to pay the balance due, after receiving dividends from the estate of A. *Fife Banking Company v. Robert Walker Rannie, 5th Feb. 1836, p. 364.*
- No. 181. — Circumstances in which, where a bank, on the death of a party, had allowed a cash-credit, granted to the deceased on a bond with three co-obligants, to be operated upon by his son, on the faith of a letter signed by two only of the three co-obligants, requesting the bank to continue the credit 'in terms of, and to the extent of our said bonds,' 'which 'shall continue in full force,' &c.—the Court found that the two parties signing the letter were liable, conjunctly and severally, to the bank for the whole sum due under the cash-credit; though they pleaded, *inter alia*, that they signed only on the faith that the signature of the third co-obligant was to be obtained by the bank, and that the bank having failed to do so, and having given no notice of the omission, had no claim at all against them, or, at least, only to a limited extent. *Bank of Scotland v. Durie's Trustees and Miss Aitken, 1st July 1836, p. 889.*
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———— See *Statute 3. and 4. Will. IV. c. 76*. No. 146.

———— See *Tack*. No. 152. No. 164.

———— A postnuptial contract of marriage, to which the father of the wife was a party, bearing, in consideration of counter obligations on the husband, payable at his death, that the father should make payment to the spouses in conjunct liferent, and their children in fee, of a sum of L.20,000, but with a declaration that the sum so 'devised' should be liable to be affected by him, by provisions to the children, to be payable at the first term after his death, and failing which, at such term subsequent to his death as the spouses should appoint; the contract farther declaring, that in case he should destine a certain estate, at any time during his life, to the value of at least L.20,000, or any other heritable estate of that value belonging to him, to be estimated as at the first term after his death, the same should be held as implement of the obligation incumbent on him in regard to the sum of L.20,000, payable on the death of himself and the survivor of the spouses—found, that interest was due on the principal sum only from the date of his death. *William Berry and Others v. Sir Robert Henderson's Trustees*, 24th June 1836, p. 830. No. 169.

———— See *Husband and Wife*. No. 172.

COLLATION. An heir of entail, who is also the heir alioqui successurus, and one of the nearest of kin of his predecessor, is not entitled to share in the moveable succession without collating his liferent interest in the entailed estate. *Sir Windham Carmichael Anstruther v. Mrs Marian Anstruther and Husband*, 20th Jan. 1836, p. 185. *James Viscount Maitland and Others v. Marquis and Marchioness of Chandos and Others*, 20th Jan. 1836, p. 265. No. 57.
No. 58.

COLLEGE OF JUSTICE. Summary application to compel an agent to deliver up papers refused. See *Process*. No. 105.

———— Remit to society of W. S. in respect to conduct of a member. See *Nobile Officium*. No. 115.

COMMISSION. See *Settled Account*. No. 79.

COMPETITION. See *Landlord and Tenant*. No. 41.

———— (LANDLORD WITH POINDER.) *George Tulloch v. Lady Willoughby d'Eresby and Husband*, 19th Dec. 1835, p. 151. No. 46.

———— See *Bankrupt*. No. 147. No. 185.

COMPOSITION. (ON CAUTIONARY OBLIGATION FOR ANNUALRENT.) See *Bankrupt*. No. 75.

CONJUNCT FEE AND LIFERENT. See *Clause*. No. 169.

CONSUETUDE. See *Corporation*. No. 179.

CONSTRUCTION. See *Marriage-Contract*. No. 22. No. 44.

———— See *Provisions to Children*. No. 157.

———— See *Clause*. No. 169.

———— See *Agreement*. No. 172.

———— See *Heritable and Moveable*. No. 178.

CONTRACT. A party agreed, by a writing unstamped, to furnish goods at a certain rate, payable at certain stated periods; he afterwards agreed, by parole, to lessen the rate; after accepting payment at the reduced rate at the stated periods, he sued for the balance, contending that a parole proof could not vary the written agreement;—found, that, in the circumstances, a parole proof of said variation was admissible, and distinction taken between the present and the case of *Law v. Gibsons*, 3d February No. 73.

CONTRACT continued.

1835. *Andrew Thomson v. Monkland Steel Company*, 2d Feb. 1836, p. 320.

No. 104.

(BREACH OF.) Circumstances where a purchaser of a landed estate, who became bound to pay the price at stated periods, and failed in performance, and where the seller, in reliance upon the purchaser's stipulation, intimated to an heritable creditor on the estate sold, that his bond would be paid at a particular term;—and the bond not having been so paid up,—found, in an action of relief against the purchaser by the seller, for damages found due to the creditor, who had not got payment of his bond, that the purchaser was liable in relief as for breach of contract. *Thomas Mansfield, (Farquharson's Trustee,) v. Lieutenant-Colonel John Campbell*, 27th Feb. 1836, p. 510.

J. S.
No. 6.

(LIABILITY OF MEMBERS OF A CONGREGATION.) A builder having raised an action for payment of the balance of the price remaining due for building a chapel for a congregation of the Associate Secession Church; and it having been ruled by the Lord Ordinary, and acquiesced in, that only members of the committee, or of the congregation during a certain period, should be liable,—held, by the presiding Judge, that the question who were, or who were not, members of the congregation, must be determined by the laws of the Secession Church. 2d, That however many defenders there might be, if they were all included in one summons, they must be looked on as one party, and be entitled to only six challenges. 3d, The evidence of a witness who was a defender in the action, but against whom decree in absence had been obtained, refused, in respect that he was an interested party, although the pursuer offered to discharge the claim under the decree. *George Wallace v. George Dickson and Others*, 17th March 1836, C. J. S. p. 24.

No. 32.

CORPORATION. Found, (1.) That the Fleshers of Canongate, by virtue of their seal of cause—possession following on it—and the judicial recognitions thereof that have taken place—do constitute a legal incorporation, entitled to the exclusive exercise of the trade or craft of fleshers within the bounds limited, but subject to the effect of the provisions of the act 1703, c. 7, in so far as that act is still legally in force. (2.) That the act 1703, c. 7, is still in force, and must receive effect, in so far as it provides, that 'it shall be leisome to all persons whatsoever to sell and 'break all sorts of fleshies on every lawful day of the week, and that in all 'the towns and burghs of this kingdom, free of any imposition whatsoever, the petty customs of burghs excepted.' (3.) That the general right and liberty declared by the statute does not extend to the act of slaughtering cattle within burgh, or within the bounds of the privileges of the Incorporation of Fleshers of Canongate. *Incorporation of Fleshers of Canongate v. William Wight and Others*, 11th Dec. 1835, p. 110.

No. 179.

(ELECTION OF OFFICE-BEARERS.) Circumstances in which it was found, that long-continued usage in terms of an ancient law, alleged to have been unanimously enacted by a corporation, in presence of certain members of the Town-Council, was sufficient to establish a rule of election, by which the corporation was obliged, in all time coming, to elect their office-bearers, in equal numbers, from the two trades which composed the corporation; the original seal of cause containing no regulations nor directions as to the election of office-bearers. *John Gray and Others v. Walter Smith and Others*, 30th June 1836, p. 876.

No. 26.

CURATOR BONIS. Special circumstances in which the Court, with consent of certain parties nearest of kin, granted authority to a curator bonis to grant charters to enter and receive vassals. *Simon Fraser, Petitioner*, 2d Dec. 1835, p. 76.

CURATOR BONIS. *Sir John Dalrymple and Others v. Charles Ranken*, No. 170.
' 25th June 1836, p. 838.

DAMAGES. See *Assault*. J. S. No. 1.

_____ Action of damages by a tenant against his landlord, for pre- J. S.
venting him, by injurious statements, from disposing of his lease, and also No. 3.
for improperly arresting him as in med. fugæ—Verdict for defender.
James Dick v. James Stewart, 5th Jan. 1836, C. J. S. p. 15.

_____ See *Reparation*. J. S. No. 4.

DECLARATOR. See *Regalia*, (*Harbour*.) No. 161.

DILIGENCE. See *Trust*. No. 127.

_____ See *Bill of Exchange*. No. 168.

_____ See *Sequestration*. No. 174.

DISCHARGE. See *Agreement*. No. 172.

DIVORCE. See *Process*. No. 189.

DONATION. See *Presumption*. No. 30.

ENTAIL. See *Statute*, 10. Geo. III. c. 51. No. 21.

_____ See *Collation*. No. 57.

_____ (SPECIAL CASE.) *George Baillie v. Sir G. Baillie Hamilton*, No. 59.
21st Jan. 1836, p. 275.

_____ (REGISTRATION.) A decree of adjudication of an entailed No. 83.
estate, proceeding upon debts contracted by an heir in possession, and
infert under the fetters of a strict but unrecorded entail, found effectual
to attach the estate, although not obtained until after decree of forfeiture
had been pronounced in a declarator of irritancy and contravention brought
against the debtor, at the instance of a substitute heir, after the entail had
been recorded. *Mrs Munro or Ross and Husband v. Drummonds*,
9th Feb. 1836, p. 374.

_____ (OBLIGATION ON SUBSTITUTES FOR PROVISIONS BY EN- No. 84.
TAILER.) (Sequel of the case, *Ashkirk Entail*, see vol. x. p. 426.)
Found, that Archibald Cochran and all the heirs of entail substituted to
him by the deeds of entail of the estates of Ashkirk, and other lands in
their order, as they may successively succeed to, and obtain possession of
the entailed estates, are bound, as a condition of their holding the entailed
estates, and drawing and enjoying the rents and proceeds thereof, according
to their respective rights and interests, or as an obligation consequent
thereupon, to satisfy and pay the provisions made and granted by Archi-
bald Cochran, the entailor, by his general settlements, with interest, in so
far as not satisfied and paid before the succession of such heir. *Mrs*
Euphemia Kerr v. Alexander Cochran and Others, 9th Feb. 1836,
p. 374.

_____ An heir of entail in possession having, in virtue of powers con- No. 125.
tained in the entails under which he possessed, created, by his marriage-
contract, a liferent in favour of his wife, and having also, by the same
deed, provided his younger children in a sum of three years' free rent of
the tailzied estates, 'so far as the same are free and unaffected at the
'time with liferents,' and under certain other deductions,—found, (1.)
That the succeeding heir of entail was entitled, in estimating the free ren-
tal on which the children's provisions were to be paid, to deduct the life-
rent created in favour of their mother. (2.) That he was not entitled
to deduct the sum which, in virtue of the option conferred on him by the
10. Geo. III. c. 51, he had allotted to the payment of sums expended in
improvements under that statute by his predecessor. *Miss M. G. Lock-
hart Macdonald v. Sir Norman Macdonald Lockhart*, 18th May 1836,
p. 624.

_____ (LIABILITY TO FETTERS.) See *Trust*. No. 128.

ENTAIL. (PROVISIONS TO CHILDREN.) See *Interest*. No. 193.

- No. 175. — An heir of entail, in possession, disposed the estate to himself in liferent, and to his eldest son in fee, expressly referring to the original entail, to which it was substantially conform, though varying in some respects, particularly in the fetters not being applied to the institute nominatim,—found, after the death of the disposer, that the disposition (which was not recorded in the Register of Tailzies) was not to be considered as a new entail of the lands, which required registration, and to have the fetters laid on the disponent nominatim, but was merely an instrument for propelling the tailzied fee to the next heir; and that an adjudication of the lands, for a debt of the granter, was ineffectual. *George Turnbull v. William Hay Newton and James Renton, (his trustee), 29th June 1836, p. 849.*

- No. 177. — An heir of entail in possession having made improvements at two different times, and assigned his statutory claims for the respective sums expended, as ascertained by separate decrees, to two different persons,—found, in a multiplepointing at the instance of the succeeding heir, that the assignee to the claim created by the first improvements, for the sum ascertained by the first decree, was entitled, although the second assignee pleaded prior intimation, to be preferred primo loco on the fund in medio, in respect that, as the assignments related to different subjects, there could be no room for the question of intimation.

Opinion expressed by the Court, that the assignments of such claims were as effectual before as after decree. *Sir Thomas J. Inglis Cochran v. Basil Cochran's Trustees and Mrs Vernon, 30th June 1836, p. 865.*

EXCEPTIO FALSI. See *Bill of Exchange*. No. 63.

EXCLUSIVE PRIVILEGE. See *Corporation*. No. 32.

- No. 2. EXPENSES. An heritable bond of annuity was granted to a party as trustee, for payment of debts, &c. of the granter: The grantee raised money on it by transferring it to a third party:—held, that the grantee was not entitled to claim the expense of the transference from the granter, notwithstanding a clause in the bond, by which the granter bound and obliged himself, &c. to 'be at the whole expense of any discharge or discharges of these presents, or conveyance of the same, or any part thereof made to any person or persons.' *William Bell v. Sir William Francis Elliott, 13th Nov. 1835, p. 3.*

— See *Auditor's Fee*. No. 3.

- J. 8.
No. 10. — Where the defender makes a tender equal to, or exceeding the damages found due, he is entitled to expenses from the date of the tender. *Anderson v. Marshall, 24th Nov. 1835, p. 35.*

— See *Agent and Client*. No. 12.

- No. 17. — A verdict was obtained for L.25, the value of shelving in a shop belonging to the pursuer, which had been occupied by the defenders. The defenders having previously offered to pay the expense of said shelving, or to replace it,—the pursuer was found liable in costs to the defender. *William Ewing v. Chalmers and Collins, 26th Nov. 1835, p. 51.*

- No. 40. — (OF WITNESSES AT JURY TRIAL.) *William Thom v. Thomas Grahame, 14th Jan. 1836, p. 155.*

- No. 50. — (JURY TRIAL.) *William Ewing v. Chalmers and Collins, 20th Jan. 1836, p. 185.*

— See *Process*. No. 67.

— See *Arbitration*. No. 87.

- No. 120. — The House of Lords having reversed a decision, in which there was a decerniture for expenses, by a judgment containing a declaration in regard to a certain point in the case, and ordering, that, with this de-

EXPENSES continued.

claration, the case be remitted back to the Court of Session, 'to proceed therein as shall be consistent with this judgment,'—held, by a majority of the whole Court, that as the effect of the said declaration was to exhaust the whole cause on the merits, it was not competent for the Court to entertain a claim, made by the appellant, for the expenses incurred prior to the appeal. *James Stewart v. Alexander Scott*, 11th March 1836, p. 592.

FACILITY AND CIRCUMVENTION. See *Testament. J. S. No. 10. J. S. No. 15.*

FACTOR LOCO TUTORIS. Authority granted to a factor loco tutoris, applying by summary petition, to borrow money, upon the security of the heritable estate of a pupil, to pay off heritable and personal debts affecting the same, or such sum as might pay off the whole personal debts to which the heritable estate might be made liable.

No. 82.

Opinion expressed by Consulted Judges, that whenever it has been made to appear to the Court, that the power craved by a factor was either necessary to prevent serious loss to the estate, or expedient in order to procure evident and positive advantage, or where the interest of third parties connected with the estate, as, e. g. in relation of superior and vassal, &c. was affected, the Court has been in the constant practice of granting the powers necessary for accomplishing the object. *George Sommerville and Others, and their factor loco tutoris, Petitioners*, 6th Feb. 1836, p. 371.

(AUTHORITY TO SELL.) *James Burness, S. S. C. Petitioner*, 4th June 1836, p. 733.

No. 149.

FEU. A clause protecting both parties from abatement from, or addition to feu-duties, or any other claim whatever arising from variation of measurements, having been introduced into a feu-contract,—found, 1. That the superior was thereby protected against an action of damages, founded on alleged deficiency of surface; and, 2. That while no action of reduction of the contract was brought, any allegations of fraud in the introduction of the clause were incompetent. *David Scott v. The Earl of Moray*, 20th May 1836, p. 679. No. 66.

No. 132.

FEU-DUTIES. See *Superior and Vassal. No. 40.*

FIAR. A testatrix directed her trustees to 'set apart L.1000, (contained in a bond,) and apply the yearly interest thereof, as an annuity to Walter Colville, my nephew, during his life; and declaring, that on the death of Walter Colville, and at the first term of Martinmas or Whitsunday thereafter, the said sum of L.1000 shall be divided, and applied by my trustees in manner following: That is to say, they shall pay and deliver L.400 thereof to Mrs Brockie, wife of Thomas Brockie, and L.400, L.100 and L.100 to three others, 'and to their respective heirs, in case of their decease.' Mrs Brockie had previously, by a mutual deed with Thomas Brockie, conveyed to him, in case of his surviving her, the whole goods in communion or property 'otherwise belonging to me at the time of my decease,' appointing him, by the same deed, her executor, under burden of payment of a fourth of the free produce to Mrs Brockie's next of kin: The testatrix died in 1819, Mrs Brockie in 1823, Thomas Brockie in 1826, and Walter Colville, the nephew, in 1833:—Found, in a question betwixt the representatives of Thomas Brockie, the husband, and those in right of the next of kin of Mrs Brockie, the wife, that the fee of the L.400 had vested in Mrs Brockie, and was conveyed to Thomas Brockie by the said mutual deed executed by the spouses.

No. 92.

One-fourth of the amount directed to be paid to those in right of Mrs Brockie's next of kin, in terms of said mutual deed; and also one of the sums of L.100 directed to be paid to the representatives of a legatee who

FIAR *continued.*

had predeceased the liferenter. *David Aikman v. George Brockie and Others, and John Marchbanks and Others, 18th Feb. 1836, p. 432.*

FOREIGN. (CONSTITUTION OF DEBT.) See *Process.* No. 23.

- No. 54. ——— (LEX LOCI CONTRACTUS, AC SOLUTIONIS.) Circumstances in which it was found, in respect to the acceptance of a bill of exchange signed at Paris, by a party who had been resident in Scotland since the bill fell due, (adhering to the interlocutor of the Lord Ordinary, pronounced after taking the opinion of foreign lawyers,) (1.) That the defence of the sexennial prescription was inapplicable; (2.) That the plea of *res judicata*, founded on a decree of the Tribunal of Commerce in Paris, against a party in absence, was untenable, and that the party's representative ought to be reponed, notwithstanding the opinion of French lawyers to the contrary. *M. Lippman and Mandatary v. Sir W. H. Don and Tutors, 20th Jan. 1836, p. 175.*

———— See *Husband and Wife.* No. 89.

- No. 89. ——— (RES JUDICATA.) The plea of *res judicata*, arising from a decree obtained in the Court of Exchequer in England, in favour of two out of three co-plaintiffs carrying on a joint suit against an executor, for recovery of a legacy in which they all had an interest, having being pleaded by one of the obtainers, a Scotchwoman, in bar of an action in the Court of Session, at the instance of the third co-plaintiff in the English suit, to have it found that all right to the legacy was in him,—held, under opinion of English counsel, that there could be no adjudication between co-plaintiffs, and the plea of *res judicata* repelled. *Mrs Ann Grant or Clark v. John Ludovez Newmarsh, 16th Feb. 1836, p. 395.*

- No. 89. ——— (LIS ALIBI PENDENS.) Found, that the circumstance of personal funds having been recovered in England, and brought into the courts of equity there, does not bar an action in the Court of Session in regard to them, if they are so situated that that Court has otherwise jurisdiction, and the plea of *lis alibi pendens* repelled. *Mrs Grant or Clark v. John Ludovez Newmarsh, 16th Feb. 1836, p. 395.*

FRAUD. See *Testament, J. S. No. 10.* J. S. No. 15.

- No. 126. FRIENDLY SOCIETY. Circumstances in which, upon a construction of the above statute and relative bye-laws of a Friendly Society, it was found, —that the expulsion of a member was just, and the proceedings legal and regular. *William Howie v. Aberdeen Mason Lodge, 18th May 1836, p. 630.*

- No. 8. GUARANTER. Circumstances in which a letter of guarantee was held, from its terms and the subsequent conduct of the parties, to be limited to a specific transaction. *Hugh Baird v. James Corbett and Others, 21st Nov. 1835, p. 24.*

- No. 74. ——— A party who had guaranteed the 'regular acceptance' of certain drafts, payable at sixty days, found liable in payment of them, though not presented for acceptance till due, when they were presented at once for acceptance and payment, and dishonoured. *National Bank of Scotland v. William Robertson, 3d Feb. 1836, p. 323.*

———— See *Cautioner.* No. 181.

HARBOUR. See *Regalia.* No. 161.

HEIR AND EXECUTOR. See *Collation.* No. 57.

HERITABLE CREDITOR. See *Title-Deeds.* No. 5.

———— See *Trustee.* No. 60.

———— See *Trust.* No. 71.

- No. 178. HERITABLE AND MOVEABLE. In a marriage-contract between a domiciled Englishman and a Scotch lady, all subjects, heritable and moveable,

HERITABLE AND MOVEABLE *continued.*

belonging, or that should pertain and belong to the lady during the subsistence of the marriage, were, on her part, conveyed to trustees, for the purpose of 'paying to the husband and wife, and to the survivor, the interest of said sums; and after their death, to pay the said sums thereby assigned to the children of the marriage; whom failing, to the heirs and assignees of the wife.' The wife having died intestate, the husband claimed right to certain heritable securities in Scotland, as her heir in mobilibus by the law of England,—Held, that the word 'heirs,' as above quoted, imported the heirs at law in heritage by the law of Scotland. *Charles Knight Murray and Mandatary v. George, Earl of Rothes and Others*, 30th June 1836, p. 871.

HOMOLOGATION. See *Schoolmaster*. No. 50.

HUSBAND AND WIFE. See *Bill of Exchange*. No. 63.

— An Englishman having, while resident in Scotland, married a native Scotchwoman, also then resident and domiciled there,—found, that the legal effect of the marriage, in regard to funds in England left to the wife by an Englishwoman, by an English will, and which vested in her during the continuance of the spouses to reside in Scotland, must be regulated by the law of Scotland. *Mrs Ann Grant or Clark v. John Ludovez Newmarsh*, 16th Feb. 1836, p. 395. No. 89.

— In a postnuptial contract of marriage, by which certain provisions were made in favour of the wife, who conveyed to the husband all the property of which she might be possessed, and renounced her legal rights in consideration thereof,—found, in the circumstances of the case, that although one of these provisions was declared payable from the funds conveyed by the wife, this expression was not taxative, but demonstrative, and the provision was due without reference to the amount of the wife's estate. *John Mathew and Others, (Moon's Trustees,) v. Walter Carmichael and Others*, 28th June 1836, p. 839. No. 172.

— See *Process*. No. 189.

IMPLIED CONTRACT. See *Schoolmaster*. No. 50.

— Circumstances in which, in an action of declarator by the representatives of the proprietor of a certain area of ground, against a party who had built upon and possessed the same for a considerable period, it was found,—that the portions of the ground so built upon were held in feu, and that although no written contract had passed between the parties, there were data sufficient to enable the Court to compel the defender to enter into a regular feu-contract. *Trustees of the late Alexander Forsyth v. George Learmonth*, 16th June 1836, p. 811. No. 163.

— See *Clause*. No. 169.

— Action by a land-surveyor for L.612:19:5½, being the price of work done in the execution of a survey and plan of an estate. Defence, that pursuer had exceeded his instructions. Verdict for pursuer, Damages, L.497:9:5½. *Henderson v. Campbell of Monzie and Others*, 22d March 1836, C. J. S. p. 42.

J. S.
No. 11.

IMPLIED DISCHARGE AND RENUNCIATION. See *Legitim*. No. 58.

— See *Presumption*. No. 66.

IMPRISONMENT. See *Legal Diligence*. No. 119.

INHIBITION. See *Tack*. No. 19.

— See *Bill of Exchange*. No. 60.

(1.) Certain words essential to the validity of letters of inhibition were written as a note on the margin, which was signed by the writer to the signet who subscribed the letters, but no notice was taken of the marginal note at the end of the letters, there being no allegation of No. 61.

INHIBITION *continued.*

fraud,—the diligence was found effectual. (2.) Certain words or letters erased found not in substantialibus, and not fatal to the validity of the inhibition. *Jean King and Others v. The Greenock Bank*, 23d Jan. 1836.

- No. 112. — A party having raised an inhibition to secure payment of the expenses of a process; and having obtained a decree for expenses, which was allowed to be extracted in name of his agent; and having afterwards raised a process of reduction of a deed *ex capite inhibitionis* in his own name, with the concurrence of his agent, 'for all interest he had in the premises,'—found, that he was entitled to follow out the inhibition in that manner. *Robert Smith, with consent of A. P. Henderson, v. John Little*, 5th March 1836, p. 559.

- No. 188. — An action was raised by English bankers against certain parties in Scotland, acceptors of a bill, designing them 'executors' of a party deceased, and concluding against them as so named; letters of inhibition were raised upon the said action; a petition to recall the inhibition refused, although, 1. The bill for the letters of inhibition was passed before a mandate was granted by the pursuers, such mandate being only given previous to the signing of the letters themselves; and, 2. The diligence was directed against the petitioner personally, although designed as executor,—the nature of the action truly inferring personal responsibility. *Alexander, Earl of Caithness v. Eaton, Hammond and Son, and Mandatary*, 5th July 1836, p. 905.

- No. 37. **INSURANCE.** A party insured machinery, which was afterwards destroyed by fire: the claim against the insurers was submitted to arbitration, in terms of the policy, and decree-arbital pronounced:—Found, in a reduction by the insurers of the decree-arbital, (1.) That it was competent to amend the summons, to the effect of stating, as a ground of reduction, that the pursuers had since ascertained that the insurance was effected with an intention, on the part of the defenders, of setting fire to the machinery. (2.) That an additional issue—whether the insurance was effected by the defender upon a fraudulent overvaluation of the machinery, with the intention of destroying the same by fire? might be sent to trial. *Hercules Insurance Company v. John Hunter*, 12th Dec. 1835, p. 121.

- No. 108. — B. effected an insurance with a Scotch company on 'grain &c. his own, or in trust, in all or any of the granaries, warehouses, lofts or cellars in Glasgow, Port Dundas, and in the vicinity of these places.' A. effected an insurance with an English company, 'on goods, his own, in trust, or on commission, in a certain storehouse in Glasgow, belonging to him, specially described.' It was a condition *inter alia* of A's policy, 'that if any assurance be effected with this company on buildings or goods at the same time that they are assured with some other company, or if they should be subsequently assured with some other company, the policy granted by this company will be void, unless the circumstance is noticed in the policy, or by indorsement thereon.' A fire broke out in A's storehouse, when a quantity of wheat belonging to B, and deposited there by him, was destroyed. Certain other policies effected by A. were indorsed on his policy, but B's policy was not so indorsed, or noticed in A's policy. In a joint action by A. and B. against A's insurers, for their proportion of the loss on the wheat,—held, that the pursuers were entitled to recover. *James Donaldson and James Pinkerton senior v. Manchester Fire and Life Assurance Company*, 2d March 1836, p. 519.

- J. S.
No. 16. — Decree-arbital, by which a party insured was found entitled to the amount at which certain machinery, destroyed by fire, had been insured, brought under reduction on the following grounds, J. S. No. 16:

INSURANCE *continued.*

(1.) That the party insured had destroyed the machinery, or caused it to be destroyed, for the purpose of defrauding the insurers; and, (2.) That the insurance was effected upon a fraudulent over-valuation of the machinery, with the intention of destroying the same by fire.—Verdict, finding there had been a fraudulent over-valuation of the machinery, but not with an intention of destroying the same by fire, and finding for the party insured on the first ground.

Observed on the Bench.—Insurance is not of the nature of a wager, but is a contract of the strictest equity, and productive of indemnity only; and it is contrary to strict equity and fair dealing if a party insured put a value on his property for insurable purposes, which the true worth of that property does not warrant. *Hercules Insurance Company and Robert Salmond v. John Hunter*, 26th July 1836, C. J. S. p. 62.

INTERDICT. See *Title-Deeds*. No. 5.

See *Regalia*, (*Harbour*.) No. 161.

INTEREST. Circumstances in which the Court found, that the arrears of interest due on a bond of provision, granted by an heir of entail in favour of his younger children, were to be accumulated with the principal, as at the second term subsequent to the date of citation; and that interest was due on the accumulated sum from that term until payment. *Pater-son's Trustees v. James Corbet Porterfield*, 24th May 1836, p. 686. No. 133.

See *Clause*. No. 169.

IRBITANCY. See *Tack*. No. 164.

JOINT-OBLIGANT. See *Cautioner*. No. 181.

JUDICIAL FACTOR. It is competent for a judicial factor on a trust-estate to appear in a ranking and sale, and require lands, conveyed by the trust-deed, to be struck out of that process, although he has not completed a feudal title to the said lands in his person. *Thomas Mackenzie v. Waller Ferrier*, 1st June 1836, p. 715. No. 143.

JUDICIAL SLANDER. Action of damages for slanderous matter in judicial proceedings, and for an arrest in England, pending proceedings here for the same debt, the said arrest being further alleged to be in itself funditus illegal and informal. Verdict for pursuer, L.2000. *Samuel James Hal-lam v. Frederick Gye and Company*, 22d Dec. 1835, C. J. S. p. 2. J. 8. No. 2.

JURISDICTION. See *Statute*. No. 35.

See *Nobile Officium*. No. 43.

See *Process*. No. 45.

See *Process-Criminal*. No. 1.

See *Burgh*. No. 78.

See *Statute*, 4. Geo. IV. c. 34.

(**DOMICIL**.) An Englishman by birth, who died in Scot- No. 89.

land, where he had resided as Governor of a Fort for fifty years, possessing a farm and acting as Justice of Peace during that period, and where he had contracted a marriage with a Scotchwoman,—held to be a domiciled Scotchman. *Mrs Ann Grant or Clark v. John Ludovex New-marsh*, 16th Feb. 1836, p. 895.

See *Nobile Officium*. No. 115.

Found, (1.) That in a charge of breach of trust to an amount above £.10, the police court has no jurisdiction: (2.) That it must be set forth in the complaint, and the conviction must bear, that the value of the subject of the charge did not exceed £.10. *John Anderson v. James Stuart*, 15th Feb. 1836, C. C. J. p. 7. C. C. J. No. 3.

JURY TRIAL. See *Expenses*. No. 10.

Issues having been finally prepared, upon 19th November No. 39.

JURY TRIAL *continued.*

1834, and the parties having entertained a proposal of extrajudicial settlement,^r which was broken off in February 1835, and the pursuer having given no notice of trial within twelve months after the preparation of the issues, the Court, upon the motion of the defenders, dismissed the action with expenses. *James Inglis v. Alexander Glen and Spouse*, 15th Dec. 1835, p. 125.

See *Expenses*. No. 49.

No. 64.

(ISSUES.) A landlord having let premises to be used inter alia as a dye-work, in an action of damages for alleged injuries occasioned by some of the dyeing operations of his tenants, an issue was granted against the landlord, Whether these operations were carried on under his authority. *Edward Collins v. James Hamilton and Others*, 26th Jan. 1836, p. 291.

(WANT OF GROUND FOR REMIT.) See *Process*. No. 65.

See *Process*. No. 67.

(REMIT RECALLED.) See *Process*. No. 78.

No. 94.

In an action for payment of work done under a contract a missive tendered in evidence of the agreement having been refused, because unstamped, and verdict therefore given for the defender,—a new trial was granted after the missive had been stamped, on the ground that it was essential to the justice of the case. *George Wallace v. George Dickson and Others*, 19th Feb. 1836, p. 451.

See *Process*. No. 162.

No. 176.

(ISSUES.) In an action of damages by proprietors of a steam-carriage, for injury sustained through obstructions put down on a public road by road trustees,—found, (1.) That although malice was alleged in summons and condescendence, it was not necessary that malice should make part of the issue; and, (2.) That the proper question to be put in the issue was, whether the defenders wrongfully performed certain operations, to the loss, injury and damage of the pursuers. *William Dauncey and Another v. Robert Scott and Others*, 29th June 1836.

No. 183.

(ISSUES.) In justification only necessary where plea veritas convicii. *Robert Ogilvie v. Peter Scott*, 2d July 1836, p. 895.

No. 184.

(NOTICE OF TRIAL.) Term for giving not to be extended. *Smith v. Bank of Scotland*, 5th July 1836, p. 895.

No. 186.

(ISSUE.) Malice appointed to be inserted in the issues in an action of damages against a Sheriff-substitute, founded on alleged irregularity in taking a precognition, and in other steps of a criminal cause. *Edward Railton v. James Watson*, 5th July 1836, p. 901.

No. 192.

(NOTICE OF MOTION.) Usual notice to the opposite party necessary on a motion for remodelling issues. *James Hamilton v. Tennent and Company*, 9th July 1836, p. 914.

J. S.

No. 2.

ISSUE, (COMPETENCY OF.) (4.) Question, whether an issue could be allowed, on a mere allegation that a party had instituted an ordinary action, in which he made claims, which a Jury might think he ought or must have known to be unjust. *Samuel James Hallam v. Frederick Gye and Company*, 22d Dec. 1835, C. J. S. p. 2.

J. S.

No. 3.

NEW TRIAL. Motion for new trial, on the ground of misdirection by the presiding Judge, refused. *James Dick v. James Stewart*, 5th Jan. 1836, C. J. S. p. 15.

See *Proof*. J. S. No. 5.

See *Contract*. J. S. No. 6.

See *Process*. J. S. No. 8.

JUSTIFICATION. See *Jury Trial*. No. 183.

LANDLORD AND TENANT. Found, in regard to a sequestration by a landlord of his tenant's effects, who had died before warrant of sale, or payment was granted, 1. That the tenant's medical attendant had a legal claim for deathbed charges, preferable to the landlord. 2. That this preferable claim includes a fair and reasonable charge for attendance and furnishings during the illness terminating in death, and is not confined to the sixty days before death. *John Drysdale v. Charles Kennedy*, 15th Dec. 1835, p. 135. No. 41.

See *Competition*. No. 46.

LAW-AGENT. See *Reparation*. No. 107.

Circumstances in which it was held, 1st, That the presumption of a mandate to an agent to pursue an action in the Court of Session, arising from the possession of the title-deeds, was redargued; that the action must be dismissed, in so far as the pursuer disclaiming the mandate was concerned, and that the defenders had no claim against the disclaimer for expenses. 2d, That the agents, who had, without proper authority, though acting bona fide, used the name of the disclaimer as one of the pursuers of the action, were liable to him for his expenses arising after his disclamation, and to the defenders for all their expenses, reserving to the agents any claim of relief competent against the other pursuers. *James Cowan junior v. James Farnie and Others, and James Farnie and Others v. Messrs Mowbray and Howden*, 4th March 1836, p. 541. No. 110.

See *Trust*. No. 115.

LEGACY. See *Pactum Illicitum*. No. 28.

See *Husband and Wife*. No. 89.

See *Fiar*. No. 92.

See *Trust*. No. 98.

LEGAL DILIGENCE. An incarcerating creditor having failed to renew aliment after it had been exhausted, though intimation of the fact had been given personally to his agent, and the debtor having been liberated in consequence,—held, that a re-incarceration, two days afterwards, on the same diligence, and for the same debt, was not competent, no change of circumstances in the debtor being alleged. *William Crawford v. Alexander Dawson*, 11th March 1836, p. 589. No. 119.

LEGITIM. The daughter of a Scotch nobleman, on her marriage with the son of an English nobleman, executed a contract of marriage, conceived in the English form;—found, (1.) That she had not thereby discharged or renounced her right to legitim; (2.) That as she was the only younger child of her father who had not renounced the right of legitim, her claim extended over one-third of his free moveable estate; and that it was not to be reduced in amount, by imputing thereto any sums provided to her by her father in said contract. *James, Viscount Maitland, and Others, (Lord Breadalbane's Trustees,) v. Marquis and Marchioness of Chandos and Others*, 20th Jan. 1836, p. 265. No. 58.

LIS ALIBI PENDENS. See *Foreign*. No. 89.

MANDATARY. Special circumstances in which it was found that the pursuer of an action, a Scotchman, and proprietor of a landed estate in Scotland, who had gone abroad, was bound to sist a mandatary. *William Dempster v. William Potts*, 19th Dec. 1835, p. 152. No. 47.

See *Inhibition*. No. 188.

MANSE. A manse requiring thorough repairs to render it habitable, and the heritors of the parish having offered to repair it, and also to make certain additions, but which offer was rejected by the minister and presbytery; in a suspension of a threatened charge on a decree of the presbytery, for additions to the manse, by an architect who had originally been No. 140.

MANSE *continued.*

employed to report by the heritors, but whose report they had rejected, as being extravagant in the circumstances of the parish—Before answer on the general question of the minister's right to additions, remit made by Court to another architect to report what was necessary and sufficient to render the manse not unsuitable to the benefice, and whether the addition to it, proposed by the presbytery, was required. *Maurice Carmichael and Others v. Rev. Alexander Hugh M'Lean*, 27th May 1836, p. 705.

- No. 9. **MARRIAGE.** Action of reduction of a decret of divorce, pronounced by the Commissaries of Edinburgh, brought beyond year and day after the date of the decret,—found to be incompetent.

Question, Whether a patrimonial interest will entitle third parties, after the death of the party divorced, to reduce the decree of divorce. *Ronald Menzies and Tutors v. Stevenson and Others*, 21st Nov. 1835, p. 31.

- No. 77. **—————** (INSUFFICIENT CONSTITUTION OF). A party had given to a female, with whom he previously held illicit intercourse, a letter purporting a declaration of marriage, but made conditional on the birth of a child: (1.) Found, that said letter, (independently of its terms,) in respect there was sufficient evidence of its having been delivered and accepted for the purpose of imposing upon third parties, was not a legal instrument to constitute a marriage. (2.) Opinion by Lord Ordinary, adhered to by the Court, that where a declaration or acknowledgment of marriage is conditional on the birth of a child, and where it is certain that there has been a great deal of personal intercourse before the letter is delivered, the mere delivery of that letter, with proof that the intercourse was afterwards continued, is not sufficient to constitute a marriage according to the law of Scotland. *Christian Stewart and Children v. John Menzies*, 4th Feb. 1836, p. 342.

MARRIAGE-CONTRACT. See *Provisions to Children*. No. 11.

- No. 22. **—————** Words in a marriage-contract held to import a *jus crediti* in the children, in respect to funds which had belonged to the wife, and so to entitle the only child of the marriage to rank upon the father's sequestrated estate, who had intromitted with said funds, to the extent of his intromission. *George Young v. Ebenezer Watson*, 2d Dec. 1835, p. 64.

- No. 44. **—————** Words in a marriage-contract held not to import a general conveyance by the husband to the children, but to limit the conveyance to a specific sum therein mentioned. *Alexander Fraser and Mandatary v. John Fraser's Trustees*, 7th Dec. 1835, p. 145.

————— See *Husband and Wife*. No. 172.

————— See *Heritable and Moveable*. No. 178.

MASTER AND SERVANT. See *Reparation*. J.S. No. 8.

MEDITATIO FUGÆ WARRANT. See *Damages*. J.S. No. 3.

- No. 91. **MINISTERS' WIDOWS' FUND.** A minister holding a church under 5. Geo. IV. c. 90, found entitled to be admitted as a contributor to the Widows' Fund. *Rev. Donald Gordon v. Trustees of Ministers' Widows' Fund*, 18th Feb. 1836, p. 422.

- No. 109. **MULTIPLEPOINDING.** A creditor who had lodged a claim and was ranked on the estate of his debtor, by trustees appointed to distribute the property amongst the creditors, by a trust-deed, to which almost all the creditors, himself excepted, had acceded, having raised an action of multiplepoinding in the name of the trustees, but contrary to their wishes, as well as of the 200 acceding creditors, in order to obtain a judicial decision on his claim,—found, that the action was incompetent. *Mrs Jane*

MULTIPLEPOINDING *continued.*

Stewart or Irvine v. Patrick Crichton and Others, 4th March 1836, p. 538.

MUTUAL CONTRACT. A disposition omnium bonorum by a father to a son, and by which the father also conveyed acquiranda, in consideration of certain obligations by the son, (partly set forth in the deed, and partly undertaken in a separate writing,) held to be irrevocable. *John Braidwood v. Thomas Braidwood*, 26th Nov. 1835, p. 44.

No. 15.

See *Bank Manager*, No. 65,

See *Mutual Contract*. No. 102.

NOBILE OFFICIUM. The pursuer in an action for damages having, during the dependence of the action, printed, and not having taken due means to prevent the distribution of a statement alleged by the defender to be false and injurious, and likely to create a prejudice against him in the depending action, and some of the copies of the statement having got into circulation, the Court, on a petition and complaint by the defender, ordained, 1st, That the copies of the statement should be sealed up, and their farther circulation interdicted; and, 2d, The record having been completed, the whole copies were ordered to be destroyed, and the defender found liable in expenses. *Donald Smith v. William Mitchell*, 16th Dec. 1835, p. 144.

No. 43.

Circumstances where the Court, ex proprio motu, appointed the proceedings in a depending action to be laid before the Keepers of the Signet and Commissioners, in order to report to the Court their opinion thereon, in reference to the professional conduct of the defender in that action, a member of the Society of Writers to the Signet. *James Carnegie and Others v. James John Fraser*, W. S. 8th March 1836, p. 577.

No. 115.

See *Proof, (Oath.)* C. C. J. No. 4.

NOTARY-PUBLIC. See *Bill of Exchange*. No. 60.

NOVATION. See *Society*. No. 180.

NUISANCE. See *Jury Trial*. No. 64.

PACTUM ILLICITUM. An offer of proof that an annuity was bequeathed to a female in consequence of a stipulation on her part, or agreement between her and the party bequeathing the annuity, as the consideration of her entering into, or continuing a criminal intercourse with him,—found relevant as a defence by the executors against payment of the annuity.

No. 28.

Issue to this effect approved of, and remitted for trial. *Ann Johnstone v. Mackenzie's Representatives*, 4th Dec. 1835, p. 79.

See *Marriage*. No. 71.

PARENT AND CHILD. See *Proof*. No. 142.

PARTICEPS CRIMINIS. Circumstances sufficient to constitute participation in the crime of assault. *Lord Advocate v. Swanston and Others*, 29th Feb. 1836, C. C. J. p. 9.

C. C. J.
No. 5.

PEER. A party having suspended a charge for payment of a bill accepted by him, in respect of his privilege of exemption from the personal diligence of arrestment, as being a Peer of Scotland, but before his title to be ranked among the Peers of Scotland had been duly established, bill of suspension passed on caution. *Alexander Alexander v. Smith and Chapman*, 16th Jan. 1836, p. 166.

No. 53.

PERICULUM. A sum having been consigned to await the result of an action, and the bank in which it was placed by the defender, by consent of the pursuer, in consequence of an arrangement between them, having failed,—found, that in consequence of the mutual agreement, the loss

No. 102.

PERICULUM *continued.*

must fall on both equally. *William Scott v. Lieutenant John Selbie, 26th Feb. 1836, p. 500.*

PERSONAL EXCEPTION. See *Cessio Bonorum*. No. 130.

- No. 116. PERSONAL PROTECTION. A limited personal protection granted *ad interim* to a party who had availed himself of the privileges of the Sanctuary of Holyroodhouse, in order to enable him to be examined as a haver in a depending process, and to make the necessary searches for the documents called for. *Thomas Paton, Pentland's Trustee, Petitioner, 8th March 1836, p. 583.*

PHYSICIAN'S FEES. See *Landlord and Tenant*. No. 41.

POINDING. See *Competition*. No. 46.

- No. 62. ——— (THE GROUND.) *Laurence Tweedie v. Ebenexer Beattie, 23d Jan. 1836, p. 287.*

- No. 85. POOR'S-ROLL. (CERTIFICATE OF POVERTY.) A certificate of poverty, signed by the minister and elders of a Relief Congregation, found insufficient. *Charles Elphinston, Petitioner, 11th Feb. 1836, p. 382.*

- No. 25. POSSESSORY JUDGMENT. A proprietor who has possessed an access through a neighbour's grounds for seven years, is entitled to a possessory judgment, though his title be a bounding charter, having no clause of parts and pertinents, or of ish and entry. *James Liston v. Mrs Isabella Galloway, 3d Dec. 1835, p.*

PREFERENCE. See *Trustee*. No. 60.

PRESCRIPTION. See *Promissory-Note*. No. 1.

- No. 4. ——— (TRIENNIAL.) In an action for remuneration for services performed as a governess or housekeeper, although no specific amount had been fixed or agreed upon between the parties, prescription was held to apply, except to the last year, which fell within the period. *Mrs Margaret Smellie v. William Miller, 17th Nov. 1835, p. 6.*

- No. 51. ——— (TRIENNIAL.) Three years not having run at the death of the ancestor from the date of the longest due sum pursued for by a creditor, the representatives acknowledging constitution of the debt, and not alleging payment since the ancestor's death, cannot plead the triennial limitation. *James Little v. John Ritchie, 15th Jan. 1836, p. 164.*

————— (SEXENNIAL.) See *Foreign*. No. 54.

————— (TRIENNIAL.) See *Settled Account*. No. 79.

- No. 113. ——— (TRIENNIAL.) In an action for payment of a writer's accounts, against the representative of his employer, a provincial writer, circumstances in which it was found, that the pursuer was entitled to found on other accounts than those libelled on, in order to elide the plea of triennial prescription. *Daniel Fisher, S.S.C. v. John Francis Ure and Walter M'Gibbon, his Tutor, 8th March 1836, p. 561.*

- No. 122. ——— (NEGATIVE.) The right to reduce a decree-arbitral, affecting a claim to heritable property, and which had remained unchallenged for forty years,—held to have been lost by the operation of the negative prescription. *Earl of Dundonald v. Boyes' Trustees, 12th May 1836, p. 612.*

————— See *Corporation*. No. 179.

- No. 30. PRESUMPTION. Circumstances where, in reference to payments by a father to his sons, the rule *Debitor non præsumentur donare* was held applicable. *Mrs Rachael Booth or Black v. John Livingston Booth, 8th Dec. 1835, p. 89.*

- No. 76. ——— Circumstances in which a mandatary was presumed to have accounted to the mandant for sums uplifted under the mandate. *Mrs Jane Watson or Stuart v. Alexander Maconochie's Executors, 4th Feb. 1836, p. 337.*

PRESUMPTION. See *Settled Account*. No. 79. No. 124.

See *Implied Contract*. No. 163.

PRINCIPAL AND AGENT. Circumstances in which it was found, (adhering to the interlocutor of the Lord Ordinary,) in an action by the sellers of goods against a party for whose behoof they were purchased, (1.) That the sellers, by letting the stipulated term of credit expire, while in the knowledge of the defender as the principal party to whom the goods were furnished, without making any demand on him, and subsequently taking a bill in payment thereof, from a party who acted as agent and purchased the goods from them, must be held to have elected to take the agent for their debtor, and could not claim payment from the principal party. (2.) That the sellers, by making no demand on the principal till some time after the credit expired, and by transacting with and taking a bill from the agent, did mislead the principal to settle with the agent by paying to him the price of the goods, and were barred from maintaining an action against the principal. *Campbell and Maclean v. James Stevenson and Mandatary*, 25th Feb. 1836, p. 486. No. 100.

PRISONER. It is not necessary to intimate an application for liberation under the above A. S. to the incarcerating creditor, or his known agent. The A. S. does not require the physician's certificate to be immediately recorded in the burgh court-books. *Mary Emond v. Magistrates of Haddington*, 10th Dec. 1836, p. 107. No. 31.

See *Burgh*. C. C. J. No. 7.

PRIVILEGE. See *Peer*. No. 52.

See *Jury Trial*. No. 186.

PROCESS. In an action for the sum in a prescribed promissory-note, the pursuer not having averred that he could establish the debt aliunde, an application by him, after closing the record, for a diligence to recover documents for this purpose, refused. *William Ewing v. Burnett's Trustees*, 12th Nov. 1835, p. 1. No. 1.

See *Marriage*. No. 9.

See *Proof*. No. 14.

See *Expenses*. No. 17.

Found, (1.) in regard to the constitution of a debt, England being the locus contractus, that it is not necessary to aver what the law of England is in regard to the facts set forth on record: (2.) (Adhering to the Lord Ordinary's interlocutor,) that the constitution of the debt by an advance of money made in England by a person domiciled in that country, and by a check on his London banker, may be proved by such evidence as would be sufficient to constitute such a debt, according to the law of England. *George Nicol v. James Mortimer*, 2d Dec. 1835, p. 69. No. 23.

See *Pactum illicitum*. No. 28.

See *Reduction*. No. 29.

See *Prisoner*. No. 31.

Found incompetent to enroll in the Reduction Roll a summons containing, in the first place, certain conclusions declaratory of the import of a particular decree, and alternatively, conclusions reductive of the decree. *Todd's Trustees v. Burns*, 12th Dec. 1835, p. 119. No. 34.

(AMENDMENT OF LIBEL AND ISSUES.) See *Insurance*. No. 37.

See *Jury Trial*. No. 39.

A party having raised an action before the Court of Session against the owner, ship's-husband and agent of a vessel, for repairs, furnishing and painting, and the summons having been signed, passed the signet, paid fee-fund dues, and been called as an ordinary action,—found, No. 45.

PROCESS continued.

that it was a maritime cause, and that the action must be dismissed, in respect the regulations of 11. Geo. IV. and 1. Will. IV. c. 69, § 40, had not been observed. *Peter Gavin and Son v. John Stalker*, 19th Dec. 1835, p. 149.

- _____ See *Mandatory*. No. 47.
 No. 48. _____ (BOXING PAPERS.) *Earl of Strathmore v. Trustees of late Earl*, 12th Jan. 1836, p. 154.
 _____ (JURY TRIAL.) See *Expenses*. No. 49.
 _____ See *Peer*. No. 52.
 _____ See *Arrestment*, (*Loosing of*.) No. 53.
 _____ See *Cautioner*. No. 55.
 _____ See *Expenses*. No. 56.
 _____ See *Poining the Ground*. No. 62.
 _____ (EXCEPTIO FALSI.) See *Bill of Exchange*. No. 63.
 No. 65. _____ The leading conclusion of an action being, that the defenders should be ordained to restore and reinstate the pursuer in the office from which he had been dismissed, and the next or alternative conclusion being for damages in case this should not be done, there being no independent ground of injury arising from the time, mode or terms of the dismissal, and the Lord Ordinary and Court holding that there was a power of dismissal;—found, that there were no sufficient grounds for a remit for trial by jury; and action dismissed accordingly. *William Mitchell v. The Western Bank of Scotland*, 26th Jan. 1836, p. 292.
 No. 67. _____ (JURY TRIAL.) Expenses given to a wife who had obtained a verdict in her favour, in an action in which her husband was also pursuer along with her, upon a separate ground, but was unsuccessful. *Brodie and Spouse v. Blair*, 28th Jan. 1836, p. 307.
 No. 68. _____ In an action of count and reckoning, calling on trustees to account for their intromissions and management under the trust, but containing no declaratory conclusion, that the trustees had, by their conduct, forfeited the protection of the clause of exemption;—found, that the pursuer might, in such an action, demand payment of all the trust-funds vested in the trustees, in regard to which they cannot shew that their liability to account has been discharged. *Mrs Blane or Deane and Others v. Duncan Paterson and Others*, 28th Jan. 1836, p. 307.
 No. 70. _____ An interlocutor, remitting a cause to the Jury Roll, on a question of fact as to intromission, depending on documentary evidence more than on parole proof,—recalled, and the case sent back to the Lord Ordinary, with power to grant a further diligence, or to grant a commission for proof. *Sir James Boswell v. Mathew Montgomerie*, 29th Jan. 1836, p. 317.
 No. 75. _____ Question as to proper form of summons, where a cautioner for annualrent had become bankrupt. *James Thomas Murray v. John Moncur, Mathew Neil and Others*, 3d Feb. 1836, p. 326.
 _____ See *Arbitration*. No. 87.
 No. 87. _____ (COUNSEL'S FEES.) Question as to fees paid to counsel attending examination of havers previous to trial. Fee allowed in the present instance. *John Harley v. Daniel McGown*, 13th Feb. 1836, p. 385.
 No. 89. _____ Decree granted against a defender, ordaining her to grant a power of attorney, to enable the pursuer to uplift a sum of money which had been lodged in the hands of the Clerk of the Court of Exchequer in England, under an order of that Court, for the use of the defender and others, the right to the sum having been ascertained, in the action in the Court of Session, to be in the pursuer. *Mrs Ann Grant or Clark v. John Ludovez Newmarsh*, 16th Feb. 1836, p. 395.

PROCESS continued.

New trial granted where an action had originally been founded on an unstamped missive after the same had been stamped, in respect it was essential to the justice of the case. See *Jury Trial*. No. 94.

(SUSPENSION.) A party having prayed for suspension of a charge on the ground of forgery, and that without caution or consignation, and having afterwards, in Court, expressed his readiness to find juratory caution, and craved leave to amend his bill,—found to be incompetent thus to amend the bill, which was refused. *David Wyllie v. John Brand*, 20th Feb. 1836, p. 470. No. 97.

(RANKING AND SALE.) Found, 1. That the common debtor in a ranking and sale was entitled to inspection of the official procedure and correspondence in the Minute-book of the common agent. 2. That the Minute-book was part of the process, and must be lodged in process. *Ranking and Sale of Cromarty*, 25th Feb. 1836, p. 485. No. 99.

(SUMMARY APPLICATION.) A writer to the signet having refused to redeliver certain documents placed in his hands, in reference to a proposed loan by his client, until he got payment or security for his account of expenses connected with the transaction,—summary petition to the Court of Session, to compel restitution of the documents, found to be incompetent. *Colonel Roderick Macneill, Petitioner, v. William Douglas, W. S.* 1st March 1836, p. 517. No. 105.

See *Multiplepoinding*. No. 109.

(SUMMONS, CALLING OF.) A summons was raised in name of the Lord Advocate, in behalf of the Commissioners of Woods and Forests: before the summons was called in Court, the act 5. and 6. Will. IV. c. 58, was passed, vesting in the Lords of the Treasury the powers formerly competent to the Commissioners of Woods and Forests, as pursuers of the action: the summons having been called in name of the original pursuers, and the Lords of the Treasury, and the Lord Advocate, as their mandatary, having thereafter craved, by a minute, to be aided as pursuers in the said action,—found that this could not competently be done, and action dismissed. *His Majesty's Advocate v. Campbell's Trustees*, 5th March 1836, p. 556. No. 111.

See *Inhibition*. No. 112.

See *Prescription, Triennial*. No. 113.

(DECREE IN ABSENCE.) *John Waddell v. Mrs Agnes Hamilton*, 10th March 1836, p. 567. No. 117.

See *Expenses*. No. 120.

Petition and complaint against a resolution of creditors on a sequestrated estate, dismissed, because the trustee was not called. *Alexander Pirie Henderson v. Gilfillan's Creditors*, 19th May 1836, p. 667. No. 129.

See *Removing*. No. 131.

(ADMIRALTY.) A process having been transferred from the Admiralty-Court, after an interlocutor pronounced by the Judge-Admiral had become final in that Court, to the Court of Session, by consent of parties, in terms of the statute 1. Will. IV, c. 69, § 25,—held, that it was competent, hoc statu, to challenge the said interlocutor without any separate process of review. *John Macarthur v. Mathie and Theakston*, 24th May 1836, p. 688. No. 134.

(MULTIPLEPOINDING.) An action of multiplepoinding and exoneration, raised in the name of two trustees, to the competency of which it was objected, that one of the trustees had disclaimed the action, and that there was no double distress, whilst, on the other hand, it appeared that the objectors had refused to exoner the remaining pursuer,— No. 135.

PROCESS continued.

- No. 139. — found competent, reserving all objections to its propriety. *James Comb's Trustees v. Robertson, Noble and Others, 24th May 1836, p. 691.*
 — (DECLARATOR.) An action of declarator, concluding that the rights of parties should be declared in terms of a certain interlocutor, on the assumption that other subsequent interlocutors, not reduced, and not alleged to be obscure, were 'utterly illegal, null and void, and incapable of operating or securing legal effect,—held to be incompetent. *Mrs Catharine Munro or Ross v. Mrs Maria Murray Hay Mackenzie, 27th May 1836, p. 704.*
- No. 141. — (ALIMENTARY.) An action for payment of a suitable sum as aliment, by a trustee against a trustee in a voluntary trust for behoof of creditors, founding on a clause of aliment in the trust-deed,—found not a proper process of aliment; and not competent to proceed in it as such in a summary way. *James Brown v. John Hay, 31st May 1836, p. 713.*
 — See *Judicial Factor*. No. 143.
- No. 144. — (ADVOCATION.—PRELIMINARY DEFENCE.) Circumstances in which a party was held to be barred from pleading, in an advocacy of a final interlocutor on the whole cause, an objection to the competency of the action, which had been repelled in the inferior court, although at the time, and frequently in the course of the proceedings, he protested that he should be entitled to insist therein. *The Honourable Douglas Gordon Halyburton v. Andrew Blair, 1st June 1836, p. 716.*
- No. 145. — (ADVOCATION.—FINAL JUDGMENT.) Circumstances in which an advocacy was found competent, in respect that the interlocutor advocated was held to have exhausted the cause; although, from the terms in which it was expressed, it could not be extracted. *Christian Anderson v. George Moon, 1st June 1836, p. 717.*
- No. 148. — (BANKRUPT.) The accepting trustee in a disposition omnium bonorum by an insolvent debtor having refused to act, but granted him authority to insist in a summons of wakening of an advocacy brought against him; and it appearing that the whole of his creditors, by a letter, declared they had no claims against him, and granted him liberty to carry on the action,—held, that the defender could not insist on caution from the pursuers on raising the summons of wakening. *John Johnston v. Edward Henry, 4th June 1836, p. 732.*
 — See *Title to pursue*. No. 162.
- No. 162. — (JURY.) Circumstances in which a cause was remitted to the Jury Roll, before answer as to certain pleas in law which raised the merits of the cause. *John Anderson v. Bank of Scotland, 16th June 1839, p. 896.*
- No. 165. — (CITATION.) An error in the name of the complainer, occurring in the copy-citation to answer a complaint under the Small Debt Act, which did not appear to create any real doubt as to who the complainer was,—held not to be a sufficient ground for an action of reduction and damages, at the instance of the defender in the complaint, who had allowed decree to be given in absence, upon which he was incarcerated. *Hugh Brodie v. Alexander Thomson and James Smith, 18th June 1836, p. 825.*
 — See *Proof*. No. 166.
 — See *Curator Bonis*. No. 170.
 — (INTERLOCUTOR.) See *Teinds*. No. 173.
 — See *Jury Trial*. No. 176.
- No. 182. — (TAXING AGENT'S ACCOUNT.) Auditor only authorised to tax judicial proceedings. *James Bennet, 2d July 1836, p. 894.*
 — See *Jury Trial*. No. 183. No. 184.

PROCESS. A. having raised an action against B., libelling alternatively marriage or seduction; and a record having been made up, and the case remitted to the Commissaries to take the proof; and the pursuer having closed her proof so far as concerned the conclusion of marriage, and asked judgment thereupon; and the judgment negating the marriage—Found, that the pursuer was not entitled to a new record as to the alternative conclusion; (2.) The Court refused to send the case to a jury, and held that any additional proof to be offered on the said ground of reduction must be by commission. *Christian Stewart v. John Menzies*, 5th July 1836, p. 902. No. 187.

A defender in an action of divorce for adultery, who had stated various acts of recrimination in defence, and in support of that defence had raised a counter action of divorce, in which, however, the oath de calumnia had not been returned,—found not entitled to a proof of recrimination, nor to demand that the order for proof in the original action should be sisted until the counter action admitted of being sent to proof. No. 189.

The Court held, that on a verbal report by the Lord Ordinary, they were entitled, under the Judicature Act, § 19, to pronounce a judgment which should be considered as a judgment of the Inner-House, although the Lord Ordinary had not made avizandum with the cause. *Sir George Warrender v. Lady Warrender*, 7th July 1836, p. 908.

(DIVISION OF COMMONTY.—STATE OF THE PROOF.—CLERK'S FEES.) The whole of the parties in a process of division of commonty found conjunctly and severally liable for the clerk's fees for preparing the state of the proof, reserving to the parties their relief against each other. No. 190.
John Parker v. Lord Cawdor and Others, 7th July 1836, p. 910.

See *Jury Trial*. No. 192.

See *Contract*. J. S. No. 6.

(JURY TRIAL). Incompetent, when pleading to the amount of damages, to refer to decided cases, to shew what damages were therein found. *John Rutherford v. William Boak*, 19th March 1836, C. J. S. p. 32. C. J. S. No. 8.

PROCESS—CRIMINAL. (TRANSPORTATION.) A party previously sentenced to transportation returning, and being found at large before the expiration of the term, may be tried either in the Circuit Court of the district where he or she was apprehended, or in that from whence he or she was ordered to be transported. *Lord Advocate v. James Martin*, 16th Nov. 1835, C. C. J. p. 1. C. C. J. No. 1.

See *Statute*, 4. Geo. IV. c. 34.

(DECLARATION.—SERVICE COPY INDICTMENT.) *Lord Advocate v. William Wright*, 23d Nov. 1835, C. C. J. p. 6. C. C. J. No. 2.

(ILLEGAL SENTENCE AND COMMITMENT.) 12th March 1836, C. C. J. p. 11. C. C. J. No. 6.

(PRISONER RETURNING FROM TRANSPORTATION.) *Lord Advocate v. James McNeill or Mathieson*, 12th March 1836, C. C. J. p. 16. C. C. J. No. 9.

PROMISSORY-NOTE. A party deceased granted a promissory-note; the grantee lodged a claim with his trustees, in consequence of a request by them to that effect, in answer to a previous application to them: the period of prescription having elapsed, the grantee raised action upon the promissory-note:—held, That the plea of prescription was not barred by the above circumstance. *William Ewing v. Burnett's Trustees*, 12th Nov. 1835, p. 1. No. 1.

PROOF. (EXAMINATION OF AGED WITNESSES). *Watsons v. Watsons*, 26th Nov. 1835, p. 43. No. 14.

- No. 16. **PROOF.** Found, (1.) That it is incompetent;—there being no improbation on the ground of falsehood,—to prove, by parole, that an infetment was taken upon a disposition, the testing clause of which was not filled up till after the act of infetment. (2.) That the title of an onerous purchaser from the grantee cannot be impeached on this ground. *British Linen Company v. Mackay and Others*, 22d Jan. 1836, p.
- See *Contract*. No. 63.
- No. 77. ——— A holograph memorandum by an unprofessional party deceased, of a conversation with a female who had consulted him before raising an action of declarator of marriage, in which she admitted that a letter, on which she purposed to found, was given to her in order to deceive a third party, received as evidence for the defender in derogation of its legal effect, in conjunction with other evidence in the cause. *Christian Stewart and Children v. John Menzies*, 4th Feb. 1836, p. 342.
- (ONUS PROBANDI.) See *Bill of Exchange*. No. 86. No. 137.
- See *Bill of Exchange*. No. 95.
- See *Prescription, Triennial*. No. 113.
- See *Settled Account*. No. 124.
- (CONFIDENTIALITY.) See *Agent and Client*. No. 138.
- No. 142. ——— (SEMIPLENA PROBATIO. — (ADMISSIBILITY OF WITNESS.) *Jane Haggart v. William Croll*, 31st May 1836, p. 714.
- See *Tack*. No. 152.
- No. 166. ——— (WITNESS.—DISCHARGE OF INTEREST OF LEGATEE.) *John Sheriff v. James Sheriff's Trustees*, 18th June 1836, p. 828.
- (BY COMMISSION.) See *Process*. No. 187.
- See *Process*. No. 189.
- C. J. S. No. 2. ——— Not competent to question a witness who has examined the books of a concern, as to the mode in which the balances were adjusted, when the books have not been produced.
- Judge's notes on a previous trial are not evidence. *Samuel James Hallam v. Frederick Gye and Co.* 22d Dec. 1835, C. J. S. p. 2.
- J. S. No. 5. ——— (WITNESS.) Objection, that the pursuer could not put in evidence excerpts taken from a person's books, without calling the party to explain them, he being alive, and in attendance,—sustained. *Reid v. Hutchinson*, 16th March 1836, C. J. S. p. 23.
- See *Contract*. J. S. No. 6.
- See *Process, (Jury Trial.)* J. S. No. 8.
- J. S. No. 12. ——— (NOTES MADE EX POST FACTO.) A medical man, a witness, not allowed to refer to a report, as notes made from memory four months after the occurrence in question.
- (METUS PERJURII.) Not competent to adduce evidence to contradict what a witness has stated on oath, by proof of what he had said when not on oath. *Thomas Walker v. James Ritchie*, 13th July 1836, C. J. S. p. 45.
- J. S. No. 10. ——— (METUS PERJURII.) Not competent to contradict what a witness has stated on oath, by evidence of what he had stated previously while not on oath.
- Question raised, but not decided, as to the competency of examining as a witness, a party, in favour of whose character the defender adducing him had led evidence throughout the trial, while the pursuers, not expecting the examination of the proposed witness,—viewing him rather as a party in the cause,—had not brought evidence to impugn his character. *Hercules Insurance Company v. John Hunter*, 26th July 1836, C. J. S. p. 62.
- C. C. J. 2. ——— (MALICE.) A prisoner having stated, in his defences, that no previous malice existed, the public prosecutor, in order to negative this

PROOF continued.

was allowed to go into a proof of previous threats, and ill-will shown.
Lord Advocate v. William Wright, 28d Nov. 1836, C. C. J. p. 6.

(OATH.) Magistrates may commit a witness refusing to take the usual oath. *John Bonnar v. Erskine, Beveridge and Others*, 15th Feb. 1836, C. C. J. p. 9.

C. C. J.
No. 4.

PROPERTY. See Clause. No. 72.

A tenant of a coal-work having leave to carry a canal through the lands of a proprietor, on a verbal understanding that he was to indemnify the tenants of the lands for damage sustained; and such payments having been made for upwards of fifty years, both by the tenant of the coal-work and by the proprietor, by whom it was subsequently wrought; the proprietor of the lands having raised an action of removing before the Sheriff, which was advocated, and having thereafter raised a process of declarator of property and for violent profits;—circumstances in which found, that no permanent right had been thus acquired to the property of the land covered by the canal, nor any right of servitude established.
John Campbell v. Duke of Argyle, 19th May 1836, p. 672.

No. 131.

See *Stat. 3. Geo. IV, c. 78*, and *2. Gul. IV, c. 87*.

PROVISIONS TO CHILDREN. An obligation in a marriage-contract, providing certain sums to the children of the marriage, according to their number, held to import a conditional institution in favour of the survivor.
Alexander S. Broomfield v. Colin Campbell, 24th Nov. 1835, p. 36.

No. 11.

See *Entail. No. 125*.

A party having left a mortis causa settlement for the regulation of his whole succession, by which he made certain provisions for his younger children, leaving the residue of his estate to his eldest son; and the eldest son having predeceased the testator,—found, (in a question betwixt the younger children as the next of kin of the testator, and the children of the eldest son,) that although, in providing for some of his younger children, the testator had expressly called the heirs of their bodies, but left the residuary provision to the eldest son individually, and without calling his heirs, although aware, at the date of the settlement, that the eldest son had children, the testator had nevertheless not died intestate in regard to said residue, but that the children of the eldest son took the residue in his place. *Anthony Dixon and Others v. Mrs June Dixon and Others*, 10th June 1836, p. 773.

No. 157.

PUBLIC POLICE. See Public Street. No. 6.

See *Stat. 3. Geo. IV, c. 78*, and *2. Gul. IV, c. 87*.

No. 151.

PUBLIC STREET, (ENCROACHMENT ON.) Found that the Magistrates of Edinburgh had no right to permit an arch to be thrown across the common passage running parallel with the east side of the North Bridge.
Trustees of John Scott v. Orphan Hospital, 18th Nov. 1835, p. 11.

No. 6.

RANKING AND SALE. See Process. No. 99.

See *Judicial Factor. No. 143*.

RAPE. Found that this crime is completed by forcible penetration without emission. *Lord Advocate v. Archibald Robertson*, 12th March 1836, C. C. J. p. 17.

C. C. J.
No. 10.

REDUCTION. Circumstances in which it was held incompetent to bring a reduction of certain interlocutors, or decrees of absolvitor, by an inferior judge, before decrees had been extracted. *Adam Coutts v. William Blair*, 5th Dec. 1835, p. 85.

No. 29.

See *Tiile to pursue. No. 162*.

See *Process, (Citation.) No. 165*.

- No. 161. **REGALIA. (HARBOUR.)** In an action of declarator, at the instance of certain pursuers who had obtained from the Crown a grant of port and harbour, with the privileges attendant thereon, including that of levying harbour, shore, and other dues within the precincts assigned in the grant; where, in defence, it was pleaded, inter alia, that the defender's lands were not within the limits of the grant to the pursuers; that, besides, the pursuers had lost, by disuse, any right they might have had to levy dues opposite to the lands of the defender; and, further, that the defender had acquired a prescriptive right to land goods for his own use;—circumstances in which it was found that the pursuers were entitled to a decree declaratory of their rights, in terms of the grants in their favour; and the Court granted interdict against the defender, prohibiting him from erecting a harbour, pier or dock, or other building, so as to interrupt, interfere, with or encroach on the rights vested in the pursuers. *Magistrates of Edinburgh v. Alexander Scot*, 14th June 1836, p. 794.
- No. 131. **RELIEF.** See *Contract, (Breach of.)* No. 104.
- REMOVING.** In an action of removing, pleading a defence of an heritable right, incompetent before the Sheriff-court. *John Campbell of Glen-saddle v. Duke of Argyll*, 19th May 1836, p. 678.
- No. 107. **RENUNCIATION.** See *Tack.* No. 19.
- REPARATION.** An agent, acting both for the borrower and lender of a sum of money, who neglected to inform the lender that a distillery, on the security of which the loan was made, was already heavily burthened with preferable securities,—held liable to the lender, to the extent of the sum lent, and interest thereon, on the subject subsequently, from depreciation in value, proving inadequate to meet the prior securities. *Jane and Isabella Haldane v. Alexander Donaldson*, 3d March 1836, p. 530.
- _____ See *Few.* No. 132.
 _____ See *Tack.* No. 152.
 _____ See *Agent and Client.* No. 153.
 _____ See *Jury Trial.* No. 176.
- J. S.
No. 4. A bridge over a canal having been raised by the person appointed by the Canal Company to manage it without any previous notice, there being no chain placed, or other precaution used to prevent passage; and a foot-passenger who was in the act of crossing when the bridge was raised having received serious injury in consequence of jumping from it when nearly at its full height,—damages of L.100 awarded by a Jury against the Canal Company. *Mary Niven or Hunter v. Edinburgh and Glasgow Union Canal Company*, 16th March 1836, C. J. S. p. 19.
- J. S.
No. 7. _____ *Henry Swane and Mandatary v. The Fife Banking Company*, 18th March 1836, C. J. S. p. 31.
- J. S.
No. 8. _____ Action of damages for loss of service of workman alleged to have been enticed away. Verdict for defender. *John Rutherford v. William Boak*, 19th March 1836, C. J. S. p. 32.
- J. S.
No. 9. _____ Action of damages for writing and sending a letter containing expressions injurious to the pursuer's character. Justification, on the ground that the defender had given sufficient cause therefor. Verdict for defender. *David Ogilvie v. Peter Scott*, 19th March 1836, C. J. S. p. 34.
- J. S.
No. 12. _____ Action of damages for an assault or injury done by a blow with a scythe. Verdict for defender. *Thomas Walker v. James Ritchie*, 13th July 1836, C. J. S. p. 45.
- J. S.
No. 13. _____ Action of damages for assault on a party making certain operations on property of defender, in virtue of sentence of Dean of Guild of a burgh not duly intimated to the defender. Verdict for pursuer. Damages L.10. *Adam Anderson v. William Brown*, 13th July 1836, C. J. S. p. 49.

- REPARATION.** Damages claimed for wrongous apprehension and detention upon a caption, following upon an incorrect charge of horning. Verdict for pursuer. Damages one shilling. *John Inch v. James Thomson and Others*, 15th July 1836, C. J. S. p. 53. J. S. No. 14.
- RES JUDICATA.** See *Foreign*. No. 54. No. 89.
 _____ See *Tack*. No. 152.
 _____ See *Teinds*. No. 173.
- REVOCATION, (OF MUTUAL CONTRACT.)** See *Mutual Contract*. No. 15. No. 155.
- ROAD.** Circumstances in which the furnisher of certain plans and estimates was held to have no claim for the expense thereof against the Road Trustees of Argyleshire, in respect that his employment had not been in conformity with the provisions of the turnpike act of that county. *David Smih v. Road Trustees of Cowal District of Argyleshire*, 10th June 1836, p. 762.
- SALE. (LOCUS PŒNITENTIÆ.)** A correspondence having taken place regarding the sale of a landed estate,—held, that the terms of the letters did not import a concluded bargain, and that the sellers were therefore entitled to enter into a new transaction with another party. *Sir David Milne v. Sir John Marjoribanks' Trustees*, 19th Feb. 1836, p. 442. No. 93.
 _____ See *Principal and Agent*. No. 100.
- SALMON-FISHING.** Found, that a clause, 'cum piscationibus,' in the titles of a proprietor, with an alleged immemorial practice, by himself and others, of fishing for salmon in an adjacent river with the rod, and occasionally with a hand-net, openly, and without molestation, and of appropriating salmon so caught to the use of himself and his friends, is not relevant and sufficient, (in competition with a proprietor having rights of salmon-fishings in the said river,) to establish a right of salmon-fishing by rod or hand-net. *Duke of Sutherland v. Hugh Ross*, 11th June 1836, p. 782. No. 159.
- SANCTUARY.** Petition of a debtor incarcerated in the Abbey jail, for debt contracted within the Sanctuary, to be transferred to another jail, in order to pursue a process of cessio, refused. *Paget Bayley, Petitioner, v. Edward Swan, Respondent*, 3d March 1836, p. 536. No. 108.
 _____ See *Personal Protection*. No. 116.
- SASINE. (ASSIGNATION OF PRECEPT.)** See *Title*. No. 150.
- SCHOOLMASTER.** Circumstances in which it was found, (1.) That the managers of an Episcopal school, instituted by private trust, were entitled to dismiss the teacher without any cause shewn. (2.) That an appointment 'at L.60 per annum permanent,' did not import permanency in reference to endurance of the appointment, but merely as to the amount of salary. (3.) That a departure from the terms of a schoolmaster's engagement was acquiesced in, and homologated by him. *James Mason v. Rev. E. Craig and Others*, 14th Jan. 1836, p. 155. No. 50.
- _____ (RIGHT TO DISMISS.) *Adam Gibson v. Directors of Tain Academy*, 11th March 1836, p. 609. No. 121.
- SEQUESTRATION.** Trustee must be called in a petition and complaint against resolution of creditors. See *Process*. No. 129.
- _____ Trustee having advertised a scheme of division, and afterwards become bankrupt, his cautioners held liable in implement. *Drummond v. Cheyne*, 29th June 1836, p. 848. No. 174.
 _____ See *Bankrupt*. No. 185.
 _____ An ex-trustee, who admitted a balance in his hands, 'but subject to a deduction of such further payments as he can instruct,' ordained to consign the full balance admitted. *William Swanston v. Robert Wight*, 9th July 1836, p. 914. No. 193.

SERVITUDE. See *Property*. No. 131.

- No. 79. SETTLED ACCOUNT. Circumstances in which, after various accounts, extending over a long tract of time, had been rendered by a law agent in town to his client in the country, and settled and docketed up to a certain date, a claim for commission on the cash transactions embraced in the accounts was found incompetent.

2. Found, separatim, that commission charges, as well as certain other charges in an account rendered by a man of business, fell under the triennial prescription. *David Melville v. Carstairs and Others*, 5th Feb. 1836, p. 361.

- No. 124. ——— Circumstances in which, after a final settlement had been made between a banking company and a customer, it was found incompetent for the bank to set aside the settlement on the ground of error. *James Walker v. William Drummond*, 18th May 1836, p. 622.

- No. 16. SOCIETY. A partnership was dissolved by the death of one of two partners: The surviving partner brought a summons of partition and sale of the heritable property of the company: Being opposed by the representatives of the deceased partner, the Lord Ordinary ordered a report from a competent person as to whether the subjects were capable of beneficial division: Certain of the subjects being reported incapable of such division, his Lordship ordered a public sale, which order was confirmed by the Court. *Walter Stewart v. John Stewart's Representatives*, 26th Nov. 1835, p. 49.

———— See *Bank Manager*. No. 65.

———— See *Bill of Exchange*. No. 137.

- No. 180. ——— An acknowledgment of a loan of a sum of money having been granted by a company, held, according to circumstantial evidence, that the debt, if originally a company debt, was, notwithstanding said acknowledgment, converted into a debt by one of the partners as an individual, and recourse lost against the other partner. *Andrew McLeod v. George Tosh and John Tosh*, 30th June 1836, p. 864.

STAMP ACTS. See *Bill of Exchange*. No. 60. No. 167.

STATUTE, 1681, c. 22. See *Entail*. No. 83.

———— 1703, c. 7. See *Corporation*. No. 32.

———— 10. Geo. III, c. 51. See *Entail*. No. 177.

- No. 21. ——— Found, that the subscription of the periodical accounts required by the statute by a factor or commissioner, is a sufficient compliance with the statute. (2.) That the expense of the introduction of water into an existing mansion-house, the building of a milk-house and ice-house, and other accommodations of a like nature, as also the building or repairing of a garden-wall, are improvements falling within the provisions of the statute. (3.) Terms of a notice to next heir held sufficient to include said particulars. (4.) Circumstances in which it was held there was no necessity for a renewal of the original notice. *A. T. Fraser, Esq. of Abertarff v. J. A. Fraser, Esq. of Lovat*, 2d Dec. 1835, p. 59.

———— 33. Geo. III, c. 54, § 8. See *Friendly Society*. No. 126.

———— 43. Geo. III, c. 141. See *Jury Trial*. No. 186.

———— 55. Geo. III, c. 42, § 6. See *Jury Trial*. No. 94.

———— 56. Geo. III, c. 70. See *Road*. No. 155.

———— 2. Geo. IV. See *Process*. No. 45.

———— 3. Geo. IV, c. 78. See *below*. No. 151.

———— 3. Geo. IV, c. 91. See *Burgh*. No. 78.

———— 4. Geo. IV, c. 34. See *Agent and Client*. No. 153.

- No. 88. ——— Found, that proceedings under this act are of criminal process, and not cognisable by the Court of Session. *Samuel Ashbury v. John W. Bell*, 13th Feb. 1836, p. 390.

STATUTE, 6. Geo. IV, c. 48. See *Process*, (*Citation*.) No. 165.

_____ c. 120. Found, that when the opinions of the other Judges are taken by a division of the Inner-House, it is the majority of the whole Court, and not that of the Consulted Judges merely, which is to rule the decision. *James Stewart v. Alexander Scott*, 11th March 1836, p. 592. No. 120.

_____ 6. Geo. IV, c. 120, § 19. See *Process*. No. 189.

_____ 7. Geo. IV, c. 115, (Police Act.) See *Jurisdiction*. C. C. J. No. 3.

_____ 9. Geo. IV, c. 29. See *Jury Trial*. No. 189.

_____ 9. Geo. IV, c. 69, (Night Poaching.) See *Particeps Criminis*. J. S. No. 5.

_____ 10. Geo. IV, c. 55. (Small Debt Act.) Found, in conformity to the decision in *Wallace v. Hume*, 3d July 1835, *F. C.*, that it formed a good ground of suspension under the statute, that the copy citation left with the defender in an action under the Small Debt Act, did not bear in gremio that a copy of the account had been left with him. *Neil Campbell Maclaren v. Robert Finlay*, 12th Dec. 1835, p. 120. No. 35.

_____ 1. Will IV, c. 37. See *Jury Trial*. No. 186.

_____ c. 69, § 25. See *Process*. No. 134.

_____ c. 40. See *Process*. No. 45.

_____ 2. Will IV, c. 87. Held, that the proprietor of an upper flat of a tenement in Edinburgh was not entitled to make use, for the purpose of water-closets, of a drain under the ground-floor of the tenement, communicating with the common sewer, without the consent of the proprietor of the said ground-floor. *John Barclay v. Mrs Sharpe and Others*, 7th June 1836, p. 737. No. 151.

_____ 3. and 4. Will IV, c. 76, § 16. See *Burgh Royal*. No. 191.

_____ It being declared by the statutes for regulating the government of Heriot's Hospital, that the perpetual Governors of the said Hospital shall be the Lord Provost, Bailies, Ministers and Ordinary Town-Council of Edinburgh for the time being, and their successors; and the Incorporated Trades of Edinburgh having, previous to the act 3. and 4. Will. IV. c. 76, elected six Deacons and two Trades' Councillors, who were members of the Ordinary Council, and Governors of the said Hospital,—circumstances in which a claim brought subsequent to the act of 3. and 4. Will. IV, c. 76, by the Incorporated Trades, to elect the same number of Deacons and Trades' Councillors as Governors of the said Hospital, was rejected,—and it was held, that the term 'Ordinary Council' applied to the Council as elected under the provisions of the 3. and 4. Will. IV, c. 76. *Convener of Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital*, 3d June 1836, p. 720. No. 146.

_____ (Glasgow Police Act.) *David Ayton v. William Maig*, 12th March 1836, C. J. S. p. 16. J. S. No. 8.

SUMMONS, (ENROLLMENT OF.) See *Process*. No. 34.

SUPERIOR AND VASSAL. (1.) Found in an action for bygone feu-duties, that certain kain being stipulated by charter as payable by the vassal, and there being no conversion, the superior is entitled, either to delivery of the kain in kind, or to the market value thereof, in the several years. (2.) That carriages stipulated in the charter not having been required to be performed in each year, in the manner specified, the superior is not entitled to demand any estimated value thereof retrospectively. (3.) That a feu-duty, stipulated to be payable annually to the titular, as superior, or the minister, as the consideration for the sale of the teinds of his lands to the party liable in payment of said feu-duty, was to be localised No. 40.

SUPERIOR AND VASSAL—*continued.*

on for stipend primo loco; that the vassal was entitled to have this duty exhausted before any allocation for stipend on his lands; that the allocation of the teinds of the vassal's lands, as stipend to the minister, was to be held as an allocation of the said duties, such duties being by law primarily liable to such allocation; and that payments of stipend made by the vassal, under decrees of locality, must be considered as payments of the stipulated feu-duties, by consent of the superior. *Alexander, Duke of Hamilton v. John Mather and John Urquhart*, 15th Dec. 1835, p. 127.

No. 42.

Circumstances in which the voluntary trustee of a vassal was held to have adopted certain feu-rights, and was found liable, qua trustee, for subsequent feu-duties, and other prestations of a feu-contract, entered into by the superior with the trustee's author. *John, Marquis of Abercorn and Commissioner v. John Grieve*, 16th Dec. 1835, p. 150.

No. 66.

A party feued out an area of ground for the purpose of building; certain tenements were built thereon by the vassal, and sub-feued in different flats to various parties, with holdings-a me, and for payment of a proportion of the feu-duty and duplicand thereof;—found, in reference to two of the vassals in non-entry, (notwithstanding the superior had accepted payment of their proportion of the feu for a long period, and had also granted charters to the other vassals for payment only of their proportions of the original feu-duty,) that said party, as superior, was entitled to insist on said vassals taking charters containing an obligation for payment of the whole cumulo feu, but not of the relief on the entry of the heirs; but that said vassals were entitled to have inserted in said charters an obligation by the superiors to grant to them, whenever required, at the vassal's expense, an assignation, to the effect of enabling them to recover from the co-feuars whatever sum or sums might at any time be exacted from them beyond their own just proportion of the said cumulo feu-duty and relief, and also a declaration, that the demand for such relief should not exceed the proportion thereof corresponding to the proportions of the whole feu in non-entry at the time. *David Wemyss and Richard Cowan v. Mrs Thomson and Henry Duncan*, 26th Jan. 1836, p. 299.

See *Teinds*. No. 103.

See *Feu*. No. 132.

See *Implied Contract*. No. 163.

SUSPENSION. See *Process*. No. 117..

TACK. See *Annualrent*. No. 13.

See *Title*. No. 18.

No. 19.

Found, in regard to a lease by which assignees and subtenants, legal and conditional, were excluded, and where bankruptcy, sequestration, or trust for creditors, or being in arrear of rent due for a year, annulled the lease,—(1.) That the tenant being a year in arrear, was under a legal obligation by his lease to remove: (2.) That a renunciation, granted by the tenant, was not struck at or affected by an inhibition anterior in date, and recorded subsequent to the renunciation: (3.) That inhibition could not secure the lease to a creditor; and even supposing that the tenant could have put in a manager, the inhibiting creditor could not have compelled him to do so: (4.) That sequestration terminated the tenant's right to the lease, and superseded the diligence of inhibition, independently of the renunciation. *James John Fraser, W.S. v. James, Marquis of Abercorn and J. Guthrie Wright*, 27th Nov. 1835, p. 55.

TACK. (RESPONSIBILITY OF LANDLORD FOR TENANT.) See *Jury Trial*. No. 64.

— Circumstances in which—found, (previous to a remit for trial by a Jury,) upon the construction of a stipulation in a tack, whereby, in the event of the tenant's bankruptcy, it should neither be competent to his creditors to possess the farm by a manager, nor for the tenant himself to continue the possession for their behoof, (1.) That it must be considered as a clause introduced for the benefit of the landlord alone, and with which he was entitled to dispense at his pleasure; and that if he did so dispense with it, and made it sufficiently known to the creditors that he was willing or desirous that they, or the bankrupt on their account, should still continue the possession, the tenor of the said clause could give them no warrant for relinquishing or deserting the possession, or exempt them from such claims of damages at the instance of the landlord, as might have been competent to him for such relinquishment or desertion, if the lease had contained no such clause or stipulation. (2.) That the landlord's acquiescence in, and adoption of certain judgments, and the tenor of his judicial statements in the proceedings which led to them, were not sufficient per se to prove that he had made his election to enforce and act upon said clause and stipulation, and still less that the creditors were in any degree induced to abandon or relinquish the lease, by any belief or opinion that he had so elected. *Sir David Kinloch v. Thomas Mansfield*, 7th June 1836, p. 741. No. 152.

— (SPECIAL CASE AS TO SEQUESTRATION.) *Sir James Grant Suttie v. George Gordon and Others*, 11th June 1836, p. 793. No. 160.

— Circumstances in which it was found, upon construing a clause in a tack, that the lease must be held to have been forfeited by the bankruptcy of the tenants. (2.) That the landlord had, in due time, and in sufficient form, declared his option that the tenants should remove from the subjects. (3.) That the effect of the bankruptcy, by sequestration of the parties to the lease, to produce a forfeiture of the lease, was not prevented or removed by the circumstance of the bankrupts having settled with their creditors by a contract for a composition. *Patrick Tennent and Others v. James M'Donald and Others*, 16th June 1836, p. 818. No. 164.

TAILZIE. See *Entail*.

TEINDS. See *Superior and Vassal*. No. 40.

— (1.) A superior having disposed certain lands with the teinds by feu charter, wherein it was stipulated that the cumulo yearly payment by the vassal was for feu and teind duty, which was declared to be full tack-duty of the lands and teinds, of which the feuars were tenants at the time, and the superior having bound himself to relieve the vassal 'of the hail 'cess and public burdens payable furth of the said lands,' for which, 'and 'for all other burdens and exaction whatever,' warrandice is given, and there being no stipend then payable out of the lands conveyed,—found, in a question betwixt the superior and vassal, that the clause was not effectual to give the vassal a right of relief against future augmentations. No. 103.

(2.) A superior having conveyed certain lands with the teinds by feu charter, wherein he expressly bound himself, his heirs and successors, 'not 'only to relieve' the vassal of 'the minister's stipend and reparation of 'manes that may be required furth of the said lands and teinds thereof, 'in all time coming;' and there being no stipend due out of the lands at the time; but part of the stipends having been afterwards allocated upon the lands, on a subsequent augmentation taking place,—found, in a question betwixt the superior and vassal, that the clause was sufficient to give the vassal a right of relief against any such augmentations of stipend.

TEINDS *continued*.

CUMULO FEU AND TEIND-DUTY. Found, that the cumulo feu-duty payable to the superior, and which was both for stock and teind, is liable to be allocated upon for stipend, to the extent of one-tenth. *James Lumsdaine and M^r Ritchie's Trustees v. Sir Alexander Hope*, 26th Feb. 1836, p. 502.

No. 156. ——— Circumstances in which it was found that teinds had not been duly disposed with the lands, and that a party purchaser, paying minister's stipend, was not entitled to relief, under a clause of absolute warrantice inserted in the disposition. *David Blair and Mandatary v. Magistrates and Town-Council of Dunbar*, 10th June 1836, p. 766.

No. 178. ——— An interlocutor pronounced by a Lord Ordinary, in a process of augmentation and locality, assailing a certain class of heritors from paying part of the stipend due to the minister,—held, although twenty years had elapsed, not to be final, nor to form res judicata, because it had never been approved of by the Court;—and the title of certain heritors, who had been parties to the augmentation and locality, to reduce the said interlocutor, sustained. *Marquis of Queensberry and Others v. John Wright and Others*, 29th June 1836, p. 843.

No. 7. TENOR, PROVING OF. Circumstances in which the adminicles were sustained in an action of proving the tenor of a disposition and sasine, stated to have been executed in implement of articles of roup, with a view to meet an action of reduction thereof, although the pursuer did not condescend on the names of the writer or witnesses, or produce any other relative writings, with the exception of an extract of a sasine from the burgh records, and an entry in the books of an agent, containing a charge for drawing and extending the disposition. *James Merry v. Mary Dun or Mason*, 21st Nov. 1835, p. 17.

————— *James A. Stewart Mackenzie v. Lord Dundas*, 12th Dec. 1835, p. 121.

————— *Town-Council of Brechin v. Guthrie, Martin and Company*, 15th Dec. 1835, p. 125.

No. 69. ——— Found incompetent to prove the tenor of a decree of valuation of teinds incidentally in a locality. *Locality of Redgorton*, 28th Jan. 1836, p. 315.

TESTAMENT. See Trust. No. 98.

————— (DATIVE.) See Cautioner. No. 123.

J. S. ——— Action of reduction of a testament on the ground of facility,
No. 10. fraud and circumvention. Verdict for pursuers. *James Henry and Others v. Mrs Anne Barrowman or Miller*, 21st March 1836, C. J. S. p. 36.

J. S. ——— Disposition and settlement, and contract of agreement re-
No. 15. duced, on the ground of fraud, facility and circumvention. *Peter Dewar v. William Mackay and Others*, 15th July 1836, C. J. S. p. 55.

No. 18. TITLE. Circumstances in which, in an action of reduction, it was held that a document purporting to be a missive of lease, holograph of, and signed by the grantor, was an unobjectionable title, if followed by possession. *John Burnett v. George M^r Kimming and John Forbes*, 27th Nov. 1835, p. 53.

————— See Possessory Judgment. No. 25.

————— (TO PURSUE). See Burgh. No. 78.

————— (TO PURSUE). See Process. No. 111.

————— (TO PURSUE). See Process, (Bankrupt.) No. 148.

No. 150. ——— A progress of titles to certain heritable subjects, founded on a sasine, on which prescription had run, which bore to be in absolute and unlimited property, whilst the warrant on which it proceeded was an

TITLE continued.

assignment to a precept, in favour of certain trustees, 'and their assignees, but in trust always, and under the burdens, &c. before written': The said precept, however, being granted in a trust-deed in favour of the said trustees, and their assignees or disponees, and the heirs of the disponees, but excluding the heirs and executors of the trustees, whereby power was given the trustees to sell and grant dispositions to purchasers, who were declared to have no concern with the application of the price or the conditions of the trust,—held to be a progress to which a purchaser could not object. *Ewen Alexander Cameron v. William Skirving Cockburn*, 4th June 1836, p. 734.

(TO PURSUE.) The title of a second son, as heir of his father, on his elder brother's death, to pursue a reduction of a settlement of heritage, made by his father to his prejudice, in favour of his said eldest brother,—to which it was objected, that the interest of the pursuer to insist in the action was excluded by other deeds of his father, executed prior to the settlement in question, under which he had a pecuniary interest, but was prevented from taking up the succession as heir of his father,—sustained. *John Anderson v. Bank of Scotland*, 16th June 1836, p. 896.

See *Teinds*. No. 173.

TITLE-DEEDS. An heritable creditor, although the security contains a special assignment to the title-deeds, is not entitled to demand the absolute delivery of the title-deeds from the proprietor of the subjects over which his security extends. (2.) Circumstances in which an interdict granted by magistrates against a proprietor using his title-deeds to the prejudice of an heritable creditor was recalled. *Lachlan M'Neill v. Walter and John Blair*, 17th Nov. 1835, p. 8.

TRANSFERENCE. (ASSIGNMENT.) See *Expenses*. No. 2.

TRUST. See *Superior and Vassal*. No. 42.

(INTROMISSION.) Circumstances in which trustees were held as intromitters, by uplifting funds on a joint discharge, and were found liable for the loss occasioned by allowing funds so uplifted to remain in the hands of a co-trustee unsecured, notwithstanding a clause of exemption, 'for neglect, omissions or diligence of any kind,' and declaring that they should be liable 'each only for his own personal intromissions.' *Mrs Blane or Deane and Others v. Duncan Paterson and Others*, 28th Jan. 1836, p. 307.

(SPECIAL CASE.) *Thomas Sprot v. William Muir*, 29th Jan. 1836, p. 319.

A trust-deed, appointing trustees to divide and allocate the residue of the truster's estate, after certain purposes, amongst his brothers and sisters, and declaring that their shares should be paid when the estate should be brought into such a situation as to admit of a general division,—contained also a clause, declaring, that if any of his brothers and sisters died before him, (the truster,) or before the said period of division, without issue, the share of that brother or sister should again accrue and be added to the general fund:—held, that as the predeceasing the period of division was put on exactly the same footing, as predeceasing the truster, therefore the share of one of the brothers who survived the truster, but predeceased the period of the general division, did not vest so as to be transmitted in terms of a settlement executed by him. *James Thorburn's Trustees v. John Thorburn's Trustees*, 16th Feb. 1836, p. 419.

See *Fiar*. No. 92.

Found, in a question with the next of kin, that a bequest to trustees was valid, whereby a testator appointed them to 'apply the rest and

No. 162.

No. 5.

No. 68.

No. 71.

No. 90.

No. 98.

TRUST *continued.*

'residue of my estate and effects to such benevolent and charitable purposes as they may think proper; and if the same shall amount to L.600 sterling, or upwards, I recommend to my said trustees, and their fore-
'saids, to execute a deed, vesting the same in themselves, and to apply
'the annual proceeds thereof, after deducting expenses, in yearly payments,
'to faithful domestic servants, settled in Glasgow or the neighbourhood,
'who can produce good testimonials of character and morals from their
'masters or mistresses, after ten years' service. No person to be entitled
'to more than L.10 sterling yearly, but as much less as my said trustees
'may think proper. And if the free residue of my estate shall not amount
'to L.600 sterling, authorise my trustees to distribute the same to such
'charitable or benevolent purposes as they may think proper.'

A testator having appointed his trustees to lay out L.2000, 'taking
'the interest of the said sum payable to a party during her life,' and the
said principal sum itself payable 'to my said trustees, or their aforesaid,
'at her death,'—found, that the fee of the said sum is vested in the trust-
tees, not as individuals, or for their own personal benefit, but as such
trustees only, and must form part of the residue of the testator's estate.
*John Miller and another (Dr Black's Trustees) v. Dr Black's next of
kin, 23d Feb. 1836, p. 471.*

- No. 101. ——— (SPECIAL CASE.) *Ramsay's Trustees v. Dr Adam Anderson
and Others, 26th Feb. 1836, p. 499.*

——— See *Multiplepointing*. No. 109.

- No. 114. ——— By a trust-settlement, two of the number of trustees were declared
a quorum while two should be in life; their number having been reduced
to two,—circumstances in which found, that an agent for the trust, mak-
ing advances to one of these trustees, was not entitled to transact with
that trustee as sole trustee, although the other resided permanently in
England. *Mrs Stewart or Heriot and Others (Heriot's Trustees) v.
Captain James Fyffe and Others, 8th March 1836, p. 569.*

- No. 115. ——— (MALA FIDES.) Circumstances in which a law-agent under a
trust, the purposes of which were known to him, having, in security of
alleged advances by him to one of the trustees, in his private character,
created and obtained a bond and disposition in security, prejudicial to,
and inconsistent with the purposes of the trust; and having taken infet-
ment, and assigned the bond and infetment to third parties, for valuable
considerations, without disclosing to such third parties the existence and
operation of the trust,—it was found, (in an action of count and reckoning
and damages by the other trustees against the law-agent,) that the law-
agent had acted in mala fides, and that whether the debt acknowledged
by the bond was a just debt, for money actually advanced or not, and
whatever might be the just state of accounts between the law-agent and
the trust-estate, he was bound, in the first instance, to restore the estate
in integrum against the real security created by the disposition and in-
fetment. *James Carnegie and Others v. James John Fraser, W. S.,
8th March 1836, p. 577.*

- No. 127. ——— (LIABILITY OF TRUSTEES.) Circumstances in which it was
found, that trustees acting under a trust-deed, by which it was declared
that they should 'not be liable for omissions, or not doing diligence, but
'each for his own actual intromissions only,' were not liable personally
for losses occasioned to the trust-estate, 1st, By the insolvency of their
factor, whom they had, for a series of years, neglected to call to account;
and, 2d, By the misconduct and insolvency of a tenant, occurring after
the factory had determined, and while the sole management of the estate

TRUST continued.

was vested in the trustees. *William Cowan v. Mrs Jane Ronald Angus or Crawford and Others*, 18th May 1836, p. 648.

— (CONSTRUCTION OF.) Expressions in a holograph trust disposition, by which the trustees were directed 'to pay over the residue' of the estate to the truster's son, declaring the will of the testator to be, that 'his said trustees shall entail the whole amount on the heirs-male' of his son, whom failing, on other substitutes,—found to be sufficiently indicative of the truster's intention, that his son, as institute, as well as the substitutes, should be subject to the fetters of the entail, which the trustees were bound to execute. *George Noble and Others v. Alexander Campbell and another*, 18th May 1836, p. 638. No. 128.

— (EXECUTION OF.) See *Process*. No. 141.

— See *Title*. No. 150.

— See *Curator Bonis*. No. 170.

TRUSTEE. Found, (1.) That a trustee under a disposition *omnium bonorum* in a *cessio* was preferable, in a competition, for expenses necessarily and profitably incurred by him as disponent in completing the titles of the common debtor, and in managing the property and bringing it to sale. (2.) That the trustee had no right of preference, or of ranking in competition with heritable creditors, holding valid and completed securities prior to the date of the disposition in his favour, for expenses incurred in the process of *cessio*, in the execution of the disposition *omnium bonorum*, or for commission as trustee. *British Linen Company v. Mackay and Others*, 22d Jan. 1836, p. 276. No. 60.

— See *Bankrupt*. No. 185.

— See *Sequestration*. No. 193.

VITIATION. See *Inhibition*. No. 61.

— See *Bill of Exchange*. No. 95.

WARRANTICE. See *Teinds*. No. 103. No. 156.

WRIT. See *Proof*. No. 60.

— See *Inhibition*. No. 61.

WRITER'S HYPOTHEC. Question as to an agent's right of hypothec, or retention of titles or documents, placed by a borrower's agent in his hands in reference to a proposed loan. *Colonel Roderick Macneil, Petitioner, v. William Douglas*, W. S. 1st March 1836, p. 517. No. 105.

WRITTEN SLANDER. See *Reparation*. J. S. No. 9.

WRONGOUS ARREST. See *Judicial Slander*. J. S. No. 2.

— See *Reparation*. J. S. No. 14.

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